



Children's Bill [B70 – 2003]

Submission to the Parliamentary Portfolio Committee on Social Development

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Introduction

The introduction of the Children's Bill into Parliament comes as a culmination of many years of work on the legislation. The Bill aims to provide a comprehensive piece of legislation to deal broadly with children's rights; the care of children; and, abuse and neglect of children.

Children's rights intersect at many levels in the work of the South African Human Rights Commission (SAHRC). The comments made in this submission draw on the experiences of the SAHRC.

In this submission, the SAHRC supports the call for the inclusion of a National Policy Framework in the Bill. We do not support the call for the inclusion of a Charter of Children's Rights in chapter 3 of the Bill, for reasons that shall be set out below. The rights of vulnerable groups need to be incorporated more adequately in the Bill. The parental rights and responsibilities of unmarried fathers need to be more fully considered. Finally, in relation to child abduction and trafficking in children, the Bill needs to incorporate a domestic approach to both of these phenomena.

The mandate and functioning of the SAHRC

The SAHRC is one of the independent institutions created in terms of Chapter 9 of the Constitution to support democracy in South Africa.

The SAHRC is mandated by section 184 of the Constitution to:

- (a) Promote respect for human rights and a culture of human rights;
- (b) Promote the protection, development and attainment of human rights; and
- (c) Monitor and assess the observance of human rights in the Republic.

The SAHRC has chosen as its focus areas the elimination of discrimination and the alleviation of poverty. In focussing our work on these areas, the commission is particularly alert to vulnerable groups such as children, persons living with and affected with HIV/AIDS, persons with disabilities and non-nationals. Thus our work relating to children cross cuts all aspects of our work.

Under the guidance of Commissioners and the Chief Executive Officer the work of the SAHRC is delivered through the departments within the Secretariat. These are: the Legal Services Department; the Education and Training Department; and, the Research and Documentation Department. In addition the SAHRC has offices in seven provinces and a presence in the remaining two; namely, North West and Mpumalanga through which its services are delivered.

Legal Services Department

The Commission provides legal services through providing a mechanism for the laying of complaints in those instances where it is alleged that a persons' rights have been violated. These matters are investigated and a finding is

made. In those instances where, a rights violation is determined as having occurred then recommendations are made to the parties. The Department aims to resolve complaints through negotiation, mediation and conciliation. Matters involving discrimination may be referred to the Equality Court. Over the years, the SAHRC has dealt with many complaints regarding the rights of children.

Education and Training Department (National Centre for Human Rights Training (NACHRET))

The SAHRC Education and Training Department provides professional training workshops on human rights to a wide range of sectors and beneficiaries. Many of these workshops have included training workshops for children. The Department was also involved in the production of a resource book entitled, *Alternatives to Corporal Punishment*.

Research and Documentation Department

The Research Department of the SAHRC carries out the constitutional mandate of the commission set out in section 183(3) of the Constitution. This section requires the Commission to monitor the progressive realisation of socio economic rights by the State. The SAHRC's Economic and Social Rights Unit releases an Economic and Social Right Report each year. In collecting, analysing and producing the report several of the indicators that are considered include the progress achieved in the delivery of rights to vulnerable groups - including children. The department also houses the Equality Unit and the Promotion of Access to Information Unit.

In addition to the work conducted by the Secretariat, the SAHRC also interacts at an international, national, regional and local level in matters concerning the rights of the child. Finally, the SAHRC has conducted a number of inquiries. In relation to children, an inquiry was conducted on sexual offences committed against children in the Gauteng area. The commission's National Inquiry into Human Rights Violations in Farming Communities highlighted many issues affecting children in these communities.

National Policy Framework

The SAHRC supports the numerous calls that have been made for the re-inclusion of the National Policy Framework (NPF) in the Bill. These provisions were contained in the South African Law Reform Commission (SALRC) version of the Bill (Chapter 2 Inter Sectoral Implementation of this Act). This chapter provided for the creation of a National Policy Framework that seeks to implement the Act at a national, provincial and local level. The NPF will guide the implementation, enforcement and administration of the Act. The chapter provides that it will be created through a consultative process and public participation.

The successful implementation of the Children's Bill calls for a body to be established that will be tasked with coordinating and monitoring the Bill's implementation. There is a need for an accessible, integrated, coordinated,

multidisciplinary and intersectoral approach to the Bill. In order to achieve this a central implementing mechanism is desperately needed.

