

**COMPLAINTS PROCEDURES FOR CHILDREN IN RESIDENTIAL
CARE: HEARING THE VOICES OF CHILDREN IN SOUTH AFRICAN
CARE INSTITUTIONS, WITH BRIEF COMPARATIVE ASPECTS**

BY

FELICITY BESONG TABI

MINI-DISSERTATION

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE
DEGREE OF MASTERS IN CHILD CARE AND PROTECTION (MCHPR)**

IN THE

FACULTY OF LAW

AT THE

**UNIVERSITY OF KWAZULU-NATAL
HOWARD COLLEGE, DURBAN**

SUPERVISOR: MEDA COUZENS.

Student Number: 213572415.

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DECLARATION BY CANDIDATE

I, Felicity Besong Tabi, declare that:

- (i) The research report in this thesis, except where otherwise indicated, is my original work.
- (ii) This thesis has not been submitted for any degree or examination at any other university.
- (iii) This thesis does not contain other person's data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.
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Date:

DEDICATION

I dedicate this work to my dearest friend and beloved husband, Mr Thomas Ashu Tabi, for his holistic support, encouragement and prayers.

ACKNOWLEDGEMENTS

My very special thanks go to my living Lord and saviour, Jesus Christ, for providing everything I needed to finish my studies. To God be the glory.

My sincere thanks go to my supervisor Mrs Meda Couzens for her guidance, support and encouragement throughout the study to its completion. I wish to express my gratitude and appreciation to my dear brother Dr Mathias Ashu Tako Nyenti for his academic support and motivation; My sisters, Mrs Marie Ngameni and Mrs Vicky Mboka-boyer for their continuous encouragement, support and prayers; my children: Tom-Carinton, Nathanael and Precious, for their sacrifice, love and support; and my helper, Mrs Sarah Mngometulu for being there for my children while I toiled to complete this study.

LIST OF ABBREVIATIONS AND ACRONYMS

ACRWC	African Charter on the Rights and Welfare of the Child 1990
CRIN	Child Rights International Network
CRC	United Nations Convention on the Rights of the Child 1989
CRM	Complaint Response Mechanism
DCS	Director of Children's Services
NCCS	National Council for Children's Services
NIHRIs	National Independent Human Rights Institutions
NGOs	Non-governmental Organisations
MCFD	Ministry of Children and Family Development
OP3	Third Optional Protocol to the United Nations Conventions on the Rights of the Child
OVC	Orphans and other Vulnerable Children
Para	paragraph
UK	United Kingdom
UNICEF	United Nations Children's Fund
1989 Act	Children's Act England (United Kingdom)
2005 Act	Children's Act 38/2005 (South African)
1995 Act	Children (Scotland) Act (United Kingdom)
2004 Act	Children Act (United Kingdom)
1968 Act	Social Work (Scotland) Act (United Kingdom)
2001 Act	Children Act 2010 (Kenya)
1996 Act	Child, Family and Community Act (Victoria, British Columbia, Canada)

ABSTRACT

Hearing the voices of children in residential care by means of a complaints procedure has proven to be an important instrument in addressing children's problems and ensuring their welfare and rights. Taking into account that children and youth, especially those in residential care or outside the parental home, are amongst the most vulnerable members of society (Representative for Children and Youth, 2010), supportive measures need to be instituted to help them become actively involved in social matters as they voice their concerns (Pancer, Pratt, Hunsberg & Alisat, 2007). In light of this South Africa and other countries have put measures in place in accordance with Article 12 of the 1989 United Nations Convention on the Rights of the Child (CRC), in order to hear children's voices in residential care by means of complaints procedures for the purposes of enhancing their rights, protection and well-being.

This study critically evaluated the implementation and effectiveness of the complaints procedure in South African residential care, compared with Kenya, Canada and the United Kingdom. The research problem concerned children's right to be heard in residential care. The study's objectives were to establish how listening to the voices of children in residential care helps improve the protection of their rights; what the South African legal framework requires in terms of listening to the voices of children in residential care; and what South Africa can learn from the experiences of other countries in this regard.

The research questions were: What do the international standards require in terms of complaints procedures for children in residential facilities; what complaints procedures are available to children in residential care in South Africa; do the existing complaints procedures in South Africa meet the standards of the CRC and of the 1990 African Charter on the Rights and Welfare of the Child; and what can South Africa learn from Kenya, Canada and the United Kingdom in terms of the complaints procedures? The methodology was desk top research in which information and literature was sourced locally and internationally. Based on the research findings it was concluded that although South Africa had a complaints procedure in place, there were other issues that compromised efforts to effectively implement the legal provisions for the voices of children in care to be heard as presented in chapter four of the study.

CHAPTER ONE

GENERAL INTRODUCTION AND BACKGROUND INFORMATION ON THE RESEARCH STUDY

1.1 Introduction

1.1.1 Background of the study

Hearing the voices of children in residential care by means of complaints procedures has proven to be an important instrument in addressing children's problems and ensuring their welfare and rights. A study by Muntingh (2012:163-164) found that, children in residential care that are deprived of their liberty are vulnerable due to their age, intellectual abilities and lack of knowledge about their rights. Since children and youth, especially those in residential care or outside their parental homes, are among the most vulnerable members of society (Representative for Children and Youth, 2010), it is important to set up supportive measures by means of a complaints procedure to help them voice their opinions on matters concerning them (Pancer, Pratt, Hunsberg & Alisat, 2007; Children and Youth People's Unit, 2001). By so doing, children are empowered rather than seen as objects of concern (Cashmore, 2002:838). Cashmore (2002:838) further asserts that children are dissatisfied when their voices are ignored in matters concerning them. One child in a residential care said: "This is my life – why are you talking about me as if I don't exist?" (Cashmore, 2002:838).

Davidson (2010:406) cites the case of the Kenelaw Residential School and Secure Unit in Glasgow, Scotland where children were continuously abused by some staff members for over 25 years without the situation being noticed or reported. Reports from investigations on the matter revealed that this behaviour remained unreported due to ineffective complaints systems and performance management, amongst other defective child care practices in the organisation (Davidson, 2010:406). Children in residential care settings are extremely vulnerable to violence, abuse, humiliation, beatings, torture, rape, isolation, restraint and harassment on the part of staff members. In such cases, the rights of children are being continuously violated by the very people that are supposed to be protecting them (Csáky, 2009:7; Pinheiro, 2006:175-182). Such situations highlight the need for governments and

stakeholders to create structures that will assist and protect children in residential care from cruelty, abuse and the violation of their rights.

Although in some cases, children in residential care may have better access to physical and material resources than those in natural home-settings, residential care remains harmful, with adverse effects on the health and well-being of children, causing long-term or permanent damage (Tolfree, 2005:4). Csáky (2009:1) and Williamson (2004:2) highlight the following disadvantages associated with residential care: children may have difficulty learning and experience long-term developmental impairment and health problems; separation from their family may cause behavioural problems in children; facilities run by faith-based organisations often provide substandard care through volunteers who may not have the necessary professional training to deal with children affected by traumatic events; many facilities fail to provide the minimum standard of care as a result of high child-to-caregiver ratios; and children in residential care may lack individual attention.

Under such circumstances, children fail to establish an attachment to their caregivers which translates into long-term psychological problems. Thus, while residential care facilities remain important in providing security, safety and shelter to vulnerable children, the placement of children in any residential care facility should be the last resort and for purposes of safety (South African Law Commission, 2002:262). Moreover, the best interests of the children placed in these facilities must be safeguarded. This is one of the reasons why it is imperative to set up monitoring and complaints mechanisms in residential care.

Based on the above discussion, it is of utmost importance to hear the voices of children in residential care in order to safeguard their welfare, develop their sense of self, and reinstate their healthy functioning as normal human beings.

1.1.2 The importance of hearing the voices of children in residential care

The child's right to be heard is a very important factor in ensuring their healthy growth and development (Oaklander, 2007:144). The 1989 United Nations Convention on the Rights of the Child (hereafter referred to as the CRC) asserts the right of all children to be heard (article 12) and the right to life and development (article 6). Blom (2006:28) observes that children are born with the ability to use their senses, body, emotions and intellect to meet

their needs. This holistic development serves as the basis for the development of a strong sense of self which further serves as the basis for good contact with the self and the environment. The researcher holds the view that when children are given the opportunity to complain and make their voices heard, they are empowered to make their own conscious decisions and take responsibility for those decisions.

In contrast, negative consequences may result when children are not listened to or given the opportunity to express themselves because many children are confronted by painful experiences in their daily lives due to traumatic events ranging from abuse, to rejection, abandonment, homelessness, the death of loved ones, their parents' divorce, teenage pregnancy and chronic diseases (Oaklander 2007:50-51,43,142). The gestalt perspective on traumatised children asserts that due to this fragmentation of their holistic structure these children are left with experiences of loss, family disintegration, depression, grief, shame, stress, hurt, loneliness, insecurity, fear and pain (Blom, 2006:179-180). If they are not heard or given a chance to complain and participate in matters that concern them, they may suppress, inhibit or block their emotions. With regards to the vulnerability of children in residential care discussed earlier, it can therefore be said that these children may relate to the traumatised children noted by Oaklander and Blom above. The researcher therefore contends that when children in care are not given a voice in matters that concern them, they may fail to take absolute responsibility for their lives and instead blame the system and their caregivers. The ultimate result may be selfishness, anger, disappointment and impeded child development.

This discussion is in line with Cashmore's (2002: 838) observation that, in light of their vulnerability and exposure to different forms of abuse and neglect, as well as a lack of reasonable and constant parental presence or personal adult attention, children in residential care may easily break down as a result of anxiety and disappointment which may lead to low self-esteem, self-condemnation, and emotional and psychological problems if there are no provisions for them to be heard.

1.1.3 Research problem

Both local and international studies note that the child's right to be heard is a very important factor in their development, safety, protection and well-being. Cashmore (2002: 838) asserts that hearing the voices of children and young people in care, has the potential to give them recognition and protection.

Given their vulnerability, children in residential care need a medium through which their voices can be heard by government and those responsible for their welfare, safety and protection. Providing them with opportunities to take part in decision-making on issues that concern them opens up means through which their genuine problems could be forwarded to the relevant authorities (Children and Young People's Unit, 2001; Sinclair, 2004). A properly structured complaints procedure provides such opportunities. A reliable and properly structured complaints procedure is a means through which children in residential care can confidently voice and channel their concerns to the authorities. This procedure is established with the objective of providing and safeguarding the rights and best interests of children, with a view to enhancing support and the well-being of children in residential care in a manner that upholds their dignity and privacy (Economic and Social Council Resolution, 2005:20).

The United Nations Committee on the Rights of the Child (2012:11) emphasises that the fundamental aims of the complaints procedure in a residential setting are to protect the rights of children in residential care, and prevent victimization and renewed acts of violence on children. Such procedures are designed to impose sanctions on offenders, compensate victims for damages suffered and impose administrative responsibilities in order to minimise or eliminate repeated or future acts of violence. The complaints procedure should also take into consideration the right of children to be educated in a child friendly manner on how, when and to whom violence should be reported. Furthermore, the reporting mechanism should be managed by trained professionals whose protection should be guaranteed (United Nations Committee on the Rights of the Child, 2012: 13-14).

The right of children for their voices to be heard in matters concerning them is provided by Article 12 of the CRC. With assistance and contributions from different countries, basic

standard guidelines were formulated that different countries could use to develop their individual complaints procedures to suit local conditions (United Nations Committee on the Rights of the Child, 2012:11-14). Article 4(2) of the 1990 African Charter on the Rights and Welfare of the Child (hereafter referred to as ACRWC) also provides that the views of children who are capable of forming their own opinions should be heard either directly or indirectly and that these views should be considered in line with appropriate legislation.

