

This publication is based on a report compiled by the Community Law Centre at UWC, on workshops held to give effect to Article 12 of the United Nations Convention on the Rights of the Child. These workshops were facilitated in order to ensure child participation in the law reform process occasioned by the South African Law Commission's Review of the Child Care Act 74 of 1983. It is also informed by an evaluation report on this process compiled by Clacherty and Associates in 2001.

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## **Children and the creation of a new Children's Act for South Africa**

South Africa's laws relating to the care and welfare of children are contained in the Child Care Act 74 of 1983. As this piece of legislation is generally regarded as being insufficient in its scope and not compliant with the provisions of the United Nations Convention on the Rights of the Child (CRC), a Project Committee of the South African Law Commission was appointed to review the Child Care Act and design a comprehensive and holistic children's statute.

This process is still ongoing, however one of the key activities undertaken by the Project Committee in its work is wide consultation with all stakeholders across South Africa. In devising its consultation process the Project Committee recognized that Article 12 of the CRC mandates child participation and so it was determined that this consultation process would also include comprehensive consultation with children themselves. Thus a range of workshops was held with children, during 1999, in order to give effect to Article 12 of the CRC.

### **Child Participation in law reform - a process informed by Article 12 of the United Nations Convention on the Rights of the Child**

The age-old adage - a child should be seen and not heard - indicates the position accorded to children in the past. They have been seen as objects not worthy of expressing a meaningful opinion and their views have historically not been taken account of or even sought out. However, with the advent of the seminal human rights document on children's rights - the United Nations Convention on the Rights of the Child (CRC)- this perception of the value of children's voices has, theoretically, been obliterated.

Apart from the general right to be heard found in the International Covenant on Civil and Political Rights and other regional human rights instruments, there have only been piecemeal references to the child's right to be heard prior to the CRC in international law. These include Article 13 of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, Article 13 of the 1984 Inter American Convention on Conflict of Laws Concerning the Adoption of Minors and Rule 14.2 of the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

Article 12 forms the core of one of the pillars of the Convention, namely participation. The CRC is generally regarded as a human rights document that safeguards the three "P's" - protection, provision and participation and that focuses on four general principles: non-discrimination (Article 2), the best interests of the child (Article 3), the right to life, survival and development (Article

6) and respect for views of the child (Article 12). Despite Article 12 being singled out as the provision focusing on child participation, a number of other Articles in the Convention inform, supplement and confirm the child's right to express his or her views and be heard, such as Articles 3, 9, 13, 37 and 40.

The principle of the best interests of the child is given an exciting dimension once read in light of Article 12. It has been said that the best interest's principle is a rather passive notion that is ordinarily defined by adults. However Article 12 ensures that the child is given a voice in decisions affecting him or herself and this would obviously apply "in all actions concerning children". The scope of Article 3 is therefore opened up to include the interaction of children. In addition the rationale behind making child participation one of the general principles of the CRC, necessarily means that the best interests of a child would include his or her views on what those are.

The interpretation of Article 3(1) that indicates it has a wide application extending beyond the rights contained in the CRC and extends to actions not expressly covered therein as well as the use of the globular term "children" instead of the singular "child" reinforces the valuable role that children's participation can play. The reason for this is that children's participation is opened up to all children in all situations that may affect them.

This wide interpretation of the best interest's principle as contained in the CRC is echoed in a judicial decision relating to the best interests of the child principle contained in the South African Constitution. Goldstone J in *Minister for Welfare and Population Development v Fitzpatrick and Others* stated:

"Section 28 requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in s 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1)."

It can be argued that children are now afforded an opportunity to affect decisions taken on a wide range of issues that may not only affect them directly as individuals but also indirectly as a particular interest group.

Having said this and bearing in mind the obligations of member States to the Convention contained in Article 4 of the CRC, there is still concern around the application of the child's right to participate and the best interests principle. It has been said that adults not only need to understand the concept of children's rights but also the benefits of listening to them and allowing them to participate, which is an exercise of mutual respect. This will necessarily involve a change of mindset and approach in dealing with children and decision-making, whether this be in the public or private sphere.

## **The content of Article 12**

As stated above, Article 12 has two aspects, a more general provision contained in Article 12(1) and the more specific application of the right to be heard contained in Article 12(2). There are a number of concepts contained in these two provisions namely, participation, freedom of expression and the right to be heard. These afford children a mechanism to make their voices heard in matters affecting their lives.

Interestingly, the right to hold an opinion (as opposed to the right to express an opinion) as contained in the International Covenant on Civil and Political Rights is not found in the CRC. This is not a crucial failing on the part of the drafters but does tend to minimise the importance of a child's ability to formulate opinions. Its exclusion from the Convention is also illogical as the right to hold an opinion is a pre-condition to the right to freedom of expression, nevertheless the CRC has chosen to focus on expressing the opinion rather than the opinion itself.

