

CONTENTS

INTRODUCTION (i)

PREFACE (ii)

EXECUTIVE SUMMARY

BIBLIOGRAPHY

TABLE OF CASES

CHAPTER 1

INTRODUCTION

1.1	Introduction	1
1.2	Background	1
1.3	First Issue Paper	2
1.4	Research papers	4
1.5	The child participation process	7
1.6	Scope of the investigation	10
1.7	The Commission's working methodology	11
1.8	Conclusion	14

CHAPTER 2

THE SCOPE OF THE INVESTIGATION

2.1	Introduction	15
2.2	The Committee's vision for comprehensive child legislation	15
2.3	Testing the vision	17
2.4	The scope of the existing legislation	18
2.5	The scope of the new children's statute	19

2.5.1	Children with disabilities	23
2.5.2	Children living on the street	23
2.5.3	Children living with HIV/AIDS	24
2.5.4	Child labour	25
2.5.5	Child health	25
2.5.6	Displaced foreign children	26
2.5.7	Children as learners in school	27
2.5.8	Children living under customary law	28
2.6	Evaluation and recommendations	29

CHAPTER 3

THE CONSTITUTIONAL IMPERATIVES RELATING TO CHILDREN

3.1	Introduction	32
3.2	Section 28 of the Constitution, 1996	32
3.3	Comments and submissions received	33
3.1.1	What rights children should have (in addition to the universal rights everyone has)?	34
3.4	Judicial interpretation of section 28 of the Constitution, 1996	39
3.5	Conclusion	51

CHAPTER 4

CHILDHOOD: ITS BEGINNING AND END

4.1	Introduction	52
4.2	The definition of a child	52
4.3	The attainment of majority	57
4.3.1	The attainment of majority by age	57
4.3.2	The attainment of majority by marriage	58
4.3.3	The attainment of majority by express emancipation	59
4.3.4	The attainment of majority in customary law	62
4.4	Comments and submissions received	62

4.5	Evaluation and recommendation	66
-----	-------------------------------	----

CHAPTER 5

THE PRINCIPLES UNDERPINNING THE NEW CHILDREN'S STATUTE, THE BEST INTERESTS OF CHILDREN-STANDARD, AND THE RIGHTS AND RESPONSIBILITIES OF CHILDREN

5.1	Introduction	72
5.2	The principles underpinning the new children's statute	72
5.3	The 'best interests of the child'-standard	78
5.4	The rights and responsibilities of children	86

CHAPTER 6

THE CHILD CARE ACT 74 OF 1983

6.1	Introduction	94
6.2	Meaning of 'child' for the purpose of the Child Care Act, 1983	95
6.3	Provisions that empower (or could empower) children	96
6.3.1	Legal representation for children in children's court proceedings	96
6.3.2	The Children's Court Assistant	100
6.3.3	The right of children to self-expression	103
6.3.4	Consent to medical treatment or surgical intervention	104
6.4	Provisions that protect (or could protect) children	106
6.4.1	The removal of a child to a place of safety pending an enquiry	106
6.4.2	Bringing children before the children's court	110
6.4.3	Children 'in need of care'	113
6.4.4	Children placed with persons other than their parents or custodian	125
6.4.5	Ill-treated and abandoned children; children whose parents fail to maintain them properly	126
6.4.6	Reporting of suspected instances of ill-treatment, abuse or undernourishment	

	of children	127
6.4.7	Necessary medical operation or treatment of children	129
6.4.8	Commercial sexual exploitation	130
6.4.9	Unlawful removal of children	131
6.4.10	Child labour	132
6.4.11	Appeals	133
6.4.12	Deadlines	134
6.5	Provisions that affect (or could affect) children	136
6.5.1	Procedure in the children's court	136
6.5.2	Maintenance of children in need of care and contribution orders	137
6.5.3	Permanency Planning	139
6.5.4	Reunification Services	142
6.5.5	Adoption of children	143
6.5.6	Leave of Absence from a Placement	144
6.5.7	Absconder's Inquiries	144

CHAPTER 7

ESTABLISHING PARENTHOOD AND THE STATUS OF CHILDREN

7.1	Introduction	146
7.2	Legitimacy of children	146
7.3	Artificial insemination	147
7.4	Evaluation and Recommendations	151
7.5	Surrogate motherhood	157
7.6	Evaluation and recommendations	170