As stated in the second paragraph of this section, a complaints procedure must be in accordance with the provisions of article 12 of the CRC. However, the fundamental challenge with this instrument, which may vary from country to country, is adequate implementation and effectiveness among member states. Considering that most member states have formulated their own complaints procedure to suit their local environment and legal framework, problems could arise in terms of their effectiveness and correct implementation as recommended by the CRC for purposes of safeguarding the well-being of children in residential care.

South Africa and many other countries have adopted measures in line with Article 12 of the CRC, in order to hear the voices of children in residential care by means of complaint procedures. However, the implementation of legal frameworks lags behind. Some of the identified challenges in South Africa include demotivation among social services professionals as a result of poor salaries and remuneration; inadequate or improper training of the staff associated with child care services; the high caseloads of social services professionals in residential care settings to the extent that proper care or service is compromised; a lack of independent oversight; a weak complaints procedure managed by residential care staff with no inspection by the management board; and a lack of proper mechanisms to follow-up and monitor allegations of abuse or neglect in residential care (Loffell, 2008:320-324; Muntingh, 2012:166).

This study therefore critically evaluates the legal framework that regulates the use of complaints procedures for children in South African care institutions and compares these with the systems adopted in other countries in order to identify the lessons South Africa can learn and make recommendations for future developments.

1.2 Aim and objectives of the study

This study aimed to assess the South African legal framework for children's right to be heard as provided for in the Constitution and the Children's Act 38 of 2005, against international standards; identify its weaknesses and potential challenges to its implementation and compare the legal framework in South Africa with that in Kenya, Canada and the UK, in order to identify the lessons to be learnt. The study focused on whether the South African framework is able to safeguard children's rights, safety, protection and well-being.

The above countries were selected because: (i) Kenya is a developing African country that has a long-established, comprehensive complaints mechanism to deal with matters relating to the large number of children trapped in the refugee crisis in East Africa. Since refugee camps serve as temporary shelter or accommodation, children that live under such conditions may experience challenges in terms of their right to be heard in a similar manner to the experiences of children in normal residential care facilities. (ii) Canada and the UK have both instituted comprehensive complaints mechanisms that have gone through a series of review processes in order to set acceptable standards that are compliant with Article 12 of the CRC.

In order to achieve the study's aims, the following research questions were posed:

1. What do the international standards require in terms of complaints procedures for children in residential facilities?
2. What complaints procedures are available to children in residential care in South Africa? Do the existing complaints procedures in South Africa meet the standards of the CRC and of the ACRWC?
3. What are the potential challenges to the implementation of the legal framework?
4. What can South Africa learn from Kenya, Canada and the UK in terms of complaints procedures?

1.3 Research methodology

This is a desktop study where information and the literature were obtained from a variety of sources. These included local and international legal instruments such as the South African Constitution, the CRC and the ACRWC; journal articles, text books, media reports, internet sources, and publications from non-governmental institutions which were relevant to the research study. The identified sources of information included the relevant literature on residential care settings and the legal instruments associated with hearing the voices of children in South Africa, Kenya, Canada and the UK. The researcher was granted ethical clearance for the study (reference number HSS/0831/014M).

1.4 Definition of concepts

1.4.1 Child

According to article 1 of the CRC, a child will “mean every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”. This has been ratified by 192 of 194 member countries of the United Nations. The Convention explicitly indicates the upper age limit for childhood to be 18 years, but recognises that majority may be acquired at a much earlier age according to the laws applicable to the child (Children, Law and Justice, 1998:141).

Similarly, article 2 of the ACRWC defines a child as every human being below the age of 18 years. Furthermore, section 28(3) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as ‘the Constitution’) defines a child as a person under the age of 18 years.

1.4.2 Children in residential care

These are children that are kept in secure institutions because they are considered to be in need of care and protection. Examples include children living, working or begging on the streets, or children who are exposed to circumstances that could be physically, mentally or socially harmful to them (Mahery & Jamieson, 2010:16). However, the placement of children in places of safety or a Child and Youth Care Centre in South Africa is dependent on the

findings of a Children's Court providing that a child is in need of care and protection. Children in residential care include children under the care of a local authority or privately registered residential home for purposes of safe guiding and promoting their welfare (McRae, 2006: 28).

Residential care may include facilities where groups of children who are not cared for by their families, live together and are cared for by volunteers and paid staff who work in shifts (Cantwell, 2010:3). In terms of Section 28(1) (b) of the Constitution, residential care will include "appropriate alternative care" for children who are removed from their families or are deprived of family care. Otherwise stated, residential care in South Africa is a non-family-based type of alternative care, set up to provide care for children in smaller or larger groups by paid trained adults who work in rotation (Meintjes, Berry & Mampane, 2007:29). In some cases, however, workers in residential care facilities may render their services on a voluntary basis.

However, Section 191 of the Children's Act 38 of 2005 (hereinafter referred to as the 'Act') looks at residential care from a slightly different perspective. It considers residential care to consist of facilities provided to accommodate more than six children outside their family environment. These facilities are now called Child and Youth Care Centres (CYCCs). This term incorporates what was formerly known as schools of industry, places of safety, reformatories and secure care facilities. Mahery and Jamieson (2010:17) add that government's children's homes; places of safety, secure care facilities, schools of industry or reform schools are all now regarded as CYCCs. The authors add that these residential care facilities have been established under two categories: firstly, those that cater for children in need of care and other social needs which includes children's homes, places of safety and shelters; and secondly, facilities that cater for children with behavioural problems and those that are in conflict with the law, which includes secure care facilities, reform schools and schools of industry.

Building on the above discussion, residential care facilities are established in different forms and sizes which may be in a dormitory or household style format (Meintjes, Berry, Mampane, 2007:29). With the dormitory style format, the number of children per block of accommodation usually ranges between 20 and 100, and is clustered according to age groups. Under this setting, care is provided by different rotating caregivers. With the household style

format, the children are put together in smaller groupings of a maximum of 10, according to age, but are organised in a family-like setting, with the care usually provided by a fulltime housemother (Meintjes *et al.*, 2007:29).

In most sub-Saharan African countries, residential care has been considered to be an acceptable alternative placement for vulnerable children, orphans and non-orphans from poor and disadvantaged homes (Csáky 2009:1). Williamson (2004:13) adds that the main reason for children being placed in residential care is poverty and the endeavour to educate them.

1.4.3 Complaints procedure

A complaints procedure is a special mechanism to ensure effective communication of vital and sensitive information concerning children in care between the children, their guardians or care-givers and the authorities. The objective is to provide for and safeguard the rights and best interests of the child, with a view to enhancing support and the well-being of children in residential care in a manner that upholds their dignity and privacy (Economic and Social Council Resolution, 2005:20). This provides children in care with access to a known, effective and impartial process through which they can communicate complaints or concerns regarding issues that affect them. The complaints procedure is expected to be in compliance with the provisions in Article 12 of the CRC, which provides that “children are entitled to participate in all decisions that affect them” and their views “given due weight” according to their age and maturity.

In line with this discussion, the researcher considers the complaints procedure in a residential care institution to be a required instrument, established to help children in care express their views and concerns without fear. An effective complaints procedure should accommodate children’s voices so that an appropriate response or attention to their best interests is provided timeously.

1.5 Outline of the study

This study is structured as follows:

Chapter one: General introduction

Chapter two: The international framework on hearing the voices of children in residential care by means of a complaints procedure

This chapter examines the content and provisions of the CRC, specifically the Committee on the Rights of the Child - General comment no. 12 and the Third Optional Protocol to the CRC, as well as the ACRWC, specifically Article 4(1)(2) and Article 7.

Chapter three: Analysis of the legal framework for the complaints procedure in South Africa

This chapter analyses the content and provisions of the legal framework for the complaints procedure in South Africa, including the Constitution and other statutes, specifically, the Children's Act consolidated regulations, chapter 14(74).

Chapter four: Evaluation of the legal frameworks for complaints procedures for children residential care in Kenya, Canada and the United Kingdom

This chapter examines the legal frameworks of Kenya, Canada and the UK, in relation to their complaints procedures and implementation and the lessons to be learned.

Chapter five: Conclusion and recommendations

This chapter presents a summary of the study's findings, a conclusion and recommendations.

CHAPTER TWO

THE INTERNATIONAL FRAMEWORK ON HEARING THE VOICES OF CHILDREN IN RESIDENTIAL CARE BY MEANS OF A COMPLAINTS PROCEDURE

2.1 Introduction

With the coming into force of the CRC in 1989, the importance of listening to children became more evident as provided for by Article 12. However, this is one of the most difficult legal obligations for member states to fulfil due to traditions and cultural norms about children's abilities to contribute to decision-making (Lansdown, 2011: vi; Lundy, Kilkelly, Byrne & Kang, 2012:5). The misconception that children lack competence, knowledge and the capacity to make proper judgments has contributed to the belief that it is not necessary to listen to or allow children to voice their concerns and be part of decision-making in matters concerning them (Lansdown, 2011:vi). However, recent experience has shown that, irrespective of children's age, they can make reasonable contributions in matters concerning their rights, welfare and protection, if given the opportunity to do so (Lansdown, 2011:vi).

With the ratification and signing of the CRC, member states have undertaken to provide for the rights of the child to be heard and to have their views taken seriously. Lansdown (2011:vi) asserts that when the authorities provide children with the right to express themselves freely, they experience self-satisfaction especially when it has to do with matters that affect them. The author adds that giving children a voice will help them to claim their rights and oppose any violence and abuse committed against them, thereby upholding their human dignity (Lansdown, 2011: vi). Lundy, Kilkelly, Byrne and Kang (2012:4) add that when children become aware that their rights, including the right to be heard, are appreciated and advocated for by the state authorities, they feel empowered and respected as citizens with rights.

In addition to the above, hearing the voices of children create room for policy-makers to identify the hindrances associated with children's rights. Hence the right to be heard must include all "aspects of a child's life at home, in school, in healthcare, in play and leisure, in

the media, in the courts, in local communities, in local and national policy-making, as well as at international levels” (Lansdown, 2011:vi).

Subsequent to the CRC coming into force, the CRC Optional Protocol on a Communications Procedure (hereinafter referred to as the Third Optional Protocol [OP3]) was enacted and came into force on 14 April 2014, giving children or their representatives the opportunity to present complaints about violations of their rights to the CRC’s Committee on Communications Procedures (Third Optional Protocol [OP3], 2011).

Another instrument that is relevant to the notion of children’s right to be heard is the ACRWC, which provides for the rights and welfare of children in Africa. Hence the incorporation and implementation of Article 12, the OP3, and the ACRWC, by member states into their domestic laws provide legal rights and protection for children in accordance with the said international frameworks (Lundy, Kilkelly, Byrne & Kang, 2012:4).

This chapter discusses the international legal framework regarding the right of the child to be heard and to have their views taken seriously, as provided for by Article 12 of the CRC, as interpreted by the Committee on the Rights of the Child (hereinafter referred to as the Committee) in its General Comment No. 12, the Third Optional Protocol, and the ACRWC. However, it should be noted that this study focuses on hearing the voices of children in residential care by means of a complaints procedure as provided for by Article 12(2) of the CRC. Children’s right to be heard as provided for by Article 12(1) and other related statutes will also be discussed in order to emphasize the importance of hearing the voices of children in residential care as a means of mitigating the negative emotional and psychological effects on children discussed in part 1.1.2 above.