Within the Convention, there is a strong focus on the child as an individual and this can be seen in the right of the child to his or her identity, nationality, name and family relations (Article 8), the right of the child to freedom of expression (Article 13), the right of the child to freedom of thought, conscience and religion (Article 14) and the right of the child to freedom of association (Article 15). Article 12 also supports the notion of the child as an individual as it provides the right to the child to express his or her views and opinions and thereby his or her individuality. However, a necessary corollary to this is the requirement that the child is then listened to when expressing the opinion or exercising the right to be heard. It can be argued that by placing an obligation on States, in Article 4, to undertake all measures to ensure the implementation of the rights in the CRC this is achieved. However the question is raised whether this is sufficient. Van Bueren would argue that, in addition, there need to be changes in the culture of listening. She states:

“ The Convention on the Rights of the Child requires the State and therefore society, to regard children as evolving autonomous individuals. This implies walking the journey with the child's eyes. Adults have to be willing to relinquish some of their own power before a new culture of listening seriously to children can develop.“

Therefore the issue extends beyond the mere legal obligation placed on member States by article 4 of the CRC. Adults have traditionally decided matters affecting children according to their own means of reasoning and their own perceptions of what is in the best interests of children. A change must now occur that necessarily entails actively listening to the voices of children and giving appropriate weight to the opinions and views expressed by them by recognising that children have the capacity to reason and rationalise the issues at hand, whatever they may be .

In order for this change to occur there has to be a clear understanding of the import and implications of the contents of Article 12. It has been noted that the nature of Article 12 is such that it is drafted with sufficient detail to be implementable and self-executing (of direct application). The CRC requires States to respect the rights contained therein (Article 2) and take appropriate measures to ensure these rights are achieved (Article 4). Therefore, it has been noted that the Convention has adopted a flexible approach and left the matter to member States to implement its provisions in their national laws.

State parties are obliged to “assure” to the child the right to express his or her views. This ensures that States do not hold children directly accountable in the decision-making process and force them to make a decision or express their opinion, it merely obliges States to afford children the opportunity to be heard and participate by allowing them access to the decision making process. This ensures the child the freedom to choose whether or not to actually participate in any process.

Article 12(1) has very broad application in that it refers to the child expressing his or her views in “ all matters affecting the child”. This wording does not limit the scope of the child’s participation to a closed list of instances as was proposed in the drafting process of this article. The implication is that the State is now obliged to assure the child the opportunity to express his or her views in relation to public and private sphere issues and in relation to the latter it appears the child has a right to actively participate in the historically closed arena of family decision-making. This wording also ensures the child’s ability to participate in matters that extend beyond the scope of the Convention itself

By using the word “ child” in Article 12 as opposed to the word “ children” as appears in Article 3, it appears the drafters have attempted to limit the application of Article 12 to situations that directly affect a particular individual child. However, this does not mean to say that a particular child may not participate in a decision-making process that affects him or her but that which at the same time affects children generally. An example of this is the process of consulting with children around law reform concerning legislation directly affecting them; such as welfare or child care laws. Children who are a part of the child care system would obviously have a direct interest in the law reform, but their participation would necessarily also have the effect of a wider application for all children.

The inclusion of the term “ freely” is of great importance as it reinforces the fact that States are not obliging the child to participate in the decision-making process - only assuring them the right to. It requires the child’s participation not only to be voluntary but also that the views and opinions expressed are indeed the child’s own. This is of particular relevance when dealing with a situation where the child is involved in a family decision or a decision involving his or her parents, as the possibilities for direct and indirect influence over the child are vast. The inclusion

of this word also places a duty on the authority or decision-maker to ensure that the child has not been subject to coercion or duress in participating, that the voice heard is indeed that of the child's and that the opinion or view expressed has been informed by all the available information. It is obvious that if the child has formed an opinion without the benefit of accurate and complete information, then the view expressed would lack in weight.

### **Limitations to the rights contained in Article 12**

There are two restrictions in question, namely, the rights in Article 12 are only extended to children who are capable of forming their own views and those views are only given due weight according to the age and maturity of the child in question. Lücker-Babel states that the capacity of a child to form his or her own views does not mean that the child must be fully developed to do so, as the second limitation then applies - requiring a decision-making body to only give weight to those views in accordance with the age and maturity of the child. She goes on to reason that the first step is then to determine whether the child is in a position to form a view on an issue in question, but not on the whole range of issues in a particular case. Following this reasoning even a "infans" can participate where his or her feelings are interpreted by an appropriate expert and then those feelings are given due weight according to his or her age and maturity.

By making use of the requirement that a child must be capable of forming his or her own views, the CRC is allowing a greater number of children to participate in decisions, as the child's capacity varies according to his or her individual development and his or her capacity to understand the nature of and events in question is not necessarily dependant on his or her age. The *Manual on Human Rights Reporting, 1997* states:

“ This right should therefore be ensured and respected even in situations where the child would be able to form views and yet be unable to communicate them, or when the child is not yet fully mature or has not yet attained a particular older age, since his or her views are to be taken into consideration ‘ in accordance with the age and maturity of the child’.”