Many aspects of the Bill will need intersectoral and inter departmental cooperation. This was provided for in the National Policy Framework. The SAHRC supports the re-inclusion of these provisions in the Bill.

Issues that the National Policy Framework could address include:

- The integration and prioritisation of the needs of children with disabilities within all spheres of the implementation of the Bill
- Liaison between relevant government departments to address mechanisms dealing with child labour. The interconnection of services from different government departments to address child labour is needed. For example, a child removed from a situation of child labour would fall within the definition of a child in need of care and protection as defined in section 150 of the Bill.
- Strategies to deal with street children
- Strategies to adequately address the needs of children living with and affected by HIV/AIDS. For example, the development of child headed household protocols to ensure that these children receive all available needed services from the State.
- The coordination of early intervention services
- Determining obstacles and proposing solutions to promote family reunification, kinship care, adoption and other forms of alternative care.
- The creation of monitoring systems regarding the implementation of the Bill
- The coordination of early childhood development services

Chapter 3 Children's Rights

A strong call has been made by NGO's for the re-inclusion in the Bill of a charter of children's rights. Many of the rights demanded reflect a need for these rights. This is due to perceived and actual non-enforcement and realisation of these rights. There is an anticipation by those calling for the inclusion of these rights that by detailing them in the Bill will lead to the delivery of these rights on the ground. However, many of the rights demanded do not fall under the mandate of the Social Development Department. For example, education rights are the responsibility of the Department of Education and should therefore not be included in the Bill. Also, some of the rights demanded are already catered for in existing legislation. For example, the right not to be discriminated against is dealt with comprehensively in the Equality Act (PEPUDA).

Children's rights are cross cutting and intersectoral. It becomes debatable whether their rights should be stated in a single piece of children's legislation or whether their rights should be inserted in the relevant departments legislation. For example, should the Children's Bill deal with the right of access to education of children with disabilities; or, is this a matter for the Department of Education to legislate and implement through regulations and policies such as their *Policy on Inclusive Education*?

Should a right be created in the Children's Bill then positive obligations are placed on the State and more particularly the Department of Social Development, to deliver in terms of that right. From a planning and financial perspective, including rights that are the responsibility of other government departments in the Children's Bill is problematic. The SAHRC supports the inclusion in the Children's Bill of rights that are the responsibility of Department of Social Development.

The fact that such a vociferous call has been made for the inclusion and detailing of children's rights in legislation is indicative of current gaps and challenges that South Africa faces in the delivery of social and economic rights to children. The SAHRC recommends that these calls be clearly analysed, the problems identified and that this information be forwarded to the relevant Ministers and Parliamentary Portfolio Committees.

The SAHRC is not principally opposed to the development of a Charter of Children's Rights. This we believe would call for another process. In fact, our constitution makes provision for the creation of such Charters. Section 234 states:

"In order to deepen the culture of democracy established by the Constitution, Parliament may adopt Charters of Rights consistent with the provision of the Constitution."

The SAHRC would support such an initiative.

Property Rights

Various calls were made during the public hearings for the inclusion of the right of a child who owns property to the administration of that property in the best interests of the child.

The inclusion of such a right in the Bill would raise many questions as the obligations created in terms of the right are unclear. The right presupposes that legal processes have taken place to transfer the property (e.g. in those instances where it involves immovable property) to the child. It is unclear what the value of the property should be in order for it to be subject to the right. Given the levels of poverty in this country, property may be of little value in monetary terms yet of great value to the child (e.g. contents of a household). The administration of this property would involve the areas of law such as: family law; property; and, succession.

The property rights of children become especially pertinent due to the HIV/AIDS pandemic and the recognition of child headed households in the Bill. Many children are being orphaned and do not have the necessary legal capacity to administer the property from their parents. The recognition of child headed households in the Bill is silent on the property rights of these children. This matter needs research and attention.

The SAHRC is of the view that this is an important issue that needs further research to determine if legislative reform is needed to deal with this issue.

The issue ought to be referred to the South African Law Reform Commission for further research.

Harmful Social and Cultural Practices – section 12

The SAHRC welcomes the provisions of this section that aim to protect children from harmful social and cultural practices. The section includes provisions protecting children from under age marriages and engagements; prohibiting female genital mutilation; and, creating the right to refuse circumcision or virginity testing.

The SAHRC supports the position of the Commission on Gender Equality (CGE) that virginity testing should be prohibited as the cultural practice is discriminatory against young women and girls, impinges upon their dignity, is an invasion of privacy and cannot be justified in terms of the limitations clause of the constitution.