As noted in chapter one, a complaints procedure is a special mechanism through which vital, sensitive information concerning children in care is communicated between the children, their care-givers and the authorities. This provides children in care with access to a known, effective and impartial process through which they can lodge complaints or concerns regarding issues that affects them. The complaints procedure must be established in compliance with the requirements of Article 12 of the CRC.

2.2 Article 12 and General Comment No. 12 of the CRC Committee

Article 12 of the CRC addresses the “legal and social status of children, who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights” (Committee, 2009:5).

Article 12(1) provides that:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

This provision gives children the right to make their views heard in any matters that concern them as long as they are able to do so, taking into consideration their age and maturity. It further provides that children’s concerns must be taken seriously in their best interests. According to Winter (2011:400), this gives all children, including those in residential care, the freedom to express their views on all matters affecting them. Article 12(2) further provides that:

For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 12(2) provides that every child has the right to be heard in all judicial and administrative matters affecting them directly or through their representative in accordance with the law. According to Winter (2011:400), the CRC has made it obligatory for all children to voice their concerns in judicial and administrative matters personally or indirectly.

However, because the Articles and rights enshrined in the CRC are interwoven, listening to children and taking their views seriously encompass more than Article 12. It also incorporates the right to freedom of expression (Article 13). These provisions create standards against which hearing the voices of children by means of complaints procedures in care institutions can be measured.

The above provisions place an obligation on state parties to provide for the rights of children to be heard and for their views to be given due weight without any conditions being imposed, which is an important principle of the CRC. This is in line with the children's best interests principle, which is an important consideration in the interpretation and implementation of all other rights in "domestic law and areas of child protection, alternative care, family law and in some circumstances, juvenile justice" (Lansdown, 2011:1; Committee, 2009:5; Lundy, *et al*, 2012:4). However, since this is an innovative provision in international law, most member states have found it challenging to effectively comply (Lansdown, 2011: 1).

In this regard, practices and legal provisions giving effect to Article 12 of the CRC are often referred to as 'child participation' although the word 'participation' is not used in the CRC. 'Participation' has been widely used to describe processes that constitute information-sharing and communication between children and adults based on mutual respect through which children can learn how their views and those of adults are taken into consideration in order to model the results of such processes (Committee, 2009:7; Lansdown, 2011:3). In other words participation, as regulated by the CRC, includes the process of communication between adults and children whereby children express their views without limitation, to the extent that such views can influence decision-making that affects them (Willow, 2010:52).

Despite its importance, studies have shown that, most member states are still not able to effectively implement Paragraphs 1 and 2 of Article 12, due to cultural, political and economic barriers (Lansdown, 2011:1). Willow (2010:1) adds that it has not been easy to incorporate children's right to be heard as required by the CRC into domestic laws in certain countries. However, notwithstanding such barriers, the Committee (2009:6) notes that member states must provide proper means of communication, including educating children and all stakeholders on the contents of Article 12 and how it should be implemented in the best interests of children. This request is deemed necessary to help children in different group settings, including residential care to have a good understanding of their right to be heard and to have their views given due weight in matters affecting them (Committee, 2009:6).

A study by Lundy, et al. (2012:6) found that a success factor in implementing children's right to be heard by means of a complaints procedure and other rights as provided for by international frameworks, is training and awareness of what Article 12 and other provisions for children's rights are about and to whom such provisions are applicable, among member

states. This requirement also enlightens society that children are persons with rights who are supposed to be treated with dignity and respect in all circumstances (Lundy *et al*, 2012: 4).

The application of Article 12 to children in residential care is very important since such children are constantly in need of attention and it is the means through which they can voice their concerns on all matters that may affect their safety, care and protection. Csaky (2009:7) and Pinheiro (2006:175-182) add that children in residential care settings remain extremely vulnerable to violence, abuse, humiliation, beatings, torture, rape, isolation, restraint and harassment by staff members. Such treatment constitutes continuous a violation of their rights. Children therefore need to report these violations so that appropriate legal measures can be provided.

2.2.1 The right to be heard: A right of the individual child and a right of groups of children

As provided by the Committee (2009:7), children have the right to be heard individually or collectively as a group of children, such as children in a “neighbourhood, children in a class, children with disabilities or a group of girls and boys” and by implication, those in residential care. This study focuses on complaints procedures that enable children to seek redress on an individual basis. However, whether in groups or as individuals, children must be considered as individuals with personal feelings, emotions and particular interests; therefore, any views expressed by a child must be given due weight in accordance with their age and maturity based on the significance or importance of the matter under consideration.

Further to children’s right to be heard individually, the Committee (2009:7) requires state parties to create an environment that will help children express their views freely and without fear. Because children’s views can be relevant in decision-making that concerns them, the authorities are required to take them seriously (Committee, 2009:7). The importance of such a child participation process (Committee, 2009:7; Lansdown, 2011:3), was emphasized by a child by the name of Jason as follows:

If you had a problem in the Black community, and you brought in a group of White people to discuss how to solve it, almost nobody would take that panel seriously. In fact, there’d probably be a public outcry. It would be the same for women’s issues or gay issues. But every day, in local

arenas all the way to the White House, adults sit around and decide what problems youth have and what youth need, without ever consulting us (in Lansdown, 2011:5).

According to the CRC Committee, the importance of listening to children and giving due weight to their views cannot be over-stated, considering the positive contributions children have made in relation to their rights and best interests. Lansdown (2011:5) maintains that if adults and state parties are to effectively implement their obligations to promote children's right to be heard in their interests, they must listen and take children's voices and views seriously, which unfortunately is not always the case because of the way people in most parts of the world perceive children. It has been very difficult to incorporate the concept of children's right to be heard into local systems due to the perceptions adults have of children's personalities and their human rights (Willow, 2010:1). According to Beazley, Bessell, Ennew and Waterson (2006:196), disrespectfulness, beatings, rape, physical and emotional abuse and disregard for human dignity are significant acts perpetrated against children. If children were respected and given the right to freely express their views and be part of decision making that affects them, acts of violence and abuse could be reduced (Beazley et al, 2006:196). Over the years, traditional beliefs have considered children as powerless entities that can make no meaningful contribution to societal matters, and who lack the necessary understanding to make reasonable choices (Willow, 2010:39-40).

Contrary to these perceptions, Lansdown (2011:5) contends that, because adults do not usually possess all the vital information about children's private and personal issues, they cannot possibly make constructive decisions on legislation, policies and programmes designed for children. "Only children can truly tell their stories and correctly express their views in matters concerning them". Whether abused, disrespected or emotionally disturbed, children can still make important contributions to matters that affect them as opposed to being seen as objects of scorn that depend on adults for important decisions to be made on their behalf. Hence, when the authorities grant children in residential care the right to express their views and be part of matters that affect them, this enables them to defend themselves against violence and abuse (Willow, 2010:1) by means of a complaints procedure.

Cashmore (2002: 838) asserts that because children in residential care are often more vulnerable to all forms of abuse and neglect, instruments should be put in place to help them voice their need for appropriate attention and empowerment, rather than being regarded as

objects of concern, that may result in negative feelings and outbursts as highlighted in chapter one under section 1.2 paragraph 1.

According to Krappmann (2010:502), the “Child’s right to be heard is more than just listening to the child”, but should consider children’s input holistically. This may include the consideration of children’s views with regard to their needs and desires in the context of their daily experiences. Highlighting the need to hear children’s voices, Lansdown (2005) adds that when children participate in decision-making and their voices are heard on matters concerning them, there are usually developmental benefits. Sinclair (2004) agrees that, for children in residential care, participating in decision-making must be realistic and be taken seriously in order to avoid future harmful outcomes. As noted in chapter one under section 1.3 paragraph one, this has further been emphasised by Cashmore (2002:838). Because children are unique individuals with unique perspectives, needs, desires, wants, values and emotions, their concerns must be taken seriously in order to help them develop positively as noted by Oaklander (2007:50) and Blom (2006:28) (see chapter one under section 1.2.1, paragraph one). The above discussion shows the importance of hearing the voices of children, especially those in residential care in order to ensure their welfare, safety, protection and social development.

2.2.2 Legal analysis of Article 12 of the CRC

Under the provisions of Article 12 of the CRC, member states are expected to formulate their local laws in a manner that accommodates the requirements of the CRC (Committee, 2009:8). Conversely, children have the liberty to exercise or not exercise their rights and may express their views as a matter of choice. In order to effectively provide and implement the requirements of Article 12, the Committee’s General Comment No. 5, of 2003 maintains that efforts must be made by state parties to ensure that children are adequately informed and assisted to make important decisions in their best interests. This provision emphasises the importance of adults helping children to make correct and positive decisions since such decisions may influence their lives in many ways (Committee, 2009:8). In this regard, Krappmann (2010:506-507) asserts that children have the right to be listened to and be well informed about the outcomes and consequences of their proposed views. This process may include a briefing on the impact of any views or concerns expressed by children, including

alternative steps to follow when making their voices heard. The discussion below includes an analysis of Paragraphs 1 and 2 of Article 12.

Paragraph 1 of article 12

Based on the provisions of Article 12, Paragraph 1 contains the following phrases: “Shall assure”, “Capable of forming his or her own views”, “The right to express those views freely”, “In all matters affecting the child”, and “Being given due weight in accordance with the age and maturity of the child”. These key factors comprise the complete provisions of Article 12(1) of the CRC, which is summarized below according to the requirements of the Committee (2009:8-11).

The phrase “shall assure” compels all member states to provide for all children’s right, including those in residential care, to be heard, implying that, state parties must in all circumstances devise means through which children’s views are taken into consideration in all matters affecting them as well as giving due weight to those views (Committee, 2009: 8-9). Reyneke (2013: 214-215) asserts that it is important for the authorities to allow children to be part of all decisions that affect them, which may be by means of a complaints procedure for children in residential care. This is in line with the requirements of the Committee (2009:13, Para. 48-47). The phrase “Capable of forming his or her own views” implies that member states are obliged to assess children’s capacity to form an independent opinion in order to support and encourage them to freely express their views. However, this must be done with the presumption that children have the capacity to form their own views as well as recognising that they have the right to express those views freely (Committee, 2009:9).

Reyneke (2013:210) maintains that the concept of children being capable of forming their own views may refer to children’s ability to think, assess and understand the importance of a particular issue such that they feel it is necessary to voice their concern on the matter. This can be effective amongst children in residential care if care givers and those responsible for their well-being can help, guide, educate and encourage them to express their views considering their vulnerable circumstances. Reyneke (2013:210) also states that although the law provides that children’s ability to form their own views should be monitored in terms of their maturity to express such views, it should be noted that they have the absolute right to do so without any restrictions as to age or maturity. In this respect, the Committee (2009)

recognises that a child has rights from the earliest stages of their life, including the right to be heard. This right should be respected from a young age, even where children may be unable to express their views verbally (Innocenti Research Centre, 2005). Therefore, member states are required to implement Article 12, with full recognition and respect for “non-verbal forms of communication including play, body language, facial expressions, drawing and painting, through which very young children demonstrate understanding, choices and preferences” (Committee, 2009:9).