CHAPTER 8

THE PARENT / CHILD RELATIONSHIP

8.1	Introduction	175
8.2	The Diversity of Family Forms in South Africa	175

8.2.1	Current South African law and practice	175
8.2.2	Comparative review	183
8.2.3	Comments and submissions received	186
8.2.4	Evaluation and recommendation	191
8.3	The Shift from 'Parental Power' to 'Parental Responsibility'	192
8.3.1	Current South African law and practice	192
8.3.2	Comparative review	193
8.3.3	Comments and submissions received	194
8.3.4	Recommendation	195
8.4	The meaning and content of parental responsibility	196
8.4.1	Introduction	196
8.4.2	Current South African law and practice	196
8.4.3	Comparative review	197
8.4.4	Comments and submissions received	207
8.4.5	Evaluation and recommendations	214
8.4.5.1	Parental rights and responsibilities	214
8.4.5.2	Changes in terminology and the components of parental rights and responsibilities	215
8.4.5.3	The management of parental rights and responsibilities	217
8.4.5.4	Parent-substitutes	220
8.5	The acquisition of parental responsibility and parental rights	224
8.5.1	Introduction	224
8.5.2	Biological parents	225
8.5.2.1	Current South African law and practice	225
8.5.2.2	Comparative review	228
8.5.2.3	Comments and submissions received	237
8.5.2.4	Evaluation and recommendations	246

8.5.3	The Acquisition of Parental Responsibility by Persons other than Biological Parents	251
8.5.3.1	Current South African law and practice	251
8.5.3.2	Comparative review	254
8.5.3.3	Comments and submissions received	263
8.5.3.4	Evaluation and recommendations	269
8.6	Parenting plans	273
8.6.1	Current South African law	273
8.6.2	Comparative review	274
8.6.3	Comments and submissions received	276
8.6.4	Analysis and recommendation	280
8.7	The termination of parental responsibility	284
8.7.1	Current South African law	284
8.7.2	Comparative review	285
8.7.3	Comments and submissions received	288
8.7.4	Analysis and recommendation	292

CHAPTER 9

PREVENTION AND EARLY INTERVENTION SERVICES FOR CHILDREN AND THEIR FAMILIES

9.1	Introduction	294
9.2	Existing legal position in South Africa	296
9.3	Comparative review	297
9.4	Comments and submissions received	302
9.5	Going beyond prevention: Promotion of the well-being of children	306
9.6	Promotion, prevention and early intervention: An inter-sectoral responsibility	309
9.7	The role of local government	313

9.7.1	Introduction	313
9.7.2	The present legal framework concerning local authorities	313
9.7.3	Examples of local government initiatives in South Africa in respect of prevention and early intervention services	317
9.7.4	Evaluation and recommendation	319
9.8	The role of traditional leaders in the delivery of prevention and early intervention services and in safeguarding and promoting the welfare of children	322
9.9	Court-instigated services	324
9.10	Conclusion	325

CHAPTER 10

CHILD PROTECTION

10.1	Introduction	326
10.2	Scope of and guiding principles for child protective legislation	326
10.2.1	Scope of protective legislation, and needs and rights to be addressed	326
10.2.2	Circumstances in which protective intervention may be required	327
10.2.2.1	Sub-categories and combined forms of abuse and neglect	328
10.2.3	Broad statutory approaches to the protection of children	329
10.2.4	Protective measures and mechanisms	331
10.2.4.1	Reinforcement of protective potential within the family or neighbourhood	331
10.2.4.2	Statutory protection of the child within the home	332
10.2.4.3	Removal of an offender	333
10.2.4.4	Placement of the child in substitute care: by order of court or by voluntary agreement	333
10.2.4.5	Combinations of criminal justice and protective measures	334
10.2.5	Basis for selection	334

10.2.5.1	Locating the problem	335
10.2.5.2	Available resources	336
10.2.5.3	Comparative risks, including secondary abuse	336
10.2.5.4	Structural implications	337
10.2.6	Balancing the various dimensions of child protection legislation and practice	338
10.2.6.1	Balancing formal child protection services with primary and secondary preventive measures	338
10.2.6.2	Balancing and linking preventive and protective approaches with criminal justice approaches	338
10.2.6.3	Balancing punitive with rehabilitative interventions	340
10.2.7	Existing situation in South Africa	341
10.2.7.1	Formal protective interventions	341
10.2.7.2	Additional legislation with a protective dimension	342
10.2.7.3	Criminal justice measures	345
10.2.7.4	Additional and cross-cutting provisions	346
10.2.7.5	Associated policy considerations	346
10.2.8	Deficiencies in the existing system	347
10.2.8.1	Deficiencies in scope, relevance and adaptability to specific needs	347
10.2.8.2	Deficiencies in governance and coordination	349
10.2.8.3	Deficiencies in provisioning for and balancing of components	352
10.2.8.4	Deficiencies in coverage of harmful or potentially harmful social and cultural practices	355
10.2.9	Comparative review of systems in other countries	358
10.2.9.1	Grounds for intervention by the state	359
10.2.9.2	Protective options in other systems	363
10.2.9.3	Balancing between and provisioning of components in other systems	366