Section 12(5) does not provide the requirement of consent for virginity testing. The section merely provides for a right to refuse.

The SAHRC submits that virginity testing should be prohibited in the Bill.

Corporal Punishment

Since 1994, South Africa has made considerable progress in eradicating corporal punishment. Through litigation in the constitutional court, *S V Williams 1995(3) SA 632 (CC)*, corporal punishment has been abolished as a sentence in criminal offences and though legislative reform it has been prohibited by the South African Schools Act 1996 as a form of punishment administered in schools. Corporal punishment can be defined as a painful intentionally inflicted (typically, by striking a child) physical penalty inflicted by a person in authority for disciplinary purposes (see <http://www.stophitting.com/disathome/sureshrani.php>)

The SAHRC has done considerable work in the area of corporal punishment. In 2001, the SAHRC in collaboration with the WITS Education Policy Unit released a book entitled *“Alternatives to Corporal Punishment, Growing Discipline and Respect in our Classrooms”*. This guidebook is intended to assist teachers to cope with discipline in the classroom without resorting to corporal punishment. The release of the book has been accompanied with training workshops for educators through the various provincial education departments.

South African Constitution

Corporal punishment is inconsistent with our constitution, in particular the right to dignity (section 10), and the right not to be treated or punished in a cruel, inhuman or degrading way (section 12).

International human rights instruments

Corporal punishment is inconsistent with many international human rights instruments such as:

- Convention on the Rights of the Child, Article 19 and 28 specifically states that appropriate legislative measures shall be taken to protect children from all forms of physical and mental violence and that corporal punishment in any form is a violation of the Convention.
- African Charter on the Rights and Welfare of the Child also calls upon States to take legislative measures to protect children from inhuman or degrading treatment and especially physical or mental injury (Article 16)
- In 1982 the United Nations amended its definition of torture to include corporal punishment, including excessive chastisement as a disciplinary measure.

The SAHRC supports corporal punishment being prohibited entirely including the removal of the defence of moderate chastisement in criminal matters. The SAHRC supports the re-inclusion in the Bill of the provisions regarding corporal punishment contained in the SALRC draft Bill that would give effect to this (Section 142). Legislation making in this area will assist in changing attitudes in society and contribute towards creating a violence free society.

Vulnerable Groups

Children living with and affected with HIV/AIDS

The National Policy Framework needs to integrate the delivery of services to child headed households. Whilst the Bill provides for the recognition of child headed households (section 46(1)(b)) it is unclear how these mechanisms will be accessed.

Non nationals

Children who are non-nationals including children who are illegally in the country and unaccompanied minors constitute a particularly vulnerable group of children who are in need of protection. The Children's Bill which deals with the protection of children and promotion of their well-being is the forum in which to address some of the challenges that are created by these children's presence in our country. Once these children are within the borders of South Africa they are protected by the rights set out in the constitution (except those from which they are specifically excluded) and international human rights instruments such as the Convention on the Rights of Child amongst others.

The SAHRC has for a number of years monitored the conditions of detention at the Lindela Repatriation Centre. A number of reports have been written and recommendations made to government (e.g. *Report into the Apprehension and Detention of Undocumented Migrants, March 1999 & Lindela at the Crossroads for Detention and Deportation, An Assessment of the Conditions of Detention, December 2000*). In the December 2000 report it was noted that there are no separate facilities for women with children at Lindela; that adults and children sleep in the same room; and, despite Lindela denying receiving

children below the age of 15 years, that there are instances where children have been received.

The SAHRC together with Lawyers for Human Rights has established a permanent monitoring presence at Lindela following the detention of a South African citizen in December 2002 and continued reports of fraud, bribery and the excessive use of violence.

Conditions have improved over the years, however there is still the need for vigilant monitoring and addressing human rights concerns that are raised by the detention of non-nationals at the centre. One of the ongoing concerns that is yet to be addressed is that of the children who pass through Lindela. The children are kept in the detention centre with adults raising concerns that this may not be conditions which take account of the child's age. Many of the children are literally driven to the border and dumped without any authorities, family members or parents being available to receive them. There is thus a dire need for the Bill to address these issues.