In addition to the above, child rights experts have maintained that all children, as small as they may be, have the right to express their views through all forms of meaningful communication (Krappmann, 2010:507). Reyneke (2013:216) asserts that although children have the right to express their views and such views should be given due weight, the authorities must seriously engage with children to ensure that appropriate consideration is given to their views and they are able to make a meaningful contribution. Despite such engagement with children it would be unreasonable to expect adults to consider their every desire, because there are usually other important factors to consider in relation to children’s views during a decision making process (Reyneke, 2013:216). Considering their vulnerable circumstances, children in residential care must be carefully assisted as they express their views to ensure that they are correctly guided to avoid recurring emotional problems. The Committee (2009:9) requires the authorities to assist children to address their concerns or views even when they may not be well informed about their wishes and the consequences thereof. Lundy (2007) adds that irrespective of their maturity and level of understanding of a particular issue that may be affecting them, the authorities are obliged to listen to, guide and assist them to deal appropriately with the said issues. However, this does not imply that decision makers should not take children’s age and maturity into consideration when addressing matters that affect them (Reyneke, 2013:212). Children’s age and maturity must be considered when making decisions on any views expressed as this can provide insight and clearer understanding of their needs and thus enable meaningful and appropriate decisions to be made.

Children with disabilities are also capable of forming their own views. Therefore particular care must be taken to ensure that this group of children in care is supported and encouraged to freely form and express their own views in the most convenient manner (Committee, 2009:9). This may limit negative effects like low self-esteem, dis-empowerment and the lack

of protection against abuse and violation of their rights which may arise when children are not allowed to form and express their own views (Sinclair, 2004; Lansdown, 2005; Lansdown, 2001; Willow, 2010:39-40). Several authors agree that as children grow, they develop cognitively to take charge of their own issues and decision-making (Louw & Louw, 2007:299; Ashford, LeCoy & Lortie, 2006:392). When deprived of this right, they remain emotionally and medically disoriented (Ashford, LeCoy & Lortie, 2006:392; Cashmore, 2002: 838). Kilkelly and Donnelly (2006:18) maintain that when children are deprived of their right to take part or form their own views on matters concerning them, they fail to enjoy the social, political, medical or therapeutic advantages available to them.

The “right to express those views freely” may imply that children have the right to express their views without being forced to do so. Under this provision, children have the freedom to express their views as long as they are capable of doing so without limitations or the fear of being reprimanded, as a matter of choice and not an obligation (Committee, 2009:10). In this respect, children’s own opinion must be respected because it is their legal right to voice their views rather than those of others (Committee, 2009:10). It is important to highlight that although “the right to express those views freely” is discussed in terms of the provisions of Article 12 of the CRC, another international instrument, specifically Article 7 of the ACRWC also provides for the right of children to freely express their views on matters that affect them.

Article 7 of the ACRWC requires all member states to ensure that all children who are able to express their own views be allowed to do so freely, and also to be free to disseminate such views in accordance with the provisions of the law (ACRWC, 1990: chapter 1, Article 7). Thus, this provision provides children with the right to freely express their views if they have the ability to do so and to share such opinions freely in line with the ambit of the law. The above provisions therefore require state parties to ensure that all children, including those in residential care, enjoy their right to express their views freely without fear or limitation despite their vulnerability in order to promote their safety, healthy development and positive psychological well-being (Csáky, 2009:1; Williamson, 2004:2; Innocenti Insight, 2006:36).

For the sake of children’s safety and well-being, during times of interrogations or interviews, the authorities are advised to limit such processes to avoid traumatic effects (the Committee, 2009:10). Communication with children as they express their views freely must be friendly

and non-intimidating in order to ensure that they effectively contribute to understanding the issue at hand (Committee, 2009:10, Para. 26). With regard to children's right to be heard "in all matters affecting them", the Committee requires member states to ensure that children are able to express their views on any relevant issues - implying that children must be heard on issues that concern them, their environment and all socio-political matters. This should include all issues involving children's welfare, social development, safety and protection (Committee, 2009:11). Pais (1997:15-16) adds that children's right to contribute to decision-making on matters that concern their environment, schooling, social protection and poverty reduction must be promoted by the authorities.

According to Reyneke (2013:214), the above provision refers to children's right, in a broader sense, to express their views on every matter concerning them and to participate and express their views on all social activities in their communities. A major concern of the Committee is that children are often deliberately denied the right to give their own views on matters affecting them even when they are capable of doing so. Hence member states are required to integrate children's right to express their views on all matters affecting them in their domestic laws as this may promote decision-making that benefits children (Committee, 2009:11; Pais, 1997:15-16). Therefore, every child, including those in residential care, shall all be free to participate and express their views on all matters affecting them directly or indirectly (Reyneke, 2013:214).

Finally, "being given due weight in accordance with the age and maturity" of the child may imply that when children's views in matters that affect them are addressed, the authorities must consider their level of understanding in line with their age and maturity because these factors can greatly affect children's contributions and eventual outcomes (Committee, 2009:11). Similarly, Davey, Burkner and Shaw (2010:10) maintain that giving due weight to a child's age and maturity will mean more than simply listening to them because the manner in which children perceive and address issues affects their lives. Taking age and maturity into account when considering children's views reveals their level of understanding (Davey, Burkner & Shaw, 2010: 10). Willow (2010:18) contends that age and maturity must also be considered with respect to the child as an individual because children develop and mature differently depending on their environment, level of exposure and socio-cultural influences (Willow, 2010:18). Based on this point of view, one may state that in some cases, due to their vulnerable circumstances and lack of favourable educational opportunities, children in

residential care may not perceive and articulate their views as good as children of the same age and level of maturity that live in stable homes that have the advantage of better education and school facilities. This may be one of the conditions to be considered when attending to views expressed by children.

Based on the above discussion, with regard to Article 12(1), it is very important for state parties to abide by its requirements in the best interests of children. As noted, providing for children's voices to be heard and their views to be given due weight can help children, especially those in residential care, build their self-esteem and confidence and reduce the chances of abuse and violation of their rights. It is worth noting that this provision can be very relevant if the environment and structures are in place to promote it. For children in residential care, a reliable complaints procedure will be necessary. A child-friendly atmosphere and well-informed support staff can facilitate children's right to be heard in matters affecting them. Hence state parties are encouraged to promote education, training and sound information mechanisms for caregivers and other stakeholders on the right of children in residential care to be heard.

Paragraph 2 of Article 12

The provisions of Article 12, Paragraph 2 are discussed in this sub-section in detail, with reference to: "The right to be heard in any judicial and administrative proceedings affecting the child", and "The right to be heard either directly, or through a representative or an appropriate body and In a manner consistent with the procedural rules of national law" (Committee, 2009:11-12).

Children's "right to be heard in any judicial and administrative proceedings affecting them" may refer to the legal right of children to be heard in any judicial or administrative matters concerning them (Committee, 2009:11, Para, 32-39). This may include issues pertaining to their rights to education, health, a sound environment, protection and good living conditions. Such rights give children, including those in residential care, the right to make their voices heard and have their views taken seriously in accordance with the law either directly or by means of representatives (Reyneke, 2013:215). Accordingly, this provision covers a wide range of children's rights including their right to life and their social welfare, which are very

important provisions for all children who wish to address issues of abuse and violations of their rights (O'Donnell, 2009:1, 52).

O'Donnell (2009:52) further maintains that this provision serves to help children, especially those in residential care, who may need to report maltreatment and injustices against them. Because of their vulnerability and social status children are exposed to human rights violations in the sense that their opinions, voices or concerns are usually considered meaningless in matters that may affect them. O'Donnell (2009:10) emphasised that the provision for children's right to be heard in judicial and administrative matters aims to ensure that children can raise their concerns and have them taken seriously instead of having them simply take part or testify in judicial and administrative proceedings.

Under the above provision, children, including those in residential care, may lodge complaints about issues that seriously affect them through representatives, with the understanding that such complaints will be taken seriously (Committee, 2009:11, Para, 33). In this regard, the Committee requires that children are advised, informed and gain clarity on progress and the attention being given to addressing the problem. Moreover, the requirement provides that children's issues must be addressed in a safe and child-friendly environment that is appropriate to the child's age and maturity (Committee, 2009:11-12), to minimise any harm, intimidation or hostilities towards children.

With regard to children's right to be heard either directly or through a representative or an appropriate body, the Committee (2009:12, Para, 35) requires the authorities to ensure that children make the decision on how they wish to be represented and the manner in which such hearings will unfold. This shall include children's right to be allowed to be heard directly in any judicial matter (the Committee, 2009:12; Lansdown, 2011:24). The relevant authorities must ensure that children are aware of their right to be heard in judicial and administrative matters that affect them, including their right to be informed of the consequences and possible results of the matter (the Committee, 2009:13, Para, 41). Children must also be told that they have the right to decide whether to express their views directly or via their representatives and must be carefully briefed on how the process will be addressed (the Committee, 2009:13, Para, 41).

In order to expand on the CRC's provisions, a similar provision in the ACRWC in respect of children's right to be heard directly or through a representative is discussed. Article 4(1)(2) of the ACRWC provides that all member states and any other persons must ensure that children's best interests are considered when actions and decisions concerning them are made. This is applicable to all judicial or administrative proceedings affecting children that are able to communicate or express their own views directly or through a legal representative. Such views are required to be taken seriously as provided for by law (ACRWC, 1990: Chapter 1, Article, 4(1)(2)).

Based on the manner in which the ACRWC puts it, one might think that the provision refers only to children who are capable of expressing their views, whereas contextually, with reference to the CRC, the provision includes all children as long as they are willing and able to form their views. However, with reference to the ACRWC's wording, it may be argued that whether capable or not of forming their own views, as long as children are willing, they must be encouraged and assisted to express their own views on matters affecting them in their best interests. For example, when minors are raped or abused and they are not capable of communicating; what should be done? Is the law not applicable to children under such circumstances? It is obvious that some children are able to form views, but not able to express them at all times. That is why it is important that the state devises mechanisms to enable children to express their views.

In the situations or circumstances highlighted above, it might be meaningful for state parties to consider which of the regulations is more meaningful in a particular situation. In this respect, Article 1(3) of the ACRWC provides that state parties to the ACRWC are obliged to disregard "custom, tradition, cultural or religious practice" that may not be in accordance with the rights and obligations of the charter. By implication, state parties to the ACRWC are free to disregard provisions in the charter that may not satisfactorily provide for a particular situation. Therefore, in this particular case, the provision for children's right to be heard directly or indirectly in the CRC might be more accommodating than that of the ACRWC. Member states that have ratified both the CRC and the ACRWC should adhere to the higher standards in the CRC rather than the ACRWC as this is in the best interests of children.

Regarding representations on children's behalf, the authorities must ensure that there is no conflict of interests between them and their legal representatives, bearing in mind that the

views presented to the decision-makers must reflect children's views and not those of others (Committee, 2009:12 Para 35). This is why it will be in children's best interests to express their views directly in any judicial or administrative proceedings (Lansdown, 2011:24) unless it is established that they are not able to do so, then indirect representation can be provided. It is worth noting that in cases where a children's representative is required, such person must be well-informed about the children's concerns (Committee, 2009:12).

Concerning children's right to be heard in a manner consistent with the procedural rules of national law, state parties are compelled to take into consideration the importance of children's representation in judicial and administrative proceedings which must be in line with national laws (Committee, 2009:12). In other words, the provision requires member states to regulate judicial or administrative procedures in a manner in line with their Constitutions. The fairness of the legal procedures and acknowledgement of children's fundamental right to be heard as provided by Article 12 must be respected in the proceedings so that the children's right to defence is upheld and all important information on the matter can be acquired (Committee, 2009:12).

In other words, this provision requires that state parties ensure that, during judicial and administrative proceedings, children are treated with all fairness in terms of the legal procedures specified by national laws (Lansdown, 2011: 26). This implies that during proceedings, children or their representatives must be given access to the necessary information and the legal support that may be relevant to ensure proper implementation of their right to be heard. Unfortunately this may not adequately apply to children in residential care if there are no legal instruments to facilitate the implementation of such rights. It is for some of these reasons that the Committee (2009:13-14 Para, 46) requires the establishment of a complaints procedure in residential care, and children's access to Children's Commissioners or Ombudspersons.