10.2.9.4	Governance, coordination and management in other systems	369
10.2.10	Options mooted in the consultation processes, and responses received	374
10.2.10.1	Issue Paper 13	374
10.2.10.2	Research paper on legislating for child protection	374
10.2.10.3	Responses to points raised in the research paper	375
10.2.10.4	Consultation with officials of the Department of Social Development	383
10.2.10.5	What the children said	384
10.2.11	The Commission's evaluation and recommendations in setting broad principles for child protection legislation	385
10.3	Assessment and Treatment / Therapeutic Services	388
10.3.1	Types of assessment which may be required for effective protection	389
10.3.1.1	Assessment of the child, family members and the family unit	389
10.3.1.2	Risk analysis	390
10.3.2	Ongoing services / treatment / therapeutic support	392
10.3.3	Existing system in South Africa and deficiencies	393
10.3.4	Comparative review of other systems	397
10.3.5	Options mooted in the research paper	400
10.3.6	Evaluation and recommendations regarding assessment and treatment / therapeutic services	403
10.4	Permanency Planning and Associated Services and Mechanisms	405
10.4.1	Philosophy and introductory remarks	405
10.4.2	Components	406
10.4.3	Possible outcomes	409
10.4.4	Existing South African system	411
10.4.5	Deficiencies in the existing system	413

10.4.6	Comparative review of other systems	415
10.4.7	Questions raised and options mooted in Issue Paper 13 and the research paper	420
10.4.8	Evaluation and recommendations	422
10.5	Reporting and Registration of Reported Cases	425
10.5.1	Common features of reporting and registration systems	425
10.5.2	Existing situation in South Africa	427
10.5.3	Deficiencies in the existing system	428
10.5.4	An international perspective	431
10.5.5	Debates on the merits of mandatory reporting	438
10.5.6	Options mooted in Issue Paper 13 and the research paper and responses received	446
10.5.7	Evaluation and recommendations	449
10.6	Conclusion	451

CHAPTER 11

THE PROTECTION OF THE HEALTH RIGHTS OF CHILDREN

11.1	Introduction	453
11.2	Assessing Children's Health Rights	453
11.2.1	Introduction	453
11.2.2	Comparative systems in other countries	455
11.2.3	Comments received	458
11.2.4	Evaluation and recommendations	459
11.3	Children's right to basic health care services	460
11.3.1	Introduction	460
11.3.2	South African Law and Policy	460

11.3.3	Comments received	462
11.3.4	Evaluation and recommendations	463
11.4	Consent to medial treatment or surgical intervention	463
11.4.1	Introduction	463
11.4.2	South African Law and Policy	463
11.4.3	Comparative review of systems in other countries	467
11.4.4	Comments received	468
11.4.5	Evaluation and recommendation	470
11.5	HIV testing in relation to placement of children in need of care	472
11.5.1	Introduction	472
11.5.2	South African Law and Policy	473
11.5.3	Comparative review of systems in other countries	475
11.5.3.1	United Kingdom	475
11.5.3.2	United States of America	475
11.5.4	Comments received	475
11.5.5	Evaluation and recommendation	477
11.6	Confidentiality of information relating to the HIV/AIDS status of children	479
11.6.1	Introduction	479
11.6.2	South African Law and Policy	479
11.6.3	Comparative review of systems in other countries	480
11.6.4	Comments received	481
11.6.5	Evaluation and recommendation	482
11.7	Access to contraceptives	482
11.7.1	Introduction	482
11.7.2	South African Law and Policy	483

11.7.3	Comparative review of systems in other countries	483
11.7.4	Comments received	484
11.7.5	Evaluation and recommendation	484
11.8	Access to termination of pregnancy services	484
11.8.1	Introduction	484
11.8.2	South African Law and Policy	485
11.8.3	Evaluation and recommendation	487
11.9	Right to refuse medical treatment	487
11.9.1	Introduction	487
11.9.2	South African Law and Policy	487
11.9.3	Comparative review of systems in other countries	489
11.9.4	Comments received	489
11.9.5	Evaluation and recommendation	490

CHAPTER 12

THE PROTECTION OF CHILDREN AS CONSUMERS

12.1	Introduction	492
12.2	Comments and submissions received	492
12.3	Protecting and Informing Child Consumers	493
12.4	Enforcing children's contracts	494
12.5	Trade practices and consumer protection	496
12.6	The sale of dangerous goods to children and safety standards	498
12.7	The sale of solvents and other harmful substances to children	501
12.7.1	Comparative review of systems in other countries	501
12.7.2	Comments received	502
12.7.3	Evaluation and recommendations	503
12.8	Safety at places of entertainment	505

12.9	Media regulation	508
12.9.1	Television broadcasts	508
12.9.2	Radio broadcasts	513
12.9.3	On-line services	514
12.9.4	Printed material	516
12.9.5	Complaints and review mechanisms	517
12.10	Advertising	519

