

MEMORANDUM ON THE OBJECTS OF THE CHILDREN'S BILL, 2003

1. LEGAL-TECHNICAL BACKGROUND OF BILL

This Bill (the "current Bill") contains part of the envisaged Children's Act. The Bill which was initially submitted to Parliament ("the consolidated Bill") dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a "mixed" Bill, including elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution. Due to its mixed character, the Deputy Speaker of the National Assembly requested the Executive to split the consolidated Bill, which has now been done. The provisions of the consolidated Bill which will apply to the provincial government have been removed and, consequently, the current Bill only contains matters which have to be dealt with in terms of section 75 of the Constitution. The numbering of the consolidated Bill has, however, been retained, hence the gaps in the current Bill, indicated by "*****". As soon as the current Bill is enacted, an amendment Bill containing the matters which apply to the provincial government only ("the amendment Bill") will be introduced. The amendment Bill will have to be dealt with in terms of section 76 of the Constitution. The amendment Bill will complete the current Bill by inserting the provisions which deal with welfare services.

2. GENERAL BACKGROUND AND OVERVIEW

The lives of children are affected by various pieces of legislation and international conventions. Apart from section 28 of the Constitution, which deals with the rights of children specifically, some of the statutes pertaining to children currently on the statute book are the following:

- The Age of Majority Act, 1972 (Act No. 57 of 1972)
- The Child Care Act 1960 (Act No. 74 of 1983)
- Children's Status Act, 1987 (Act No. 82 of 1987)
- Guardianship Act, 1993 (Act No. 192 of 1993)
- Hague Convention on the Civil Aspects of International Child Abduction Act, 1996 (Act No. 72 of 1996)

Over the past few years, it has become clear that existing legislation is not in keeping with the realities of current social problems and no longer protects children adequately. In addition thereto, the Republic of South Africa has acceded to various international conventions, such as the UN Protocol on the Rights of the Child and the African Charter on Children's Rights, the principles of which have to be incorporated into local legislation.

During 1997 the Minister for Social Development requested the South African Law Reform Commission to investigate the Child Care Act, 1983 and to make recommendations to the Minister for the reform of this particular branch of the law. After an extensive process of research and consultation, the Law Reform Commission finalised its report and proposed a draft Children's Bill in January 2003.

The Department of Social Development then took the process further through close liaison with the national Departments of Justice and Constitutional Development, Education, Health, Labour, the South African Police Service, the provinces, national non-governmental organisations and service providers as well as the Office on the Rights of the Child in the Presidency. Consultative workshops were also held with the Portfolio Committee on Social Development.

3. OBJECTS

The main objects of the proposed Children's Bill are:

- (a) To make provision for the structure, the services and the means for promoting and monitoring the sound physical, intellectual, emotional and social development of children;
- (b) to strengthen and develop community structures which can assist in providing care and protection for children;
- (c) to protect children from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical and moral harm or hazards;
- (d) to provide care and protection for children who are in need thereof;
- (e) to give effect to the Republic's obligations concerning the well-being of children in terms of the international instruments binding on the Republic; and
- (f) in general, to promote the protection, development and well-being of children.

Significant new proposals to address lacunas in the present situation include specific provision for the participation of children in matters affecting them, an extension of the rights of unmarried fathers, provision for a High Court procedure to allow persons other than parents to gain rights with regard to children, the need to formally

recognise and provide for child-headed households and the protection of children. The Bill proposes to lower the age of majority and provides for parental responsibilities and rights agreements. Provision is made for parenting plans in certain instances. A chapter to formally regulate surrogate motherhood is also introduced to give effect to an earlier parliamentary investigation into this issue.