So instead of limiting the right by setting out a specific age and thereby also limiting the number of children who can participate, the CRC has adopted a flexible and inclusive approach.

Once the question of whether a child has the capacity to form an opinion has been determined, the question shifts to the weight to be given to that opinion. The two determining factors are the age (an objective determinant) and maturity (a subjective determinant) of the child. These two factors are of equal value. In addition, it is argued that the more serious the consequences of the decision are, the more the child's opinion needs to be considered having regard to the nature of the problem and the degree of interest it represents to the child.

Again, advocating a change in the culture of listening, Van Bueren states, in relation to these two tests:

“ For children truly to be heard the listener has to understand the language of the child in order to assess whether, in accordance with the Convention, the child is capable of expressing views. The sole test is that of capability, not of age or maturity.”

The interpretation of the various components of Article 12 is thus necessary in ensuring a successful implementation of the provision by the member States to the Convention. However, in addition, as Van Bueren has noted above, there needs to be willingness on the part of the implementers - the adult decision-makers and representatives- to engage with the dialogue of children so as to ensure their meaningful participation.

### **The State's obligations**

#### *Article 4*

*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, States parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.*

This provision obliges States to take steps to see that they respect and ensure the rights contained in the CRC to every child for whom they are responsible. However, there is a distinction made between economic, social and cultural rights, as these only have to be implemented according to the availability of resources. However, for the present purposes of the discussion around Article 12, States are unconditionally bound to ensure the implementation of the child's right to express his or her views and to be heard through “ appropriate, legislative, administrative and other measures”. This provision is placing a direct obligation on the member States to adopt domestic laws and procedures to ensure the implementation of the rights contained in the CRC in their respective countries. It has been noted that whether or not the steps taken are “appropriate” is a question for the Committee on the Rights of the Child to decide.

In fact the Committee has often recommended that law reform reflect Article 12 in its comments on the periodic reports of various countries, for example, Italy and Canada. In its comments on the United Kingdom's Initial Country Report, it stated:

“ The Committee would like to suggest that greater priority be given to incorporating the general principles of the Convention, especially the provisions of Article 3, relating to the best interests of the child, and Article 12, concerning the child's right to make their views known and have these

views given due weight, in the legislative and administrative measures and in policies undertaken to implement the rights of the child. It is suggested that the State Party consider the possibility of establishing further mechanisms to facilitate the participation of children in decisions affecting them, including within the family and the community.”

### **Implementing Article 12(1) - The right of the child to express his or her views**

In general, Article 12(1) focuses on the child expressing his or her views as an individual in matters affecting him or her in particular as opposed to matters affecting children as a whole.

In its *Guidelines for Periodic Reports*, the Committee on the Rights of the Child requires that the reporting country should provide information on legislative and other measures taken to ensure the right of the child to express views on all matters affecting him or her, which include family life, school life, the administration of juvenile justice, placement and life in institutional and other forms of care and in asylum seeking procedures. It is clear, however, that the scope of the instances in which a child can become involved in expressing his or her views is vast and expansive. Indeed, Lücker-Babel lists a number of instances where a child might be consulted, including hobbies, access to consumer goods, regulation of road traffic and protection of the environment, but warns that in consulting with a child on specific matters, one should determine whether the matter at hand has a real and specific bearing on the life of the child.

Article 4 of the CRC obliges states to undertake “appropriate...and other measures” to ensure the implementation of the rights contained in the Convention. The reference to “other measures” reinforces the view of the Committee on the Rights of the Child that legal frameworks alone will not achieve the necessary changes in attitudes and practise in relation to child participation in families, schools and communities. It therefore encourages education on the Convention itself as well as information programmes and systematic training of those working with and for children to try and achieve a more suitable environment to allow for increased child participation.

Hodgkin and Newell list a number of instances where children have been given opportunities to participate and express their views in government and policy making. For example, Costa Rica initiated children’s elections where children were given the opportunity to express their views on a range of issues that they felt were important and needed immediate attention and the government then took steps to ensure that these views were taken account of in policy-making decisions. Slovenia undertook a consultation process with children through schools where the children could express their views on matters of concern to them. In addition, a structured system of consultation was undertaken, beginning with school parliaments, which then met at municipal level on an annual basis

and this culminated with a Children's Parliament convened by the National Assembly at which children's deputies, municipal representatives, NGOs and government ministers were represented. Finally, Nepal has undertaken a Children's National Seminar on the Convention organised by UNICEF and various NGOs. Subsequent to this a children's national network was established to promote children's rights and the seminar participants also made comments on Nepal's country report to the Committee on the Rights of the Child.

### *The example of child participation in South Africa's reform of the juvenile justice system*

One of the most direct ways a child can have an impact on decisions affecting his or her life is by expressing his or her views in relation to child specific law reform. In this respect South Africa has undertaken an innovative initiative in consulting with children. Since the advent of a constitutional democracy and South Africa's ratification of the CRC, a law reform process was initiated in respect of juvenile justice. In this process a comprehensive consultation with children occurred under the auspices of the Project Committee on Juvenile Justice of the South African Law Commission.