CHAPTER 13

CHILDREN IN NEED OF SPECIAL PROTECTION

13.1	Introduction	524
13.1.1	Overarching problems and strategies	526
13.1.2	Current law and practice	527
13.1.3	Approaches in other systems	528
13.1.4	Recommendations	528
13.2	Children living in extreme poverty	529
13.2.1	Introduction	529
13.2.2	Mortality	531
13.2.2.1	Perinatal mortality	531
13.2.2.2	Infant mortality	532
13.2.3	Morbidity	532
13.2.4	Malnutrition	535
13.2.4.1	Child feeding	537
13.2.4.2	Micronutrient deficiencies	537
13.2.4.3	Malnutrition and infection	538
13.2.4.4	Programmes to improve child malnutrition	539

13.2.5	Evaluation and recommendations	541
13.3	Children infected with and affected by HIV/AIDS	541
13.3.1	Introduction	541
13.3.2	Categories of AIDS-affected children in need of special protection	542
13.3.3	South African law and practice	544
13.3.3.1	Promotion of Equality and Prevention of Unfair Discrimination Act, 2000	544
13.3.3.2	Child Care Act 74 of 1983	545
13.3.4	Policy documents	545
13.3.4.1	White Paper for Social Welfare, 1997	545
13.3.4.2	Policy on managing HIV/AIDS within schools	546
13.3.5	Comparative review of systems in other countries	547
13.3.5.1	Identifying children in need of care and protection	547
13.3.5.2	Discrimination	548
13.3.5.3	Support for orphans	548
13.3.6	Comments received	553
13.3.6.1	Identifying children in need of care and protection	553
13.3.6.2	Discrimination	555
13.3.6.3	Models of care	556
13.3.6.4	Education	558
13.3.7	Evaluation and recommendations	558
13.4	Children with Disabilities	563
13.4.1	Introduction	563

13.4.2	International and regional instruments recognising the rights of children with disabilities	563
13.4.3	Policy	565
13.4.4	The rights of South African children with disabilities	565
13.4.5	Deficiencies in the current system	567
13.4.6	Comparative review of systems in other countries	570
13.4.6.1	Viet Nam	570
13.4.6.2	United States of America	570
13.4.6.3	Australia	571
13.4.6.4	Canada	572
13.4.7	Evaluation and recommendations	573
13.5	Child labour	577
13.5.1	Nature and extent of the problem	577
13.5.2	Approaches to the problem	579
13.5.3	International framework	582
13.5.3.1	United Nations Convention on the Rights of the Child (CRC)	582
13.5.3.2	African Charter on the Rights and Welfare of the Child	582
13.5.3.3	ILO Conventions and cooperative arrangements with South Africa	582
13.5.3.3.1	Convention 138: Minimum Age Convention (1973)	582
13.5.3.3.2	Convention 182: Worst Forms of Child Labour Convention (1999)	583
13.5.3.3.3	Convention 29: Forced Labour Convention (1930)	583
13.5.3.3.4	Memorandum of understanding	583
13.5.4	Existing legal and policy situation in South Africa	584
13.5.4.1	Constitutional provisions	584
13.5.4.2	The Child Care Act 74 of 1983	584
13.5.4.3	The Basic Conditions of Employment Act 75 of 1997	585
13.5.4.4	Other relevant legislation	586

13.5.4.5	Strategic and policy initiatives	586
13.5.5	Deficiencies in the existing situation	588
13.5.6	Comparative systems in other countries	589
13.5.6.1	Brazil	591
13.5.6.2	Uganda	592
13.5.6.3	Ghana	592
13.5.6.4	India	593
13.5.6.5	Kenya	593
13.5.7	Question raised in Issue Paper 13 and responses	594
13.5.8	Recommendations	595
13.6	Children living and working on the streets	597
13.6.1	Introduction	597
13.6.2	Law and practice	598
13.6.2.1	The Child Care Act 74 of 1983	598
13.6.2.2	Regulations arising from the Child Care Amendment Act, 1996	599
13.6.2.3	The South Africa Schools Act and its implications for 'at risk' learners in mainstream schools	599
13.6.2.4	The South African Schools Act and its implications for non-formal education outside the school system	601
13.6.2.5	The Gauteng Street Children Shelters Act 16 of 1998	601
13.6.3	Comparative systems in other countries	602
13.6.3.1	Defining street children	602
13.6.3.2	Prevention mechanisms and strategies	602
13.6.3.3	Non-formal education outside the school system	603
13.6.3.4	Consent to surgical intervention and other treatment	605
13.6.3.5	Begging	605
13.6.3.6	Supporting and reunifying street children with their families	605