With regard to keeping children informed about the outcome and the attention given to their views, the Committee (2009:13, Para 45) stipulates that "since the child enjoys the right that his or her views are given due weight, the decision-maker has to inform the child of the outcome of the process and explain how his or her views were considered". This provision takes into consideration the importance of respecting, appreciating, and getting children involved and keeping them well-informed about any decisions taken on their behalf in

matters affecting them. When state parties or the authorities appreciate children's participation and give them formal and vital information about the decisions taken on matters affecting them, children feel empowered and trust their relationship with the authorities.

When this relationship is trustworthy, children can confidently express their satisfaction in the decisions taken or reject them in favour of alternative solutions in their own best interests, which may, in situations of judicial or administrative proceedings provide grounds for an appeal (Committee, 2009:13). A complaints procedure can be very instrumental in ensuring that this provision is effective among children in residential care. Considering the fact that the rights of these children are continuously violated in residential care (Csáky 2009:7; Pinheiro, 2006:175–182), a reliable complaints procedure will be a good medium through which they can express their views and receive appropriate feedback.

Based on the above discussion on children's right to be heard in all judicial and administrative proceedings in matters affecting them, one may state that effective implementation can be achieved if all parties concerned are well-informed and are appreciative of the said legal provision. The law cannot be applied without human effort. Hence those involved in the application of the law can only do so effectively if they are knowledgeable of it and are willing to positively implement it in the interests and promotion of children's well-being. Because of their vulnerability, age and level of maturity, children in residential care may be considered to be generally less informed of their rights and also lack the ability to exercise such rights in any judicial and administrative proceedings without assistance. This is why it would be advisable for state parties to institute measures and environments that support, promote and protect children's right to express their views freely without limitation and intimidation. A successful endeavour should provide space for their views and genuine participation in all matters affecting them. This may be facilitated by the use of a complaints procedure in residential care in collaboration with independent monitoring, and human rights institutions (Couzens, 2012:556).

2.2.3 Complaints, remedies and redress for children in residential care

The Committee (2009:13-14 Para 46) stipulates that "legislation is needed to provide children with complaints procedures and remedies when their right to be heard and for their views given due weight is disregarded and violated". Another very important instrument that is in

line with the complaints procedure to ensure children's rights and protection against abuse and violence of their rights is the CRC's Third Optional Protocol' [OP3]). This instrument came into force on 14 April 2014 (International Coalition for the Third Optional Protocol' [OP3], 2014:3). South Africa, Kenya, Canada and the UK, as jurisdictions whose complaints procedures for children in institutional care are discussed in detail in this study, have not yet ratified the Third Optional Protocol [OP3] and are therefore not bound by it. In the event that they ratify it in the future, they will have to abide by it.

In line with the Committee's General Comments No. 5 (2003: Para 24), the Third Optional Protocol [OP3], provides that children, groups of children or their representatives have the right to present complaints to the United Nations Committee on the Rights of the Child in situations where they feel their rights have been violated, and they have failed to obtain redress in their respective countries (International Coalition for the Third Optional Protocol [OP3], 2014:2).

Based on the above provision, the Child Rights International Network (CRIN) (2014:1) states that it is now possible for a child or group of children to launch complaints about violations of their rights independently, to the international authorities by means of an individual complaints procedure. These provisions give children in residential care access to justice with regard to abuse and violation of their rights by means of a complaints procedure, because the law does not allow children below the age of 18 to sue. Because such children are constantly exposed to forms of abuse, they need legal instruments to protect them.

The Committee (2009:13-14) provides that the operation of all children's institutions, schools and day-care centres, must be monitored by the Ombudsperson so that proper and appropriate attention can be paid to the voices or complaints of children in such institutions. For this to happen, children should be informed who these persons are, and how to contact them (Committee, 2009:14). Emphasising the importance of upholding the child's right to be heard in judicial and administrative proceedings through a complaints procedure, the Committee's General Comment No.12 (2009: Para, 47) states that:

If the right of the child to be heard is breached with regards to judicial and administrative proceeding as highlighted in Article 12, Paragraph 2, the child must have access to appeals and complaints procedures which provide remedies for rights violations.

The Committee further recommends that complaints procedures in residential care should be structured and presented in a manner that guarantee reliability and encourages children in care to confidently use them to voice their concerns without being exposed to the risk of violence, victimisation and punishment (Committee, 2009:14). The complaints procedure may provide legal measures through which perpetrators of child abuse and violence can be punished, thereby minimising the possibility of repeated acts of violence against children in care (Innocenti Research Centre, 2009).

(i) Mechanism for complaints procedure for children in residential care

In accordance with Article 12 of the CRC, the Committee, with assistance and contributions from different countries, formulated basic standard guidelines which different countries could adopt in order to develop their individual complaints procedures to suit the local context (Committee, 2012:13-14). The Committee indicated that, for purposes of an effective complaints procedure, the following must be taken into consideration:

(a) Reporting within communities: According to the Committee, institutions and agencies within communities involved in the welfare of children should ensure that children are educated and informed on their right to know about the established processes and whom to report circumstances of violence and dissatisfaction to; the reporting of problems, suspicions or other disturbing issues in every country must be carried out by qualified professionals working with the children; and every country must put the necessary measures in place to ensure the protection of the professionals carrying out the reporting processes (Committee, 2012:13-14). It is worth noting that these guidelines are recommendations to be considered by member states when establishing their respective complaints procedures for use in residential care facilities in their local communities.

(b) Reporting within specific systems: According to the Committee, all institutions and agencies for children in need of residential care must provide: A staff code of conduct which must include clear reporting procedures on allegations of misconduct by any team member; education and information on the right of children to know about the established processes and whom to report circumstances of violence and dissatisfaction to; special measures to encourage the reporting of violence against children and child rights violations; the protection of those who report child abuse; and communication channels through which children

themselves can report risky situations. This may include telephone hotlines and e-mail access established by the Ombudsman; and the confidentiality of the identity of victims and those who report violence (Committee, 2012:13-14). This section of the guidelines for a complaints procedure is recommended for member states to consider when establishing complaints procedures for residential care facilities in locations other than communities. In a more general perspective on a complaints mechanism in residential care and all other forms of alternative care institutions, the Committee (2005:23) recommends that the follow guidelines be considered to achieve a reliable complaints procedure:

State parties shall provide for children: (1) to be part of all individual decisions that affect their care, which may imply that children must be accorded the legal right to express their views on all matters that involve their care and welfare systems; (2) children's consent and involvement in the development of care services must be solicited, which may imply that children in care will be consulted on all processes involving the development of legislation and policy, including feedback mechanisms on the implementation of laws, policy and practices relating to care services; (3) "access to information", which implies that children will be provided with all information in relation to their placement, care, treatment plan and any alternatives, including the implications of any proposed actions; (4) a free, safe and child-friendly complaints mechanism, which may imply provision for children to access the available complaints mechanism without fear of punishment or retribution, including proper information on procedures and how to use the said mechanism in the care facility; (5) an "independent inspectorate", which may imply the provision of a reliable institution to monitor compliance with the regulations that govern the provision of care, protection or treatment of children in line with the obligations under Article 3 of the CRC; (6) an "independent monitoring body", which must play the role of the children's Ombudsperson or Commissioner with powers to undertake investigations and carry out unannounced visits to residential care facilities to listen to children's views and make recommendations on private issues; and (7) "consultative mechanisms", to represent a council for children in residential care facilities that is empowered to be part of any development and implementation of policy and any rules of the institution (Committee, 2005:23).

In conclusion, a complaints procedure is an important instrument to assist in providing for the right of children in residential care to be heard in all judicial and administrative proceedings. Based on the above discussion, hearing children's voices, respecting their views and

providing them with the opportunity to be heard in all judicial and administrative proceedings in matters affecting them is very important for their safety, protection and well-being. Reyneke (2013:219) maintains that children's involvement in judicial or administrative matters or decision-making processes is important because such decisions may affect them positively or negatively. Contrary to the view that children are not able to make any meaningful contribution to matters that affect them, it is important that they are assisted to make their voices heard. Aside from making a meaningful contribution, this is also about children's human right to be heard.

2.3. Conclusion

This chapter presented the international legal framework for children's right to be heard, including the right of children in residential care to be heard by means of a complaints procedure. It discussed the provisions of Article 12 (1)(2) of the CRC, the OP3 and Article 4(2)(7) of the ACRWC, which member states are compelled to comply with. These legal frameworks require all members states to provide for children's right to be heard and for their views to be given due weight in all matters affecting them. The discussion focussed on the right of children in residential care to be heard by means of a complaints procedure.

This chapter also explained that children in residential care have the right to make a contribution to their welfare and protection by making their voices heard and having their views taken seriously through a complaints mechanism. Hearing the voices of children, especially those in residential care, can assist in preventing violence and abuse and also promote effective child development. The ways in which member states should put national legal frameworks in place that enable children's voices to be heard in accordance with international instruments were also examined. The chapter noted that children have the right to be heard and their views expressed must be given due weight, taking into account their age and maturity, in any decision-making process that affects them.

CHAPTER THREE

ANALYSIS OF THE LEGAL FRAMEWORK FOR THE COMPLAINTS PROCEDURE IN SOUTH AFRICA

3.1 Introduction

Since the CRC came into force most member states are still struggling with the obligation to make children's voices heard. This is as a result of common cross cultural beliefs that children lack competence, knowledge and judgement, that parents or caregivers know what is good for them and, that, if given the opportunity and space to speak, children will become disrespectful, behave badly and make excessive demands (Lansdown, 2011:vi). Despite the arguments cited above, Article 12 (1)(2) of the CRC and the ACRWC have regulated for children's right to be heard and for their views to be given due weight in matters affecting them, and most member states have made considerable efforts to comply with these instruments (Committee, 2009: 5; ACRWC, 1990: Article, 4(1)(2) & 7).

Since South Africa is a signatory to the CRC and the ACRWC, the country took steps to enforce the above provisions by passing local laws that provide for the right of children to be heard and participate in all matters affecting them, in order to ensure their welfare, protection and best interests in accordance with the requirements of Article 12 (1)(2) of the CRC and Article 4(1)(2) and 7 of the ACWRC. South Africa signed and ratified the CRC on 29 January 1993 and 16 June 1995, respectively; and also signed and ratified the ACWRC on 10 October 1997 and 7 January 2000, respectively (Reyneke, 2013:209; Rosa & Dutschke, 2006: 224; Couzens, 2010:268). This chapter examines South Africa's compliance with and implementation of these international instruments. It provides information on the country's legal structures that enable the voices of children in residential care institutions to be heard by means of a complaints procedure, in compliance with the obligations of the international instruments discussed in chapter two.

It is worth noting the importance of hearing the voices of children in residential care by means of a complaints procedure due to the severe circumstances associated with children's life experience in South Africa and other parts of the world that were discussed earlier.

Clampett and Atmore (2014) mention that while the current population of children in residential care in South Africa is not known, a study conducted by Hall et al (2012:82-85) revealed that by 2010 there were about 4,440,000 children in out-of-home situations, which included children in residential care.