The aim of the study was to ask children for their views on various aspects of the draft Child Justice Bill released for public comment by the South African Law Commission in December 1998.

The children who were selected to participate, included children in a diversion programme, children under the age of 12 and children over the age of 14 awaiting trial in a place of safety, children awaiting trial in prison, children serving a sentence in a reformatory and those serving a sentence in prison and a group of scholars who had never been in trouble with the law. Methods of consultation included role-playing, small group discussions and individual written feedback and children were asked to share their experiences of the present system of criminal justice and comment on the proposed changes. The issues addressed ranged from age and criminal capacity, diversion (referral away from the criminal justice system) to sentencing and legal representation.

It has been said that the consultation with children in the child justice sphere provides an excellent example of how public participation can strengthen policy and legislation and how the participation of children in the lawmaking process in South Africa has enriched the dialogue of making children's voices heard.

### **Conclusion**

Article 12 provides a wonderful opportunity for children to become involved in decisions affecting their lives. This scope for children's involvement in decisions affecting them is a positive step towards empowering children, protecting their

interests, building their future capacity and encouraging adults to be more receptive to the insights and understanding of children.

However, at the same time, it is ironic that this broad participatory right, while allowing the child to affect national legislation and other matters of great import, does not extend to a right of political expression. They can be seen to have cognitive ability in respect of court proceedings and law reform, but not sufficient insight to affect the democratic process that initially granted them the right to participate.

The means that the CRC provides for this participation by children to occur is very broad in scope. It allows children to participate in all levels of decision-making. This includes involvement in policy and law making, being heard in official proceedings, playing an active part in community and school decisions, and finally having a voice in family decisions. This is encouraged by the Committee on the Rights of the Child. But it has been noted that perhaps the mere fact that a State Party to the Convention has to report to the Committee, has resulted in the creation of a process of child participation in government that did not exist before. The ultimate objective is to create a natural, ongoing process of children's participation - not just a process that serves a particular need at a particular time.

Ultimately, it is submitted that there is much to be done still in affording children their rights in terms of Article 12 of the Convention and least of all this involves informing the children of their rights and ensuring adults adopt an attitude which displays a willingness to respect and understand the value and scope of the child's right to be heard in all matters affecting him or her.

## **Part One:**

### **How the consultations worked**

The structure of the consultations with the children was devised by members of the Project Committee for the Review of the Child Care Act, people from social welfare departments and NGOs as well as a technical advisor from Save the Children UK in a series of meetings in 1998. It was decided to use pre-existing, focus groups of children in their natural setting rather than create groups of children specifically for the purpose consulting with them. In this way children who had first hand experience of the child-care system were given a chance to comment on issues affecting them.

### **Specific groups and ages of the children**

- Children between the ages of 13 and 18 years who had suffered abuse and neglect (including sexual abuse)
- Children in foster care aged between 13 and 18 years
- Children in residential care aged between 13 and 18 years
- Children in Secure Care (in trouble with the law) between the ages of 14 and 18 years
- Children in Alternative Care aged between 15 and 18 years
- Street Children between the ages of 12 and 16 years
- Children with behavioural problems aged between 9 and 17 years
- Deaf Children between the ages of 13 and 18 years
- Children between the ages of 7 and 14 years from an after school care centre
- Children from a school of religion aged between 4 and 12 years in one group and 13 and 18 years in a second group.

### **Location of the groups**

- Northern Cape - two rural and one urban group
- Gauteng - two rural and six urban groups
- Eastern Cape- one rural and two urban groups
- Kwa-Zulu Natal - two rural and nine urban groups
- Western Cape - three rural and three urban groups
- Northern Province- two urban groups
- Free State- one rural group

**The** groups were run by facilitators who were affiliated to an institution or organisation linked to the children who participated in the workshops. This not only provided wide access to children but also provided for a much more relaxed setting so that the children could interact with people that they knew. The group facilitators underwent training on how to run the focus group workshops before the consultation process actually occurred. The actual consultation workshops with the children had a particular structure that the facilitators were requested to follow.

## **Content of the consultation workshops with the children**

Stage one: a group session to introduce the children to concepts concerning children's rights, the law and the role of government

Stage two: each child is given an opportunity to interview another member from his or her group in order to explore wider opinion amongst the children

Stage three: a group session where a range of questions identified by the Law Commission was raised with the children

Stage four: a follow-up group session to give feedback to the children on the outcomes of the consultation and the action they had recommended

**In** addition to the facilitator, who was to support the children, brief them and take them through the questions, a reporter was also present at the workshops to record the opinions of the children as accurately as possible. The responses of the children were then sent back to the Law Commission. Of all the groups only 40 focus group's responses were returned.

**The** aim of the consultation process with the children was to gain their views on law reform and not to undertake a strict research project to obtain scientifically accurate evidence. The result is a collection of the broad views and opinions of children on the child care system and what they expect from it.