13.6.4	Comments received	606
13.6.4.1	Defining street children	606
13.6.4.2	Prevention mechanisms and strategies	607
13.6.4.3	Non-formal education outside the school system	609
13.6.4.4	Access to health care services	610
13.6.4.5	Begging	611
13.6.4.6	Commercial sexual exploitation of street children	612
13.6.4.7	Deficiencies	612
13.6.4.8	Supporting and reunifying street children with their families	615
13.6.5	Evaluation and recommendations	616
13.7	Commercial sexual exploitation of children	625
13.7.1	Introduction	625
13.7.2	Trafficking in children for purposes of commercial sexual exploitation	625
13.7.3	Comparative systems in other countries	626
13.7.3.1	United States of America	626
13.7.3.2	Italy	627
13.7.3.3	Thailand and China	627
13.7.3.4	Cambodia	628
13.7.3.5	Japan	628
13.7.3.6	African countries	628
13.7.4	Evaluation and recommendations	629
13.7.5	Child prostitution	631
13.7.5.1	Introduction	631
13.7.5.2	Child prostitution within the borders of South Africa	632
13.7.5.3	Child prostitution and the South African legal system	633
13.7.5.4	Comparative systems in other countries	634

13.7.5.4.1	Thailand	634
13.7.5.4.2	Britain	634
13.7.5.4.3	Japan	635
13.7.5.5	Evaluation and recommendations	635
13.7.6	Child pornography	637
13.7.6.1	Introduction	637
13.7.6.2	Child pornography and the South African legal system	637
13.7.6.3	Comparative law	638
13.7.6.4	Evaluation and recommendation	639
13.7.7	Conclusion	640

CHAPTER 14

THE PROTECTION OF CHILDREN CAUGHT UP IN THE DIVORCE / SEPARATION OF THEIR PARENTS

14.1	Introduction	642
14.2	The impact of divorce / separation on children	644
14.3	Child-parent relationship must survive divorce / separation	646
14.4	Problems parents face in divorce / after separation	646
14.5	Improving Outcomes for Children	649

CHAPTER 15

EARLY CHILDHOOD DEVELOPMENT

15.1	Introduction	663
15.2	Basic problems and existing law	664
15.3	Policy documents	666
15.4	Submissions received	668
15.5	Defining ECD	673
15.6	ECD services provided at places of care (partial care facilities)	676

15.7	Lines and levels of Government responsibility	678
15.8	Conclusion and recommendations	681

CHAPTER 16

PARTIAL CARE

16.1	Introduction	684
16.2	Basic problems	686
16.3	Current law and practice	686
16.4	Partial care provided at 'places of care'	687
16.4.1	Minimum building standards for partial care facilities (places of care)	690
16.4.2	Registration of partial care facilities (places of care)	692
16.4.3	The number of children criterion	693
16.5	Reconsidering the merits of a registration process and introducing a system of licensing	694
16.5.1	Introduction	694
16.5.2	Alternatives to registration	695
16.5.3	A basis for licensing partial care	702
16.5.4	Evaluation and recommendations	703
16.6	Defining 'partial care'	708
16.7	Partial care not provided at partial care facilities (places of care)	711
16.8	Monitoring and inspection	712

CHAPTER 17

FOSTER CARE

17.1	Introduction	713
17.2	Conceptualising foster care	713

17.2.1	Problems of definition	713
17.2.2	Current law and practice	714
17.2.3	Comparative systems in other countries	717
17.2.3.1	United States of America	717
17.2.3.2	England and Wales	718
17.2.3.3	Ireland	719
17.2.3.4	Ghana	719
17.2.3.5	Uganda	719
17.2.3.6	Kenya	720
17.2.4	Comments received by the Commission	720
17.2.5	Evaluation and recommendations	721
17.3	Alternative models of foster care	723
17.3.1	Cluster foster care, or community foster care	724
17.3.1.1	Introduction	724
17.3.1.2	Current Practice	724
17.3.1.3	Comparative review of systems in other countries	725
17.3.1.4	Comments received	725
17.3.1.5	Evaluation and recommendations	726
17.3.2	Specialist or professional foster care	727
17.3.2.1	Introduction	727
17.3.2.2	Current Practice	728
17.3.2.3	Comments received	729
17.3.2.4	Evaluation and recommendations	731
17.4	Selection criteria for prospective foster parents	732
17.4.1	Broad concerns and current practice	732
17.4.2	Comments received	732
17.4.3	Evaluation and recommendations	733

17.5	Social and cultural issues when placing children in foster care	733
17.5.1	Introduction	733
17.5.2	Current Law and Practice	734
17.5.3	Comparative review of systems in other countries	736
17.5.3.1	United States of America	736
17.5.3.2	England	737
17.5.4	Comments received	737
17.5.5	Evaluation and recommendations	739
17.6	Parental rights and responsibilities for foster parents	740
17.6.1	Introduction	740
17.6.2	Current Law and Practice	740
17.6.3	Comparative review of systems in other countries	741
17.6.4	Comments received	743
17.6.5	Evaluation and recommendations	746
17.7	Termination of parental rights and responsibilities over certain children in foster care	747
17.7.1	Introduction	747
17.7.2	Current Law and Practice	747
17.7.3	Comparative review of systems in other countries	749
17.7.4	Recommendations	750
17.8	Statutory supervision	750
17.8.1	Introduction	750
17.8.2	Current Law and Practice	751
17.8.3	Comments received	751
17.8.4	Evaluation and recommendations	753
17.9	Duration and extension of foster care orders	754
17.9.1	Introduction	754
17.9.2	Current Law and Practice	755
17.9.3	Comparative review of systems in other countries	755
17.9.4	Comments received	756
17.9.5	Evaluation and recommendations	757