From January to April 2004, 76 minors were held at Lindela. The majority of these children come from Mozambique and Zimbabwe. These children are sent back to their countries on buses that leave twice weekly. Very often, no attempt is made to ascertain if the children's parents are in South Africa and there is no current system to ensure that the children are adequately received in their countries of origin. The children are 'dumped' at the border with no official reception for them. It is unclear what happens to children who come from further afield such as Kenya, India and Somali – it is thought that these children are perhaps released from Lindela due to a lack of cooperation from their governments embassies to identify the children, and supply them with travel documents. There are currently attempts to separate children from adults who are detained at Lindela but this does not occur in all cases. *(Information supplied by Shani Winterstein, LHR Refugee Rights Project, August 2004)*

The SAHRC recommends that a number of amendments be made to the Bill in order that these children are adequately cared for and protected.

Definition of a child

The definition of a child in the Bill should state explicitly that non-nationals (including foreign children illegally in the country and unaccompanied minors) are included. The extent to which children are protected by the rights enshrined in the Constitution has been subject to considerable debate and litigation in the constitutional court. There is thus a need to amend the definition to provide clarity and certainty.

Children's Court procedure

Children arrested as non-nationals illegally in the country must be brought before the children's court and an inquiry must be held to:

- Determine the child's status
- Determine if the child is a potential asylum seeker
- Determine if the child has care givers in South Africa

- Determine the place and conditions under which the child shall be kept
- Determine the repatriation of the child
- Determine whether the child is a child in need of care in terms of section 150 of the Bill

Section 46 of the Bill should be amended to include a provision that gives the court the power to make an order for the care of a child who is a non-citizen and for the repatriation of the child to its country of origin

The children's court must monitor the enforcement of this order to ensure that the matter is dealt with swiftly

Children with disabilities

To achieve a society based on equality it is necessary to remove barriers faced by people with disabilities in order to create an inclusive society. The introduction of the Equality Act (PEPUDA) goes some way in providing a mechanism by which people with disabilities may challenge discrimination. The SAHRC has already assisted in successfully challenging such discrimination when it took the matter of Esthe Muller, a quadriplegic lawyer, to the Equality Court. In this case, the applicant alleged that the Ministers of Public Works and, Justice and Constitutional Development infringed her constitutional right to practice her profession as the buildings, the magistrates courts in Meyerton and Springs, were not accessible.

In order to promote the creation of a barrier free court system for children with disabilities, the SAHRC recommends the following:

Section 42 – Children's courts and presiding officers

That an additional sub section be added to section 42(7) of the Bill which states that court hearings must be held in a room which is accessible to children with disabilities.

National Policy Framework

The National Policy Framework should also make reference to children with disabilities and ensure that the implementation of the Bill takes account of the special needs of children with disabilities.

Street Children

Street children are determined to be children in need of care in terms of section 150(c) of the Bill. The mechanisms to deal with these children, which are contained in the s76 Bill, need to be included in the National Policy Framework.

Chapter 4 Parental Responsibilities & Rights

Section 21 Parental responsibilities and rights of unmarried fathers

This section provides a mechanism whereby the biological father of a child may acquire parental responsibilities and rights.

The section does not provide for formal procedures to be followed, or, for a court to make a determination as to which rights the biological father should be granted in respect of the child. The biological father obtains automatic rights (automatic acquisition) when he determines that the conditions set out in section 21 have been fulfilled. This creates a potential situation that is ripe for dispute. The onus would be on the mother to dispute this acquisition of rights by the father.

South Africa currently has legislation that regulates the rights of unmarried fathers. The *Natural Fathers of Children Born out of Wedlock Act 86 of 1997 (Natural Fathers Act)* was drafted in response to a constitutional challenge (*Fraser v Children's Court, Pretoria North 1997 CC*) around the non-recognition of rights of unmarried fathers. The Children's Bill will repeal in whole the *Natural Fathers Act*.

There is a procedure to be followed to acquire rights in the *Natural Fathers Act*. The Act provides in section 2 for a formal application in the High Court by an unmarried father to acquire rights of access, custody and guardianship. The section further sets out a number of relevant factors that the court is bound to take into consideration when considering such an order.

Parental responsibilities and rights are defined in the Bill as meaning the right: to care for a child; to have and maintain contact with the child and to act as the guardian of the child. These rights mirror those of access rights, custody and guardianship that are currently referred to in the *Natural Fathers Act*.

There has been controversy over the provisions of section 21 which are viewed by some as being too generous towards unmarried fathers, particularly in light of the gender imbalances that exist in South Africa. Section 21 provides an informal procedure for the acquisition of rights that can potentially be detrimental to a child. The 'best interest of the child' standard must be applied in determining the acquisition of rights by unmarried fathers. This calls for a more formal procedure to determine these rights. An objective determination by an independent authority is needed. The current Bills' provisions provide for a subjective procedure.