## **Part Two:**

### **Listening to the children**

## A. Children's Rights

Children's rights have been universally recognised as needing specific protection. This can be evidenced by the human rights documents specifically aimed at protecting and guaranteeing these rights. In the present context the three most important children's rights instruments that have informed this consultation process are the CRC, the South African Constitution and the African Charter on the Rights and Welfare of the Child.

In formulating their questions on children's rights the Law Commission had regard to the various rights accorded children in these documents. These rights range from the right to life, freedom of expression, protection against child abuse to the right to family care.

Accordingly the Law Commission asked certain questions regarding children's rights:

**" What rights do you think children should have (in addition to universal rights which everyone has)?"**

The majority of the children, especially those in foster care, agreed that children should have the **right to be consulted, listened to and respected by adults**, including people in authority, particularly when decisions are made affecting children.

Another important right identified by the children is the **right to be protected against any kind of harm** and to be provided with medical care.

Again the children in foster care placed emphasis on the **right to be treated fairly and not to be discriminated against** because of the fact that they live in institutions or in alternative care.

A number of the children also identified rights such as the **right not to be beaten**, the **right to food and water**, the **right to live with their family** and the **right to receive a free formal education** (especially for children living on farms).

**" How do you think that children's rights can be enforced: locally, nationally and internationally?"**

Most of the children were in agreement that **children should be made aware of their rights and responsibilities** and that **adults should also be made aware of those rights** so as to both respect them and teach respect of them. To achieve this the children thought that their rights should be exposed through the

media and one group of children felt that radio and television should have specific slots dedicated to teaching children's rights.

The majority of the children also felt that the national government must enforce the rights of children by **punishing those who violate the rights of children.**

**“ We learned about rights that I have. The right to say no. The right to go to school. The right to decide what's good for me. I must make my own decisions.”**

## **B. The Role of Law**

South Africa has ratified the CRC and has therefore assumed the obligation to take “ all appropriate legislative, administrative and other measures for the implementation of the rights...” contained in the CRC. In addition section 28 of South Africa's Bill of Rights constitutes a 'mini' children's Bill of Rights due to the detailed listing of rights contained therein. Therefore the Constitution has created a legislative framework to ensure that children's rights are legally justiciable.

The Law Commission therefore formulated the following questions for the children:

**“ How do you see the current role of government and the law in South Africa in enforcing children's rights?”**

Most of the children thought that the government was not doing enough to combat crime and the abuse of children and therefore was not making the country safer for children.

A large number of the children also felt that it was the government's duty to **establish a safe environment** and enforce protective legislation in respect of children.

**“ What do you think should be the ideal role of government and the law in enforcing children's rights? What in your view should be improved or changed from the present role?”**

The majority of the children felt that the government should ensure that **the rights of children are monitored and enforced** and offenders punished. This was the unanimous feeling of all the children in the abused and neglected group as well as the group of deaf children.

A significant number of the children thought that the government should **conscientise children and adults on the rights of children.**

**“ We had a say, feeling needed, important - you know”**

### **C. The age of majority**

The CRC, in Article 1, defines a child for the purposes of the Convention as “every human being below the age of 18 years, unless under the law applicable to the child, majority is attained earlier”. The African Charter on the Rights and Welfare of the Child defines a child for the purposes of the Charter as “every human being below the age of 18 years”. Section 28(3) of the South African Constitution states “ In this section, ‘child’ means a person under the age of 18 years”. Our present Child Care Act 74 of 1983 also defines a child as any person under the age of 18 years but the Age of Majority Act 57 of 1972 provides for the attainment of majority only at the age of 21 years.

Accordingly the Law Commission was eager to hear the children’s views relating to age:

**“ What things do you need protecting from?”**

The majority of the groups stated that they needed protection from **neglect and abuse** - particularly by their parents. The next most prevalent response related to protection from **using and dealing in drugs.**

There was also strong support for protection from **rape, crime and gangsterism.**

Interestingly only one group of children identified **AIDS** as being something they needed protection from.

The Law Commission asked:

**“ When do you think that you become an adult and what does this involve?”**

The most prevalent responses were almost evenly spread across the groups as being:

21 years of age  
when you can take responsibility for your own actions  
18 years of age

This was followed by a further question:

**“ At what age do you think that children should be able to make their own decisions (without the permission of their parents or carer) to marry or establish their own family?”**

The group responses were as follows:

9 groups felt that 18 years was the appropriate age  
17 groups felt that 21 years was the appropriate age  
3 groups felt that 25 years was the appropriate age

A number of **exceptions** to this were noted and these included **children with special problems and needs** (such as children in extreme poverty or deaf and mentally challenged children) and **persons who have not yet completed school** (irrespective of whether they might have reached the age of majority).

The Law Commission asked:

**“ What should you be free to do?”**

In respect of this question there was a clear majority of responses from the children that favoured the view that they should be free to **make their own decisions**, but with guidance from adults.

Child-headed households are an increasing phenomena in South Africa and so the Law Commission asked:

**“ If a child is the head of a household, what rights do you think he or she should have?”**

A large number of the children said that children who head a household should have the **right to make decisions and enter contracts** such as opening bank accounts. Many children also identified the **right to support and respect** from the extended family, for example aunts and uncles.