17.10	Rights of non South African children to foster care grants	757
17.10.1	Introduction	757
17.10.2	Current Law and Practice	758
17.10.3	Comments received	758
17.10.4	Evaluation and recommendations	759
17.11	Social security	759
17.11.1	Introduction	759
17.11.2	Current Law and Practice	760
17.11.3	Comments received	761
17.11.4	Evaluation and recommendations	761

CHAPTER 18

ADOPTION AS A FORM OF SUBSTITUTE FAMILY CARE

18.1	Introduction	765
18.2	Adoption as substitute family care	765
18.3	Current South African law and practice	766
18.3.1	Introduction	766
18.3.2	Requirements for adoption	768
18.3.3	Consent to adoption	771
18.3.4	Adoption procedure	774
18.3.5	Effect of an adoption	775
18.3.6	Rescission of an adoption order	776
18.3.7	Appeal	777
18.3.8	Review	778
18.3.9	Record and registration of adoption	779
18.3.10	Giving or receiving considerations for adoptions	780
18.3.11	Section 10 of the Child Care Act and private placements of children	781
18.3.12	Adoption in customary law	783
18.4	Comments and submissions received	787
18.4.1	Introduction	787

18.4.2	The concept of adoption	787
18.4.3	The purpose of adoption	794
18.4.4	Section 17 qualifications for adoption (Who may adopt?)	796
18.4.5	Who may be adopted?	801
18.4.6	Section 18(4) requirements	804
18.4.7	Consent to adoption	807
18.4.8	Dispensing with consent to adoption	812
18.4.9	Withdrawing consent	818
18.4.10	The effect of adoption	819
18.4.11	Post-adoption contact	821
18.4.12	Prohibition of consideration in respect of adoption	824
18.4.13	Subsidized adoptions	829
18.4.14	Access to information in adoption register	832
18.4.15	Section 10 of the Child Care Act, 1983, and private placements	838
18.5	Transracial adoptions	841
18.6	Evaluation and recommendations	853
18.6.1	The need for adoption	853
18.6.2	Who may be adopted?	858
18.6.3	Section 17 qualifications for adoptions (Who may adopt)	861
18.6.4	Consent to adoption	874
18.6.5	The effect of adoption and post-adoption contact	875
18.6.6	Prohibition of consideration in respect of adoption	876
18.6.7	Subsidized adoption	876
18.6.8	Access to information	876
18.6.9	Facilitating open adoptions	877
18.6.10	Adoption services	881

CHAPTER 19

RESIDENTIAL CARE

19.1	Introduction	883
19.2	Forms of residential care	884

19.2.1	Current South African law, policy and practice	884
19.2.2	Comparative law	887
19.2.2.1	Kenya	887
19.2.2.2	Uganda	888
19.2.2.3	Namibia	889
19.2.2.4	New Zealand	891
19.2.2.5	Scotland	892
19.2.2.6	Evaluation	893
19.2.3	Comments and submissions received	894
19.2.4	Evaluation and recommendations	897
19.3	Regulation of residential care	899
19.3.1	Current South African law and practice	899
19.3.2	Comments and submissions received	900
19.3.4	Evaluation and recommendations	903
19.4	Human resources	905
19.4.1	Current South African law and practice	905
19.4.2	Comparative review	906
19.4.3	Comments and submissions received	907
19.4.4	Evaluation and recommendations	908
19.5	Registration and classification	909
19.5.1	Current South African law and practice	909
19.5.2	Comments and submissions received	910
19.5.3	Evaluation and recommendations	912
19.6	Programmes	913
19.6.1	Current South African law and practice	913
19.6.2	Comparative law	917
19.6.2.1	Kenya	917
19.6.2.2	New Zealand	918

19.6.3	Comments and submissions received	919
19.6.4	Evaluation and recommendations	921
19.7	Geographical location and size	922
19.7.1	Current South African law and practice	922
19.7.2	Comments and submissions received	923
19.7.3	Evaluation and recommendations	926
19.8	Procedures	927
19.8.1	Current South African law and practice	927
19.8.1.1	Designation	927
19.8.1.2	Duration of orders	927
19.8.1.3	Appeals from the children's court	928
19.8.1.4	Release at the age of 18	928
19.8.1.5	Discharge	928
19.8.1.6	Children who abscond	929
19.8.1.7	Administrative transfers	930
19.8.1.8	Leave of absence	931
19.8.2	Comments and submissions received	932
19.8.2.1	Designation	932
19.8.2.2	Duration of orders	932
19.8.2.3	Appeals from the children's court	936
19.8.2.4	Release of a child at the age of 18	937
19.8.2.5	Discharge	938
19.8.2.6	Children who abscond	939
19.8.2.7	Administrative transfers	941
19.8.3	Evaluation and recommendations	945
19.8.3.1	Designation	945
19.8.3.2	Duration of orders	946
19.8.3.3	Appeals from the children's court	947
19.8.3.4	Release of a child at the age of 18 years	947
19.8.3.5	Discharge	948
19.8.3.6	Children who abscond	948