Residential care in South Africa refers to non-family-based alternative care, set up to provide care for children in smaller or larger groups by paid trained adults who work in rotation (Meintjes, Berry & Mampane, 2007:29). In some cases, however, workers in residential care facilities may render their services on a voluntary basis. Section 191 of the Children's Act, considers residential care to be a facility provided to accommodate more than six children outside their family environment which may be called CYCCs in South Africa. These facilities are usually set up in different forms and sizes and may be dormitory-style institutions or household-style care (Meintjes et al. 2007:29). Williamson (2004:13) notes that the main reason that children are placed in residential care is poverty and the endeavour to provide education. However, this solution has its disadvantages in relation to the child's developmental and social well-being.

Tolfree's (2005:4) study revealed that residential care remains harmful, with adverse effects on the health and well-being of children and causes long-term or permanent damage. Other studies maintain that residential care facilities fail to provide the minimum standard of care as a result of high child-to-caregiver ratios, as well as the lack of individual attention and love given to the children compared with parental figures. Children may face learning challenges and experience long-term developmental impairment and health problems; and the separation from their family may cause behavioural problems (Csáky, 2009:1; Williamson, 2004:2; Innocenti Insight, 2006:36). These disadvantages highlight the need to provide a means through which children in residential care can express their views on matters concerning them, one of which should be a complaints procedure which is the focus of this study. Hence, the application and implementation of the South African complaints procedure for children in residential care is analysed to evaluate its effectiveness as provided by the legal framework discussed in chapter two.

3.2 The South African Constitutional framework

3.2.1 Status and aims of the Constitution

The South African Constitution is based on the principle that the country belongs to all that live in it and that socio-cultural differences should be respected. As the supreme law of land, the Constitution aims to reconcile past differences, build a democratic society that appreciates “social justice and fundamental human rights”; “improve the quality of life” of its people and maximise their potential (Preamble of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution)).

Section 1(a) and (c) of the Constitution provide that South Africa is a sovereign and democratic nation that recognises: human dignity, equality and the promotion of “human rights and freedom”; as well as the supremacy of the Constitution and the rule of law. In terms of section 2, the Constitution shall be the “supreme law” of the country. Therefore, any law or conduct that is not in line with its provisions is invalid; all constitutional provisions must be enforced. Section 7(1) of the Bill of Rights provides for the rights of all who live in South Africa, and further upholds the “democratic values of human dignity, equality and freedom”. Section 7(2) provides that all the rights set out in the Bill of Rights shall be “respected, protected and promoted”, in favour of all persons in the country.

The Constitution guarantees the rights of everyone including children. This includes children’s right to be heard and for their views to be given due weight as provided for in the Act. Various sections of the Constitution protect rights that support or promote children’s right to be heard.

3.2.2 Children’s rights

With regard to regulations in South Africa that provide for children’s rights, including the rights of those in residential care to be heard in all matters that affect them, the legal provisions provide as follows:

Section 28 (1)(b) provides that all children shall enjoy the “right to family or parental care” or adequate alternative care in an out-of-home situation. In the context of this study, this refers to children in residential care. By implication, children may also exercise their right to

express their views in matters that affect them. According to Jamieson and Proudlock (2014: 214), the provisions in section 28(1)(b) also include “the right of every child to family care, the right not to be separated from the family except when necessary for the child’s best interests, and the rights of children deprived of their family environment to alternative care by the state”. One of the duties imposed on the state in this regard is to ensure that children deprived of a family environment receive alternative care and therapeutic services. Government is thus obliged to provide CYCCs and other community alternatives (Jamieson 2014: 214, 220). The state must ensure that CYCCs satisfy standards of care, health and safety; as well as legal safeguards (UN 2010: para 90 and CRC 2003: para 35). The state is further required to establish independent complaints and monitoring mechanisms for CYCCS which are accessible to children, parents and caregivers (CRC 2000: para 25). A therapeutic environment requires that children’s rights be respected. This includes their right to have their views heard or considered (Jamieson 2014: 223; CRC Art. 12). Further discussion on children in residential care was presented in part 1.4.2 in Chapter one.

Section 28(1)(h) of the Bill of Rights provides that every child shall have the right “to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result”. This provision accords all children, including those in care, the right to express their views in all matters affecting them before any appropriate court of law with the assurance of a fair hearing, with the support and assistance of legal experts.

These provisions enhance child-care and protection, adequate legal representation in matters that affect them and caters for children’s best interests. Section 28(2) also emphasises that children’s best interests are paramount in all matters that affect them. Thus, the best interests of all children must be protected in accordance with the law, including less privileged and vulnerable children.

3.2.3 Other rights supporting the right of children to be heard

The Constitution guarantees other rights that support and promote the rights of children. An example is the right to equality. Section 9(1) of the Bill of Rights provides for the equality of all persons before the law, including the right to “equal protection and benefits of the law”. In this respect the law provides that all people including children and those in vulnerable situations have equal rights, protection and benefits. Section 9(2) emphasises the “full and

equal enjoyment of all rights and freedoms”, established to promote “equality, legislative and other measures” provided for the purpose of protecting different groups of people that are disadvantaged due to unfair discrimination. By implication, children in residential care must also enjoy equal freedom and protection despite their circumstances, which includes their right to freely voice their opinion in all matters that affect them.

Section 9(3) of the Bill of Rights provides that the state may under no circumstances directly or indirectly discriminate against any person or groups of persons on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”. Subsection (3) of section 9(4) adds that national laws shall be promulgated to prevent such discrimination. In addition, section 9(5) provides that no person or group of persons shall be unfairly discriminated against for any of the reasons stated under subsection (3) above unless it is accepted in terms of the law that any such discrimination was fair.

Based on the provisions discussed in the previous paragraph, discrimination against persons, which by implication includes children in care is not permitted unless under certain legal circumstances which unfortunately are not clearly stated. However, the above provisions emphasise that discrimination against all persons or groups of person is unlawful. This is particularly pertinent in the case of children in care who may be exposed to discrimination due to their vulnerable circumstances. Furthermore, section 10 of the Constitution provides that all persons be accorded the right to human dignity, and that this right must be “respected and protected”. Thus, children have the right to be treated in a manner that ensures that their dignity is respected and protected.

Section 34 provides that all persons shall have the right to a fair judicial process in an open court or in an alternative environment considered appropriate for such hearing to take place with fairness and credibility. Together with section 28(1)(h), this section accords all children, including those in care, the right to express their views in all matters affecting them before any appropriate court of law or other appropriate forum.

3.2.4 Limitation of children's rights

Children's rights and other supporting rights are not absolute but can be limited. Section 36 of the Constitution sets out a general limitation clause. Section 36(1) provides that all the rights enshrined in the Bill of Rights "may be limited only" when the law applies generally and to the extent that such limitations are considered to be justified in the context of a democratic society that upholds "human dignity, equality and freedom". Important factors that must also be considered include: the nature of the right; the importance of the purpose; the nature and extent of the limitation; the relationship between the limitation and its purpose; and less restrictive means to achieve the purpose.

Furthermore, section 36(2) provides that unless as provided for in section 36(1) or in any other law as enshrined in the Constitution, "no law may limit any right entrenched in the Bill of Rights". Thus, all children, including those in residential care, have the right to exercise and enjoy all rights including their right to be heard and for their views to be given due weight without limitation for any unconstitutional reasons.

3.3 Statutory framework

3.3.1 Children's Act and Regulations

In addition to the above measures that grant children the right to be heard and for their views to be given due weight in judicial and administrative matters affecting them, the Children's Act 38 of 2005 sets out the provisions discussed below.

Section 10 of the Children's Act 38 of 2005 states that:

Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.

This legal provision gives children the right to be involved and express their opinions and views on all matters that affect them with the conviction that such contributions will be taken seriously in accordance with the requirements of the international instruments discussed in

chapter two. With regard to this provision, Reyneke (2013:209-210) emphasises that “every child” refers to all children, including vulnerable and disadvantaged children, which in this study, applies to children in residential care. Although the word ‘participation’ is used instead of “expressing their views in any matters affecting them”, this suggests that all children have the right to be heard. Reyneke (2013:209) adds that the law provides that the views of all children that are of an age and maturity to be able to be part of any matter concerning them must be given appropriate attention. Such rights remain “binding on natural and juristic persons” in accordance with their nature and duty of responsibility (Reyneke, 2013:209).

In addition to participation as a means of expressing children’s views in matters that affect them, section 61(1)(a) of the Act provides that, in any matters affecting children, the presiding officer of a children’s court shall ensure that children that are able to express their views considering their age, maturity and development must be allowed to do so if they so desire in any judicial proceedings. On the other hand, section 61(1)(b) provides that, where children are not willing or are not able to directly take part or express their views in matters that affect them in a children’s court, the presiding officer shall enquire and note down the reasons why the children are not able to participate. This provision therefore gives children the right to make their voices heard in the children’s court in all judicial and administrative proceedings affecting them. In situations where children are not able express their views the law has also provided that efforts be made to establish why this is the case so that measures are taken to provide appropriate legal aid if necessary. This is in accordance with the requirements of Article 12(2) discussed in chapter two.

Based on the above, Reyneke (2013:209) contends that the provision for children “to participate” as provided in the Act, instead of “the right to be heard or express views“ is in line with the requirements of the General Comments No 12 of the United Nations Committee on the Rights of the Child. The Committee is of the view that the CRC broadens the concept of children’s right to be heard or express views into participation, which is more inclusive of other rights. Participation thus refers to the:

On-going processes which include information sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes (Reyneke, 2013:209).

Section 14 of the Act gives children the right to be assisted in addressing issues that affect them in court as long as such issues are within the legal powers of the said court. Thus children, including those in residential care, have the right to legal advice, guidance and support in making their voices heard in judicial and administrative matters affecting them, within the context of the appropriate courts. In addition, section 15(2)(a) provides that children must have access to a competent court to address any matters that infringe on their rights. Sub-section (2)(b) further provides that any competent person may stand in for or represent children in court if they are not able to do so on their own to address the violation of their rights as enshrined in the Bill of Rights and the Act, 38 of 2005.

The provisions discussed in the preceding paragraph give children the right to directly express their views in all judicial and administrative matters affecting them or through a competent representative in circumstances where they cannot represent themselves before any court. This is in line with the requirements of Article 12(2) of the CRC which provides that children have the right to be heard directly or through their representative in any judicial and administrative proceedings that affect them. In the same vein section 53(1) and (2) provide that children or any persons acting for them or in their interests may approach a children's court provided that such matters are within the powers of the children's court. This gives children, including those in residential care, the right to be heard in a children's court in any judicial and administrative proceedings that affect them.

Although the above provisions give children the right to be heard, they do not directly provide for children's rights to be heard in residential care by means of a complaints procedure. However, the fact that these laws give children the right to be heard or express their views in all matters that affect them, and require that such views be taken seriously, leads one to conclude that these regulations have provided space for the enactment of appropriate alternative regulations that can directly provide for children in residential care to express their views by means of a complaints procedure. Hence, in terms of legal provision for a complaints procedure for children in residential care, Chapter 14 under the General Regulations, section 74(1) of the Act provides that "each child and youth care centre must have a written complaints procedure, approved by the centre's management board, which must":

(a) “be appropriate to the age and stage of development of the children residing at the centre”; (b) “allow for children to complain about particular incidents or staff members”; (c) “be accessible to the children”; (d) “be structured in such a manner that it does not cause conflict”; (e) “encourage restorative justice interventions, where appropriate”; and (f) “allow for fair procedures for those who have allegations made against them”.