It is submitted that section 21 should be amended with the insertion of a sub section that ensures that the parental responsibilities and rights that are acquired in terms of the section must be subject to the provisions of section 22 (Parental responsibilities and rights agreements) and section 23 (Assignment of parental responsibilities and rights by order of court) of the Bill.

Section 22(3) and 23(2) - Guardianship of a child

Section 22(3) and 23(2) states that only the High Court may make decisions regarding guardianship of a child. Given the lack of access to justice in South Africa it is proposed that children's courts be added as a forum where such decisions may be made.

Section 26 Assignment of parental responsibilities and rights to parent substitutes

Given the number of child headed households and AIDS orphans in our country this section is welcomed. Child headed households are a social reality that need to be legitimised and recognised. The failure to do so gives rise to many difficulties and the potential violation of rights.

Section 30 Co holders of parental responsibilities and rights

There is no clarity in the Bill as to what should happen where there is a dispute between co holders of rights. This may give rise to conflict and litigation. It is recommended that additional clauses be added to this section that provides for a dispute resolution mechanism.

Chapter 18. Child abduction

The purpose of this chapter is to give effect to the *Hague Convention on International Child Abduction* and to combat parental child abduction. In giving effect to our international obligations the chapter fails to deal with the abduction of children within the borders of South Africa. The chapter fails to criminalize domestic abductions and fails to give any guidelines on how affected government departments should deal with domestic abductions.

It is recommended that the chapter be amended to include the following provisions:

- The definition of child abduction should be placed in the definitions section of the Bill. The wording from the Hague Convention should be altered to refer to both international and domestic abduction.
- An additional clause should be inserted in the chapter prohibiting child abduction.
- Section 277 should be amended to refer to the definition of child abduction contained in the Bill rather than referring to Article 3 of the Hague Convention (international definition of child abduction)
- Section 297 should be amended by adding a subsection that authorises the Minister of Justice and Constitutional Development together with the Minister for Social Development to make regulations for their respective departments concerning matters relevant to the handling of domestic child abduction.
- Section 297 should also provide for the Minister of Justice and Constitutional Development to make regulations detailing the role of the Family Advocates office in child abduction matters

Chapter 19 Trafficking in Children

The provisions in the Bill that give effect to South Africa's international obligations to implement the *United National Protocol to Prevent Trafficking in Persons* is welcomed.

Definition

It is further welcomed that the definition has been drafted in a manner that makes the provisions of this chapter applicable to both domestic and

international trafficking in children. In its work the SAHRC has noted the phenomenon of child trafficking in the Western Cape and trends have also been picked up in Mpumalanga and Limpopo. Children appear to be trafficked for purposes of sexual exploitation and exploitation as domestic workers in private households.

The definition of trafficking however omits the definition of exploitation - as is contained in the *UN Protocol*.

“Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

The SAHRC recommends that this be added to the definition.

Section 150 Children in need of care

Section 150 should be amended to specifically include victims of trafficking as children in need of care. Section 150(e) refers to children who have been exploited – a core component of trafficking, however trafficking should be stated specifically.

It is suggested that the words “... *including victims of trafficking*...” be inserted after the word exploited.

Further law reform needed

The provisions contained in the Bill deal mostly with international trafficking of children in an attempt to honour South Africa’s international obligations. Domestic trafficking however is a greater problem currently within the country in that there are more domestic victims of trafficking than international victims of trafficking.

It is noted that the South African Law Reform Commission is currently working on developing legislation that will deal with trafficking holistically. The SAHRC is involved in this process and has submitted detailed comments on the Issue Paper 25, Project 131 in March 2004. The Sexual Offences Bill also makes reference to trafficking in persons.

It is recommended that upon the conclusion of the SALRC process that comprehensive legislation is tabled before parliament. This legislation should include the provisions that are currently proposed in the Children’s Bill and the Sexual Offences Bill. The future legislation would repeal the provisions in these pieces of legislation and provide a comprehensive framework for dealing with this phenomenon. Chapter 19 will thus serve as interim legislation pending the final outcome of the SALRC process.

Children’s Protector

When systems fail children there is not always a place to go to obtain assistance and relief. The creation of an ombuds office would provide such a forum.

The SAHRC supports the call for a Children's Ombudsperson.

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