19.8.3.7	Administrative transfers	948
19.9	Rights to care and protection in residential care facilities	949
19.9.1	South African law and practice	949
19.9.2	Comments and submissions received	955
19.9.3	Evaluation and recommendations	957
19.10	Minimum standards and quality assurance in residential care	957
19.10.1	Current South African law and practice	957
19.10.2	Comments and submissions received	960
19.10.4	Evaluation and recommendations	965
19.11	Funding of residential care	967
19.11.1	South African law and practice	967
19.11.2	Comments and submissions received	972
19.11.3	Evaluation and recommendations	975

CHAPTER 20

RELIGIOUS LAWS AFFECTING CHILDREN

20.1	Introduction	976
20.2	Hindu law	976
20.3	Evaluation and recommendation	978
20.4	Jewish religious law	978
20.5	Muslim law	979
20.5.1	Introduction	979
20.5.2	Submissions received	980
20.5.3	Conflicts between Islamic law and South African law relating to children	984
20.5.5	Evaluation and recommendation	986
20.6	Summary of recommendations	986

CHAPTER 21

CUSTOMARY LAW AFFECTING CHILDREN

21.1	Introduction	988
21.2	Current South African position	989
21.3	Comments and submissions received	993
21.4	Comparative law	1004
21.5	Evaluation and recommendations	1005

CHAPTER 22

INTERNATIONAL ISSUES AFFECTING CHILDREN

22.1	Introduction	1009
22.2	Inter-country adoptions	1010
22.2.1	Introduction	1010
22.2.2	History of inter-country adoptions	1011
22.2.3	The position before Fitzpatrick	1012
22.2.4	Minister for Welfare and Population Development v Fitzpatrick and others 2000 (3) SA 422 (CC)	1015
22.2.5	Current practices and approaches: An overview of comparative law	1017
22.2.5.1	United Kingdom	1018
22.2.5.2	France	1021
22.2.5.3	Sweden	1021
22.2.5.4	Canada	1023
22.2.5.5	New Zealand	1025
22.2.5.6	Ecuador	1027
22.2.5.7	India	1028
22.2.5.8	Romania	1034
22.2.5.9	Colombia	1040
22.2.5.10	Conclusions	1044
22.2.6	The need for law reform	1044
22.2.7	Evaluation and recommendations	1045
22.3	International child abduction	1065
22.3.1	Introduction	1065
22.3.2	The Hague Convention on the Civil Aspects of International Child Abduction, 1980	1065

22.3.3	Sonderup v Tondelli and another 2001 (1) SA 1171 (CC)	1077
22.3.4	Evaluation and recommendations	1079
22.4	Refugee and undocumented immigrant children	1089
22.4.1	Introduction	1089
22.4.2	International framework	1091
22.4.2.1	The U N Conventions on the Rights of the Child, 1989	1092
22.4.2.2	The African Charter on the Rights and Welfare of the Child	1094
22.4.2.3	The 1951 U N Convention Relating to the Status of Refugees	1095
22.4.2.4	1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	1098
22.4.2.5	The United Nations High Commission for Refugees	1098
22.4.2.6	Refugee children: UNHRC Guidelines on Protection and Care	1099
22.4.2.7	UNHRC: Guidelines on Policies and Procedures in dealing with unaccompanied children seeking asylum	1099
22.4.2.8	UNHCR Handbook	1099
22.4.3	National legislation	1100
22.4.3.1	Introduction	1100
22.4.3.2	The South African Constitution	1101
22.4.3.3	The Refugees Act 130 of 1998	1101
22.4.3.4	The Aliens Control Act 96 of 1991	1105
22.4.3.5	The South African Citizenship Act 88 of 1995	1109
22.4.3.6	The Child Care Act 74 of 1983	1110
22.4.3.7	The Social Assistance Act 59 of 1992	1110
22.4.3.8	South African Schools Act 84 of 1996	1111
22.4.4	Comparative analysis and evaluation	1112
22.4.5	Recommendations	1116
22.5	Trafficking of children across borders	1125
22.5.1	Introduction	1125
22.5.2	The trafficking of children in South Africa	1126
22.5.3	Trafficking in persons and the South African legal system	1128