With regard to the provisions in section 74(1) above, the following subsections imply that the complaints procedure for children in residential care shall be formulated in such a way that: (a) its content is in line with the age and stage of development of the children in the care centre; (b) it enables children in residential care to lodge complaints about staff members; (c) it is accessible to children in residential care; (d) there is no room for conflict amongst children and staff in the care facility; (e) it provides room for restorative justice and interventions where appropriate; and (f) it provides for fair procedures for individuals who may have been accused of wrongdoing. Additionally, Section 208(6) of the Act provides that the management Board “creates a Child’s Forum” to be part of the management board to promote and facilitate effective participation of children in residential care, taking into considerations the age, maturity and stage of development of the children. This by implication provides children in care with the right to be part of all activities and operations in the facility that affects them (Mahery, Jamieson & Scott, 2011:18).

Furthermore, section 74 (2) of the Act provides that “a child must, upon admission to the centre, be informed of the complaints procedure”. This implies that as soon as children are admitted to a residential care facility, they have the right to be informed and to be educated on the existence of the facility’s complaints procedure.

Schäfer (2011:25) asserts that section 74 of the Act, discussed above provides for all children in CYCCs to voice or express their views by means of a complaints procedure. With regards to their right to make their voices heard, Lansdown (2011:25) adds that children who by implication include those in residential care can present their concerns before the courts with the hopes that such concerns or views shall be taken seriously during judicial proceedings.

In line with the provisions of section 74 of the Act discussed above, Mahery, Jamieson and Scott (2011:17) assert that section 8 of the Act provides for children to be part of any issue that concerns them and that the state authorities, people and all other officials must respect,

protect and promote children's right to be heard in care facilities so that: (1) respect for children's right to freedom and security against brutality from their caregivers and (2) protection from the state against the violation of children's rights against abuse by caregivers can be maintained. This suggests that children's contributions and views on matters that concern them must be taken seriously, especially in decisions that will significantly affect them (Mahery, Jamieson & Scott, 2011:18). The Regulations to the Children's Act further clarify the right of children in alternative care to be heard through the establishment of complaints procedures in CYCCs as discussed in part 3.3.1 above.

Emphasizing the importance of hearing the voices of children in care, Mahery, Jamieson and Scott (2011:18) add that the Act provides that all children have the right to be well-informed and assisted to be part of any decision concerning their stay, wellbeing and development in CYCCs. If children in care are able to express their views on decisions that affect their wellbeing and life in general, they feel respected and important which may have a positive impact on their self-esteem (Oaklander, 2007:50). Unfortunately, it is difficult to effectively implement these above provisions in CYCCs due to inadequate structures, weak complaints procedures and service delivery challenges (Muntingh, 2012: 126).

Based on the regulations discussed above, it can be concluded that children, including those in residential care have the right to express their views in all matters affecting them as long as they are capable of doing so in order to address abuse, violations of their rights and other concerns regarding their safety and welfare. In other words children in residential care in South Africa have the right to express their views in any judicial or administrative proceedings affecting them directly or through a representative in keeping with national laws, based on the requirements of the CRC, by means of a complaints procedure. However, as discussed later in this chapter, the implementation of the provisions discussed above seems to be challenging due to several factors including those cited by Muntingh (2012:126) and discussed in the previous paragraph.

In addition to the issues raised by Muntingh (2012:126), Reyneke (2013:209) maintains that the lack of proper structures to promote the views of children in residential care is of major concern. This suggests that although South Africa has adopted regulations to promote children's right to be heard in line with the requirements of the international instruments discussed in chapter two, these regulations may not be effectively implemented.

It is worth noting that if children are not assisted or allowed to express their views in all matters that affect them; this might be considered a violation of their constitutional rights (Reyneke, 2013:213). For children to exercise this right they must be aware of it and be informed on how to pursue it, in addition to the availability of a safe and comfortable environment and effective communication with the appropriate authorities (Reyneke, 2013:214).

3.3.2 Critical discussion of the South African complaints procedure

As noted in chapter one, the complaints procedure was said to be a medium through which children in care can use to express their views in matters that concerns them. The legal provisions for children's rights as provided in the Constitution and the Children's Act, 38 of 2005, discussed above provided grounds upon which the complaints procedure presented above was established. However a critical evaluation of the complaints procedure with regards to the standard requirements for a reliable complaints procedure discussed in section 2.2.4 above indicate that there are very important requirements that are omitted. The Committee's General Comment No. 5 (2003; Para, 24) regulates that state parties shall provide for a complaints mechanism at all forms of residential care facilities through which children can "express their views and that those views be given due weight in matters of their placement, the regulations of care in foster families or homes and their daily lives".

Among other key items, these should include:

Legislation providing the child with the right to information about any placement, care and/or treatment plan and meaningful opportunities to express her or his views and for those views to be given due weight throughout the decision-making process; Legislation ensuring the right of the child to be heard, and that her or his views be given due weight in the development and establishment of child-friendly care services; Establishment of a competent monitoring institution, such as a children's ombudsperson, commissioner or inspectorate, to monitor compliance with the rules and regulations governing the provision of care, protection or treatment of children in accordance with the obligations under article 3. The monitoring body should be mandated to have unimpeded access to residential facilities (including those for children in conflict with the law), to hear the views and concerns of the child directly, and to monitor the extent to which his or her views are listened to and given due weight by the institution itself; and establishment of effective mechanisms, for example, a

representative council of the children, both girls and boys, in the residential care facility, with the mandate to participate in the development and implementation of the policy and any rules of the institution (the Committee's General Comment No. 5, 2003).

Based on the above standard requirements of the Committee's General Comment No. 5 (2003) for a complaints procedure in residential care, some very important items are not provided for in the South African complaints procedure. The exclusion of 1) the provision on the right to information about children's placement, treatment plan, and to express views so that such views are taken seriously; the provision on a child-friendly atmosphere to express views and care services; the provision on monitoring institutions like a children's Ombudsperson or Commissioner to monitor compliance and other relevant issues concerning children's rights and their well-being; and the provision on Children's Representative Councils in residential care so that children can be included in decision and policy-making in the institution (Committee 2009:22, Para 97) suggests that the South African complaints procedure may require revision in line with the international instruments.

Although the content of the complaints procedure in South Africa includes some important rights for the care, safety and protection of children in residential care, with regard to their right to express their views, it could be said that it does not meet the standards of the CRC on the basis of the above exclusions. To encourage children in residential care to express their views freely or to report abuse and violations of their rights, they must be informed that they have such rights, and that they can express their views without being victimised or punished for doing so. Moreover, for children to confidently speak out or express their views, they should be assisted to do so in a secure or child-friendly environment which is non-intimidating (Committee, 2009:22, Para 97). Considering their status, age and vulnerable circumstances, children in residential care should have access to, and assistance from independent institutions like Ombudspersons or Children's Commissioners. In some member states like Kenya, Canada and the UK, these bodies are mandated to oversee and promote the implementation of children's rights, including the right of children in residential care to be heard. Unfortunately, South Africa's complaints procedure does not include all these provisions.

Aside from omitting some key elements of the standard requirements some commentators have expressed concerns on the effectiveness of the South African complaints mechanism. In

this regard, Muntingh (2012:126) argues that a written complaints procedure as provided for in section 74 of the Act, which is to be managed by the staff of the CYCC, to address allegations of child abuse and torture may be ineffective because it is supposed to be managed by the very people who may be infringing on children's rights (Muntingh, 2012: 126). The author further asserts that despite the provisions for children's right to be heard as enshrined in the Constitution and Act, the lack of independence and structures to apply such provisions has been a challenge. A weak complaints mechanism to address allegations of torture, abuse and all other ill-treatment of children in CYCCs has also been of major concern in the implementation of children's right to be heard in residential care in South Africa (Muntingh, 2012:166).

In addition to this concern, Muntingh, (2012: 126) and Couzens, (2012:556) expressed concern about the lack of adequate structures to facilitate children's access to proper legal assistance. Couzens (2012:557) and Clampett and Atmore (2014) suggested that an Ombudsperson and National Independent Human Rights Institutions (hereinafter referred to as NIHRIs) could safeguard and promote children's rights, interest and welfare. Unfortunately there is as yet no Office of the Ombudsperson for children in South Africa. The Ombudsperson could also play the role of reviewing and monitoring the operation of the complaints procedure in residential care in terms of its effectiveness and reliability in promoting children's rights, welfare and protection (Clampett & Atmore, 2014). Clampett and Atmore (2014) further maintain that to achieve success and effective operations, the Ombudsperson for children must be legally mandated to operate as an independent body with the authority and power to fulfil its responsibilities without interference. As such, this office must be accountable to the South African National Assembly.

Muntingh (2012:166) adds that the lack of legislation providing for unannounced visits and inspection of CYCCs by the Management Board or independent authorities makes the whole idea of protecting children's rights unproductive. Furthermore, section 211 of the Act, which provides for a quality assurance process that involves the inspection of CYCCs every three years by independent and multi-disciplinary teams, may be inefficient (Muntingh, 2012:166) considering the time frame. Three years is too long to fast track and monitor allegations of maltreatment or abuse of children in care institutions. If such abuse or maltreatment were taking place on a daily basis, how much damage would be caused to these children in the space of three years?

3.4 Implementation of the South African complaints procedure

The Constitution and the Children's Act provide for children's right to be heard and for them to participate in all matters affecting them. However, it is important to examine how the said provisions are being implemented in the country. Experience has shown that, no matter how good or articulate laws may be, they might not be productive if not properly implemented. Implementing the legal provisions for children's right to be heard by means of a complaints procedure might be challenging in South Africa due to the lack of vital support systems. The omission of key requirements for an effective complaints procedure, the absence of independent children's monitoring bodies (Couzens, 2012:557) and many other social factors which include a complicated service network, inappropriate network coordination and ill-equipped human resources (Loffell, 2007:59; September & Blankenberg, 2004:59) may deter effective implementation and delivery of children's right to be heard.

Aside from the above-mentioned challenges, Loffell (2007:313) asserts that the massive shortage of specialist services for children in care in South Africa makes it difficult to effectively implement children's rights at residential care facilities across the country. Furthermore, the excessive caseloads of social workers and ineffective mandatory reporting of maltreatment and neglect, abuse and violence against children by child care workers and managers at most residential care facilities hinder effective implementation (Loffell, 2007:314). The UNICEF Annual Report (2012:12-13) also notes that implementation of local laws in relation to children's rights in South Africa is a major challenge due to the overloaded and congested Social Welfare Services. It adds that the "the biggest challenge in relation to the Children's Act remains the service delivery model" due to the government's partial funding system for non-profit organisations, who are expected to raise their own funding for effective operations.

Jamieson and Proudlock (2010:33) contend that, if effective implementation is to be achieved, the South African authorities must first address the shortage of social workers and other social services professionals in child protection systems across the country. The authors maintain that effective deployment of other child and youth care workers, auxiliary social workers and community development workers to remote communities to assist with the

implementation of the regulated service for children in care would make a big difference (Jamieson & Proudlock, 2010:33).

Jamieson and Proudlock (2010:34) also note that effective implementation requires that budget allocations to support residential care institutions and non-profit organisations be revised. Studies have shown that most of these institutions cannot operate in accordance with the law due to their limited financial resources (Jamieson & Proudlock, 2010:34). All of the above observations suggest that effective implementation of the South African complaints procedure and other provisions for children's rights require the adoption of other structures and models.

3.5 Compliance with the international instruments for hearing the voices of children in residential care

In order to comply with the international instruments discussed in chapter two, member states are obliged to regulate all legislation concerning children's rights in accordance with the requirements of the CRC and the ACRWC. While this has been achieved in South Africa, as discussed under section 3.2.1 above, the question is whether the said provisions are being implemented effectively in the best interests of children in line with the requirements of the international frameworks.