**“ What should the law provide or the government do to ensure support to any child who heads a household?”**

Most of the children replied that children who head households should get **financial support** from the government. It was also thought that the government should ensure that the children get **assistance from a social worker**.

It is interesting to note that seven of the focus groups felt that the government should take proper steps to ensure that no child is in fact required to be the head of a household. The children suggested that one way to achieve this would be for the government to increase foster care grants

**“ What we say was to be taken away to where it would be discussed and decide which things to take and put into law”**

#### **D. The right to be cared for**

Often children find themselves in especially difficult circumstances that arise out of various situations such as poverty. The CRC recognises certain vulnerable groups of children that need special care such as refugee children (Article 22) and disabled children (Article 23). Likewise the African Charter on the Rights and Welfare of the Child recognises handicapped children (Article 13), refugee children (Article 23) and children in armed conflict (Article 22) as being in need of care.

Accordingly the Law Commission asked the following questions of the children:

**“ In your daily life and that of your friends, what are the situations in which you would like the law to make clear to everyone what the rights of children are?”**

The children's responses related to various aspects of daily life and included:

In respect of schools, rights relating to corporal punishment and discrimination were identified.

In respect of health rights, the children felt there was a need to educate parents about their obligations regarding the health of their children. The children also wanted the right of access to free medical care and the right to confidentiality of hospital records. The status of children with HIV/AIDS was an issue that the children felt should be clarified.

Children felt that they should be protected against sexual harassment in the workplace.

Some children also felt that disabled children have a right to have facilities adapted for their use and the right to free wheelchairs.

**“Another problem we have here is that the police do not do their job. They do not help us when we take our case to them, they dismiss us. We learned that they do not have the right to do this just because we are disabled. They treat other people fine.”**

## **E. The law and families**

**“ We were taught about our rights - that parents should take care of us. There are parents who do not treat children well. Sometimes children go to school hungry. They get disability grants but the parents do not feed them. We learnt children have a right to food and to be clean”**

The CRC has a number of provisions that relate to the family. These include the right of a child not to be separated from his or her parents against their will, unless it is determined that this is in his or her best interests (Article 9) and the principle of parental responsibility for the upbringing and development of the child (Article 18). The African Charter on the Rights and Welfare of the Child contains the right to parental care and protection (Article 19) and the principle of parental responsibility (Article 20). Finally, section 28(1)(b) of the South African Constitution determines the child’s right to family or parental care, or appropriate alternative care when removed from the family environment.

The following was what the children were asked in relation to family care:

**“ There are many different kinds of families in South Africa, and the new law will have to make sure that children’s rights are always respected, no matter where they are living or whom they are living with. Would it be a good thing if the law said what the responsibilities were of the parents and families towards children?**

The overwhelming majority of the children felt that the responsibilities of parents and families towards children should be included in the law. The reasons for this

were that parents and other people who care for children can be educated and be made aware of their responsibilities and also this would prevent child abuse.

**“Should foster parents have the same rights and responsibilities as birth parents?”**

Again, a large majority of the children felt that foster parents should have the same rights and responsibilities as birth parents. The reasons included the fact that foster parents take the place of natural parents. However some children disagreed and said that because of the bond between natural parents and their children, natural parents should enjoy more rights than foster parents. Those who disagreed also felt that limitations on the rights of foster parents should be imposed to prevent the physical abuse of children by foster parents.

**“Should parents who have not married have the same rights and responsibilities towards their children as parents who have married?”**

**“ It is still their child”**

Most of the children felt that the rights and responsibilities should be the same, as the responsibility for the child rests with those who brought the child into the world. Those that disagreed were of the opinion that they should have the same responsibilities but not the same rights.

**“ Many children cannot live with their birth parents. Should the law that allows children to live with other people give children the right to say what their views are on where and with whom they should live?”**

**“ they should listen to our side of the story”**

Many of the children were of the opinion that children should have the right to express their views for a number of reasons. These ranged from the fact that the personal experiences of children who had been given a choice were good to the fact that it would prevent children from having to live with foster parents who see foster care merely as a means to access grants.

**“When a legal decision is made about where a child should live, for how long should that decision last?”**

The most popular responses to this question were:

For as long as the child is happy in his or her placement, and

Two years at the most, with regular evaluations

Other responses included 6 months, one year, no fixed period but subject to continuous evaluation and until the child reaches the age of 21 years.

**“Are there other ways that you can think of where the law could help children within their families?”**

The majority response to this question revolved around the fact that the law should provide assistance to families that have problems, for example free rehabilitation for parents who abuse alcohol. Other children mentioned the law acting against parents who do not send their children to school or who do not take responsibility for their children. Some children supported the view that government grants should be given to families in cases of extreme poverty.

## **F. Law Courts**

Both the CRC and the African Charter on the Rights and Welfare of the Child refer to “competent authorities and procedures” and “judicial and administrative proceedings” in the context of the realisation of the rights contained in their respective documents.