The Bill has 13 chapters, which can be summarised as follows:

- Chapter 1 deals with the interpretation, objects, application and implementation of the Bill, while the general principles underlying the Bill and the best interest of the child standard is set out in Chapter 2.
- Chapter 3 provides for children's rights and deals with issues such as the paramountcy of the best interest of the child, child participation, harmful social and cultural practices, access to children's courts and the age of majority.
- Chapter 4 deals with all matters pertaining to parental responsibilities and rights, parental responsibilities and rights agreements and the assignment of parental responsibilities and rights by order of court. This chapter also provides for the rights of fathers, presumption of paternity, parenting plans and the rights of children conceived by artificial fertilisation.
- The functioning, powers and jurisdiction of children's courts, the conduct of proceedings before the children's court and presiding officers and other court officials form the subject matter of Chapter 5 of the Bill.
- Chapters 16 and 17, respectively provide for adoption and inter-country adoption.
- Chapter 18 gives effect to the Hague Convention on the Civil Aspects of International Child Abduction, while Chapter 19 similarly gives effect to the

Hague Convention on Protection of Children and Co-operation in Respect of Inter Country Adoption.

- Chapter 20 introduces new legislation into the South African legal system by formally providing for surrogate motherhood.
- Chapters 21 provides for the enforcement of the Bill through powers of inspection and the creation of offences.
- Chapters 22 and 23 of the Bill deal with general administrative issues and other miscellaneous matters such as regulations, delegations and assignments, outsourcing of services and transitional measures.

4. AMENDMENT BILL

The amendment Bill referred to in paragraph 1 will add to welfare service delivery and further protection of families and children. The amendment Bill insert the following chapters in the envisaged Act:

- Chapter 6 regulates the provision of partial care and sets out the norms and standards applicable to partial care and partial care facilities.
- Chapter 7 links to chapter 6 as this chapter determines the norms and standards applicable to early childhood development services and states the obligation to present early childhood development programmes at partial care facilities and child and youth care centres.
- Chapter 8 is a crucial part of the Bill as it provides for measures for the protection of children. The chapter introduces a provision on the compulsory reporting by certain persons of children in need of care and protection, addresses the child protection system, the provision of child protection

services, the National Child Protection Register and measures relating to the health of children.

- Chapter 9 makes provision for prevention and early intervention as a first layer of services provided to children and families in need of assistance.
- Chapter 10 deals with the child in need of care and protection, provides for the identification of such children and provides for actions to be taken with regard to children in need of care and protection.
- Chapter 12 provides for alternative care of children in general, forming a link to the specific forms of alternative care dealt with in subsequent chapters.

The chapters dealing with the various forms of alternative care are chapter 13, which covers foster care and care by family members, chapter 14 that regulates child and youth care centres, Chapter 15, which deals with shelters and drop-in centres.

5. EFFECT ON THE PROVINCES AND LOCAL GOVERNMENT

The envisaged Act will rationalise legislation pertaining to children in South Africa. As such, it negates the need for each province to promulgate its own legislation on children's issues. It should therefore streamline provincial governance.

The current Bill will have no direct implications on local government.

6. CONSULTATION

Apart from the broad consultation process followed by the South African Law Reform Commission during its review of the Child Care Act, 1983, the Department of Social Development also distributed the draft Children's Bill to the Provinces, national

departments, non-governmental organisations and other service providers for comment. The Bill was also published for general comment in the *Gazette* on 13 August 2003

7. FINANCIAL IMPLICATIONS FOR STATE

The Department of Social Development is in the process of considering the financial implications of the envisaged Children's Act. The department has done an initial scoping exercise of the envisaged Act and identified the costing elements which may have inter-governmental fiscal and budgetary implications, which may include, amongst others:

- Fiscal risks: provisions that create implicit or explicit obligations on government;
- administrative costs: additional processes, personnel, management practices and procedures, information and reporting etc;
- institutional arrangements: new committees, units, associations etc;
- transfer of functions currently performed by provinces to the national government; and
- delegation or assignment of functions to provinces and municipalities.

8. PARLIAMENTARY PROCEDURE

The Department of Social Development is of the view that this Bill must be dealt with by Parliament in accordance with the procedure established by section 75 of the Constitution.