22.5.3.1	Child Care Act, 1983	1129
22.5.3.2	The Basic Conditions of Employment Act, 1997	1129
22.5.3.3	Domestic Violence Act, 1998	1130
22.5.3.4	The Prevention of Organised Crime Act, 1998	1130
22.5.3.5	The Sexual Offences Act, 1957	1131
22.5.4	Evaluation and recommendation	1135

CHAPTER 23

A NEW COURT STRUCTURE FOR SERVING THE NEEDS OF CHILDREN

23.1	Introduction	1139
23.1.1	The Family Court Pilot Project	1140
23.2	Responses received by the Law Commission	1141
23.2.1	Responses to Issue Paper 13	1141
23.2.2	Responses to the worksheet on courts	1147
23.2.3	The child participant responses	1150
23.3	Fundamental Problems in the Present System	1152
23.3.1	Too Many Courts	1152
23.3.2	Courts as Out of Touch with the Parties	1153
23.3.3	Conclusion	1154
23.4	A New Model For A Decision-making Forum: Basic Considerations	1155
23.5	Lay Forums	1157
23.5.1	Advantages of Lay Forums	1157
23.5.2.	Disadvantages of Lay Forums	1158
23.5.3	Conclusion	1159
23.6	Child and Family Courts	1159
23.6.1	Capabilities for Decision-Makers in the Child and Family Courts	1160

23.6.2	How Are the Capabilities to be Achieved?	1163
23.6.2.1	Longer-term Solution	1163
23.6.2.2	Short-term Solutions	1164
23.6.3	Incorporating a Lay Element	1165
23.6.3.1	Instigating a Lay Forum	1166
23.7	Levels and Jurisdiction of the Child and Family Court	1168
23.7.1	Multiple Courts Versus An Integrated Approach	1168
23.7.2	A Reception Component	1170
23.7.3	Case Jurisdiction	1172
23.7.4	Procedures of the Child and Family Court	1173
23.7.4.1	The Procedural System	1174
23.7.4.2	Specific Recommendations	1175
23.7.4.3	Prompt Services	1180
23.7.5	Court levels	1181
23.7.6	Accessibility of the Child and Family Courts	1184
23.8	Human resource aspects relevant to the Child and Family Courts: Staffing, training and motivation	1186
23.8.1	Selection and Training of Adjudicators	1186
23.8.2	Child and Family Advocates	1187
23.8.3	The Child and Family Court Protector	1190
23.8.4	Legal aid representation of parties	1193
23.8.5	Career path and motivation of personnel	1197
23.9	Appeals, reviews and the role of the High Court	1201
23.10	Orders of the Child and Family Courts	1204
23.10.1	Scope of Work	1204
23.10.2	Existing powers of the Children's Court	1207
23.10.3	Additional alternative care orders	1207
23.10.4	Additional child protection orders	1211
23.10.5	Reallocation of parental responsibilities	1217
23.10.6	Other orders	1219
23.10.7	Duration of Orders	1224

23.11	Evidence	1224
23.12	Court budget \ power to order payments	1226
23.13	Implementation: Should Child and Family Court work be phased in by stage	1230

CHAPTER 24

MONITORING THE IMPLEMENTATION OF THE NEW CHILD CARE LEGISLATION

24.1	Introduction	1229
24.2	International child's rights monitoring mechanisms	1229
24.3	Comparative systems in other countries	1231
24.3.1	Monitoring of children's rights by the Office of the Children's Commissioner or Ombudsman	1231
24.3.1.1	Norway	1231
24.3.1.2	Sweden	1231
24.3.1.3	Iceland	1232
24.3.1.4	New Zealand	1232
24.3.1.5	Michigan (USA)	1233
24.3.1.6	British Columbia (Canada)	1234
24.3.1.7	Austria	1235
24.3.2	Monitoring of children's rights by NGOs	1236
24.3.2.1	Sweden	1236
24.3.2.2	Philippines	1237
24.3.3	Other child's rights monitoring mechanisms	1238
24.3.3.1	England and Wales	1238
24.3.3.2	Uganda	1239
24.3.3.3	Ghana	1239
24.3.3.4	Namibia	1240
24.3.3.5	Kenya	1242
24.3.3.6	New South Wales (Australia)	1243
24.4	Child's right's monitoring mechanisms in South Africa	1245

24.4.1	Legislation	1245
24.4.1.1	The Constitution of the Republic of South Africa	1245
24.4.1.2	The Child Care Act 74 of 1983	1245
24.4.2	National Government	1246
24.4.3	Provincial Government	1250
24.4.4	Local Government	1252
24.5	Evaluation and recommendations	1253

CHAPTER 25

GRANTS AND SOCIAL SECURITY FOR CHILDREN

25.1	Introduction	1260
25.2	Current legal framework	1263
25.3	The constitutional and policy considerations underpinning the allocation of grants to children	1265
25.4	Evaluation and recommendations	1267