It is necessary for the rights contained in national laws to be enforceable in courts of law. The questions are then what court is appropriate for children and who should represent their interests in the court proceedings. The Law Commission therefore asked the following questions:

**“ Should there be a special court that deals only with children who cannot live with their parents.”**

The majority of the children responded positively to this question.

**“ Should it deal with other issues too?”**

Out of the responses received, the majority decided that it should not deal with other issues. The children, however, who said that it should deal with other issues, stated that these should nevertheless be related to children, for example police harassment of children and abuse of children’s rights.

**“Should the Commissioners of Child Welfare have special training to help children to understand what is happening?”**

There was an overwhelmingly positive response to this question as the children felt that such training would help the Commissioners understand children better

and enable them to make the children feel comfortable with the court proceedings.

**“Should children that are involved in care and protection proceedings have their own representatives?”**

Most of the children were of the opinion that they should have their own representatives, one reason being the fact that it would give children a fair chance to allow their opinions to be heard and their rights protected. Only a few children felt that there was no need for their own representative and the reasons given were that the process would be delayed and that the social workers were adequately representing the children.

**“Should that person be a lawyer or someone else?”**

A large number of the children felt that the person could be a lawyer, social worker or someone the child knows and trusts, for example a church leader. In addition to this a few of the children said that they needed to choose the person to represent them. Some of the children who said that the person should be a lawyer, qualified this by stating that the lawyer had to have proper training in dealing with matters involving children.

**“Are there ways in which other people from the community who know the child should be involved?”**

Some of the children felt that that a child should be able to call on anyone he or she wants to and others identified, in particular, family members who know the child well. A few of the children felt that the lawyer and social worker should be sufficient protection for the child and some said there should be no community involvement as communities tend to take the side of the parents and do not respect the views of children.

**“Are there other ways in which the facts affecting children, like arguments between parents, arranging childcare or giving them protection, could be sorted out?”**

A number of the children advocated for arrangements being made to get people to talk about and resolve the problems through interviews and family meetings with social workers. Again, the children felt that they should be more involved and their opinions on the issues be sought out and established. A few of the children also thought that the court should appoint an objective person to mediate the disputes and determine what is in the best interests of the child.

**“Are there other things that you want to say about the courts?”**

The children made a number of suggestions in response to this question and these include:

- Children's courts should be child-friendly, with colourful time-out rooms and pictures to make the children feel comfortable
- Courts should take children's views into account and children should be given a chance to speak for themselves
- Matters should be dealt with speedily and without delays
- Commissioners should be dressed informally
- Children should be addressed in their mother tongue
- There should be 'special' people employed at the court who understand the needs of children
- All court personnel should be trained to work with children
- The age assessment procedure should be changed
- Interpreters should be reliable and not distort what the child has said
- Police and lawyers should arrive on time

Interestingly enough one focus group contained children who had experience of criminal court proceedings and they stated that they preferred the criminal courts to the children's courts. The reason was that, although the criminal courts were impersonal, a child could at least express his or her opinion in the criminal court as opposed to the children's court.

**“ She told us they were going to put it in the Child Care Act to give to the Law Commission ”**

## **G. Residential care centres**

Section 28(1)(b) of the South African Constitution refers to “ appropriate alternative care” in relation to children who are removed from their families. The CRC places an obligation on State Parties to develop “ institutions, facilities and services for the care of children”. What does this then entail? To determine the children's views the Law Commission asked the following:

**“What do you expect from a care worker? How can the law ensure that a care worker protects you?”**

The children said that the following were some of the things that they expect from care workers:

- That they should be friendly, loving and responsible
- That they should respect the rights of children and not abuse them

That they should be trained to work with children and about the rights of children  
That they should be accessible and impartial

The following were some of the suggestions made by the children as to how the law can ensure that care workers protect children:

There should be regular inspections of residential care centres  
Care workers should not administer corporal punishment  
Rules should be laid down both for the child and the child care worker in order to prevent the abuse of children

**“Should the law say how the residential care centre is managed and how decisions are made? How do you think that decisions should be made?”**

A large number of the children felt that the law should regulate the management of residential care centres and their comments on how the decisions should be made are as follows:

Children, parents and community representatives should meet regularly to ensure that the correct decisions are made  
Children should be involved in these decisions  
The law should provide for mediators in conflict situations

Only one focus group thought that the management of the centre should make decisions on behalf of the children.

**“Should a residential care centre be inspected to make sure that the rules are carried out? Who should make sure that you are safe in a centre?”**

Again, many of the children were of the opinion that there should be inspections of the centres carried out. They endorsed the following suggestions as to who should ensure the safety of the children in the residential care centres:

An independent body who would also take the opinions of children into account  
Managers and senior staff of the centre  
The government  
Persons who understand the needs of children best  
Parents, social workers or a doctor

**“ Should the law say how families or other people from the community can visit or how you can go out to meet them? What are your ideas about visits?”**

A number of the children felt that the law should regulate visits while fewer felt that the law should not regulate visits. It was generally felt that family should be allowed to visit whenever they liked and that the children should be allowed as many visits as they like. However, it was recognised that visits should be confined to certain hours.

**“How should you be able to complain if you do not think that your rights are being respected?”**

The children generally felt that they should be able to complain to a social worker, priest or caregiver. An equal number of children felt that the complaint should be made to a child care worker, social worker or management of the centre through a grievance procedure. Other children felt that if the internal complaint mechanism fails then children should have access to an independent body for their complaints.

**“How long should you stay in a residential care centre?”**

There was an even mix of responses to this question. Some children felt that it should be for a maximum period of two years whilst others felt it should be from one to six months. A few children felt that it should be for as long as the child is still at school but most children felt that it should be until the family is relocated or the home circumstances change sufficiently.

**“What should the law say to make sure that you return to your family? What will you need when you go home and who should provide for this?”**

In response to the question regarding the law, the general response was that social workers should monitor the family's circumstances. As for the children's needs on returning home the children identified the following:

- Regular monitoring by a social worker
- Food, care and shelter
- Peace
- Responsible parents
- Financial assistance

Only one focus group responded to the question as to who should provide this and their answer was the government.

**“We were told that what we wrote would be taken to the Commission and the Commission will see what to do about our rights”**

## **H. Sex Offences**

Both the CRC and the African Charter on the Rights and Welfare of the Child contain provisions (in Articles 34 and 27 respectively) that explicitly protect the child against sexual exploitation and abuse. This is a special concern in relation to children and there is even a separate Project Committee of the South African Law Commission dealing with Sexual Offences and those that relate to children in particular.

So the Law Commission asked the following questions:

**“The law covering sexual offences against children needs to change a lot as adults who made the current laws do not understand what has happened to children. What do you think can be done to change the law to prevent the sexual abuse of children? What can be done by the police, the courts, social workers and you to help children who have experiences of sexual abuse?”**

As far as the police are concerned, the children thought that the most important point is that the police should be specially trained and screened to deal with the sexual abuse of children. In addition there should be a child friendly interview room placed at the police station and police should be more sympathetic to child victims of sexual abuse and treat them with greater kindness. A number of the children had a very practical suggestion: the police should arrest the perpetrators!

In relation to the courts the children mostly felt that the courts should ensure that perpetrators are punished. In addition, some of them thought that the law should be applied strictly with harsher punishments and no bail should be granted. They also said that children should be given more privacy and should be protected from contact with their assailants in cases of child abuse. There was also concern that court officials should be more sympathetic to the child victim, particularly victims with disabilities.

Most of the children felt that social workers could help with sex offence cases by providing counselling and support for both the child and his or her family. A few

of the children also felt that social workers can be useful in helping to prepare the child and the family for the court hearing.

As for themselves, the children regarded their role as being one of reporting and speaking out against sexual abuse. They also saw themselves as being able to support other children who have suffered sexual abuse.

**“ Don’t have a bath if you’ve been raped”**

**“Try to be cool, work with my anxieties,  
ask all questions in time and be honest  
and truthful”**

**“How would you want the law to describe a sexual offence against children?”**

Not many responses were received to this question, but the following were quite varied in content:

Anything done to their bodies against their will and by force  
It should include touching children’s bodies, adults exposing themselves to children, raping children and exposing children to pornography, bribing children with money and threatening to kill the child’s family  
Any unwanted physical contact that could have a negative influence on the child’s behaviour  
It should apply whether or not the child consents  
Sexual contact with children without their consent

There was also general consensus that the law should not allow an adult to have sexual intercourse with a child under any circumstances.

**“At what age do you think children should be able to consent to having sexual intercourse?”**

The majority of the children who answered this question thought that 18 years was the appropriate age. This was followed by suggestions, amongst others, of 21 and 16 years of age. It is interesting to note that of all the responses received, none of the children felt that sexual intercourse should be allowed below 16 years of age.

**“What should happen to sexual offenders? Should they always be put in prison or be treated to help them change their behaviour?”**

There was a fairly even split of responses by the children to this question, but slightly more children felt that the offenders should be treated to help them change their behaviour. However, most of the focus groups felt that the treatment should only be administered once the offender had been removed from society or the family.

There were some very strong responses to this question with suggestions like castration and the imposition of the death penalty for sex offenders. One focus group of children called for the publication of the names of sex offenders.

**“What other ideas do you have about this?”**

Some fundamental responses were received in this regard:

- Parents, schools and youth clubs should be trained to care for children who have suffered sexual abuse, to teach children self-defence practices and to recognise abnormal behaviour in child victims
- Specialised help for victims of sexual abuse should be more readily available
- Children should be informed with regard to the various ways to get help should they be sexually assaulted

**“What else can be done to prevent children from being sexually abused?”**

The two main responses to this question were that children should be taught to be aware of the threat of sexual abuse and they should be educated about their rights by all means including by making use of the media.

**“We were also happy that we were given a chance to be involved, to give your ideas and be listened to, and hope that they will get something useful out of what I said”**