As noted in section 3.3.1 above, studies indicate that despite having put provisions in place for children's voices to be heard and for them to participate in all matters affecting them, there seem to be some challenges with effective implementation. As this appears to be the case, it implies that much remains to be done in South Africa to ensure full compliance in respect of children's right to be heard.

Considering some of the difficulties that hamper effective implementation and full compliance regarding children's right to be heard, it is important to reiterate that South Africa's efforts to provide for the needs, welfare and rights of its children have been greatly impeded by "widespread poverty, social fragmentation, a culture of violence, high rates of unemployment and the HIV/AIDS pandemic" (Jamieson & Proudlock, 2010:30). However, despite these setbacks the government has made considerable efforts to provide for the welfare and rights of children in care by requesting National Treasury and provincial

governments to ensure that they allocate funds at all times for the implementation of regulated services for children in residential care (Jamieson & Proudlock, 2010:32). While this signifies the government's willingness and efforts to provide for the rights and welfare of children in care, the challenge lies in effective implementation amidst the above mentioned setbacks, providing grounds for the conclusion below.

3.6 Conclusion

This chapter examined South Africa's legal framework for children's right to be heard and its compliance as a signatory to the CRC and the ACRWC on the rights and welfare of the child. All member states of the CRC are required to enforce all the legislative provisions contained in the conventions. The analysis suggests that, while South Africa has made great strides in providing for the rights and welfare of children by revising existing legislation, including the right of children in residential care to be heard, the complaints procedure for children in care as regulated by the Children's Act does not include certain key items for an effective and reliable complaints procedure. There is also evidence of ineffective implementation of children's right to be heard in all matters affecting them, despite the fact that the legislation provides for such right.

The literature reviewed in this chapter notes that effective implementation is hampered by many factors. Aside from common cultural practices that consider children to be unreasonable and too immature to make meaningful contributions to decision-making, other social factors such as a shortage of trained social services professionals, overloaded and congested Social Welfare Services, poverty, the lack of an adequate service delivery model due to the government's partial funding system for non-profit organisations, an inadequate network and structural imbalances contribute to the ineffective implementation of children's right to be heard, amongst other rights. There is therefore a need to incorporate additional legal provisions and enforce the use of the services of the Human Rights Commission and independent monitoring institutions like the Children's Commissioner and Ombudsperson to promote and expand children's rights as regulated by the CRC.

Despite these challenges, there is evidence of positive change. Given the fact that there is provision for children's rights and their right to be heard, revisions can always be made to the existing legislation.

CHAPTER FOUR

EXPERIENCES OF COMPLAINTS PROCEDURES FOR CHILDREN IN RESIDENTIAL CARE IN KENYA, CANADA AND THE UNITED KINGDOM

4.1 Introduction

This chapter examines the legal provisions for the right of children in residential care to be heard by means of complaints procedures in Kenya, Canada and the UK, in accordance with the requirements of Article 12 of the CRC. It evaluates the legal framework for complaints procedures in these three jurisdictions as a tool for hearing the voices of children in residential care as well as the implementation of the complaints procedure in line with the requirements of the international instruments discussed in chapter two. Lessons for South Africa are drawn from the experiences of the comparative jurisdictions.

The three jurisdictions for this study were selected due to the fact that 1) Kenya is a developing country in East Africa that has a long-established, comprehensive working complaints mechanism to deal with matters involving the high volume of children trapped in the refugee crisis in the East African block. 2) Canada and the UK have both instituted seemingly comprehensive complaints mechanisms that have undergone a series of review processes in order to set acceptable standards to meet the requirements of Article 12 of the CRC.

4.2 Kenya

4.2.1 Introduction

Kenya is a sovereign East African nation that became a member state of the CRC and the ACRWC in 1990 (Kamua, 2013:1; Maroun & Grasso, 2006:10). As a party to these international instruments, Kenya is obliged to comply with their provisions described in chapter two of this study. In order to ensure compliance with the requirements of the international instruments that provide for children's right to be heard, among other rights, Kenya created an independent institution, the National Council for Children's Services (hereinafter referred to as the NCCS). The NCCS was established in 2003 in terms of section

31(1) of the Children's Act, 2001(hereinafter referred to as the Children's Act). Working with the Ministry in charge of children's services, the NCCS was mandated to oversee and coordinate all children's rights activities, and to advise government on all issues affecting children (the Children's Act; SOS Children's Village, Kenya, 2014:14). The NCCS fulfils these requirements as regulated in the following sections of the Act:

Section 32(2)(h) ensure the enhancement of the best interests of children among displaced or unaccompanied children held in care, whether in refugee camps or in any other institution; (i) ensure the full implementation of Kenya's international and regional obligations relating to children and facilitate the formulation of appropriate reports under such obligations; (m) formulate strategies for the creation of public awareness in all matters touching on the rights and welfare of children (the Act, 2001).

The Act also provides for the Director of Children's Services (hereinafter, referred to as the DCS) to coordinate compliance and implementation of children's services at grassroots level. This comprises monitoring, training, facilitation and providing guidelines on the implementation of children's rights for orphans and vulnerable children (SOS Children's Village, Kenya 2014:7; Maroun & Grasso, 2006:11). If well-coordinated, delinking children's services from the central government may promote effective service delivery because it reduces the workload of the central government.

Kenya has been rated among the top African nations in terms of compliance with the requirements of the international instruments for children's right to be heard and the implementation of local laws for the protection and promotion of children's rights (African Child Policy Forum, 2008). Despite this recognition, in light of the following statistics, the Kenyan government still needs to pay more attention to the welfare and protection of vulnerable children. According to UNICEF Kenya (2012) children make up 48.9 per cent of the population, which translates to 19.1 million, comprising 3,612,679 orphans and vulnerable children, most of whom are in residential care institutions (SOS Village, 2014:47).

SOS Children's Village, Kenya (2014:6) revealed that there were 1.9 million children in "out-of-home care settings" across the country, with about 700,000 in the major cities as result of various socio-economic factors, such as poverty, abuse, child labour and the absence of responsible parents or guardians, to name but a few. A study by Davidson (2010: 405) revealed that due to some of these socio-economic factors, the majority of these children

enter residential care having undergone traumatic experiences. This suggests, among other important reasons why it is very important to pay attention to the plight of children in care through hearing their voices by means of a complaints procedure. The following section discusses the legal provisions for the complaints procedure in Kenya.

4.2.2 Kenya's legal framework for the right of children in residential care to be heard by means of a complaints procedure

Kenya's 2010 Constitution provides for children's rights and protection through a Bill of Rights (SOS Children's Village Kenya, 2014:6, 12; Jarso, 2012:713). The Act also provides for the well-being of all children in Kenya (Maruon & Grasso, 2006:11). This ties in with the provisions of the CRC and the ACRWC discussed in chapter two, which compel all member states to provide for children's right to be heard, amongst other rights.

Moreover, the 2001 Act provides for regulations concerning guardianship, fostering and adoption, custody, maintenance, care and the protection of children. It also provides for the administration of children's institutions, children's rights and responsibilities, and the role of parents and the government in promoting and protecting children's rights and juvenile justice (the Act; Maroun & Grasso, 2006:11). The Act regulates for the best interests and welfare of children, which is in line with the requirements of the international instruments discussed in chapter two. Section 4(2) of the Act provides that every action taken that concerns children must be in their best interests be it in public or private social welfare institutions, a court of law, administrative authorities or legislative bodies. Section 4(3)(4) provides that all persons, and judicial and administrative institutions are obliged to safeguard, promote and conserve the rights and welfare of children in all matters affecting them. Moreover, children must be given the opportunity to express their views which must be taken seriously in accordance with their age and maturity (the 2001 Act, section 4(3)(4); Maruon & Grasso, 2006:11). Section 4(4) of the 2001 Act provides that:

In any matters of procedure affecting a child, the child shall be accorded an opportunity to express his opinion, and that opinion shall be taken into account as may be appropriate taking into account the child's age and the degree of maturity.

Based on the above provision, a national policy for a complaints mechanism was established for children in residential care through which the violation of their rights can be effectively addressed (SOS Children's Village, Kenya, 2014:52). The said provision provides for the voices of children, including those in care, to be heard and for their views to be given due weight, which might be by means of a complaints procedure (the Committee's General Comments No. 5, 2003). The above provisions indicate Kenya's commitment to promote children's right to be heard, amongst other rights.

4.2.3 The complaints procedure as a tool for hearing the voices of children in residential care in Kenya

The complaints procedure for children in residential care as regulated in the Act was reinforced by the introduction of a national policy for children by the DCS, in which the content of the standard complaints procedure was defined. According to SOS Children's Village (2002:52) this policy provides that children in care must be informed about their right to report and complain about abuse, violations of their rights and any situation that requires attention, to the responsible authorities. This can be achieved by providing a reliable complaints procedure for children in residential care (SOS Children's Village, 2002:52).

In line with section 4(4) of the Act and the provisions of the national policy on a complaints procedure for children in residential care in Kenya, Save the Children established a complaints procedure that has been used at the Dadaab refugee camp in Kenya. The content and schematic diagram of the said complaints procedure seems quite comprehensive. It also conforms to the recommended standard complaints procedure of the CRC discussed in chapter two. The complaints procedure was composed with children's participation, and put in place at the camp (Save the Children Kenya, 2011:3). The content and provision of the complaints procedure is presented below.

It is important to note that the decision to use this complaints procedure as an example of a typical instrument to hear children's voices in Kenya in this study is due to its comprehensive nature. Although the Dadaab refugee camp in Kenya may not be considered a typical residential institution for children, it provides temporary accommodation for children in need of care and protection. It is a special form of temporary home for adults and vulnerable and

disadvantaged children, which makes it a type of care institution for children. The following section provides a detailed examination of this complaints procedure.

4.2.4 The Complaints Mechanism in Dadaab, Kenya

In order to improve the quality and operation of the complaints procedure in the Ifo and Dadaab refugee camps, a pilot study was conducted and some resident children were interviewed by means of focus group discussions. The results of this study provided considerable insight into how to meet children's needs through an effective Complaints and Response Mechanism (hereinafter referred to as CRM), comprised of face-to-face reporting with caregivers, a place situated in a child friendly location, a child-centred arrangement to facilitate information dissemination, and the promotion of participation, inclusivity and flexibility (Odhiambo & Maina , 2011:1- 3). Based on the findings of the pilot study, the following key factors were found to be relevant in the establishment of a reliable complaints procedure for children in residential care in Kenya.

The complaints handling process at the Dadaab Refugee Camp in Kenya

(1) Design and nature of the CRM: In order to achieve a reliable and child-friendly complaints mechanism, its design and nature should provide space for children's ideas, views and needs; (2) Nature of the environment and location of the CRM: The "nature of the environment and location of the CRM" must be known and accessible to children and must be safe enough for them to freely express their views, under very calm and respectful circumstances. When children are comfortable with the environment they usually feel free to say whatever they intend to say without reservation; (3) Approach to the Complainant – a child friendly language and approach need to be used: The language used to communicate with children should be simple and clear so that they can be confident that their views are understood and in return, they can understand the measures being taken to address their concerns; (4) Staff and skills: All those involved or working with children in care must be well-informed about children's issues and be able to listen, be patient, tolerant and exercise the ability to provide child-friendly interviewing skills. These abilities create an atmosphere in which children feel free to complain or express themselves (Save the Children Kenya, 2011:3).

In addition to the above, the components of the said CRM (Save the Children Kenya, 2011:1-10) should include the following important elements:

- (1) The CRM must be a legally binding instrument that is supported and endorsed by the senior authorities and be resourceful enough to ensure the achievement of its objectives;
- (2) Consultation with stakeholders: There is a need for proper consultation with children and concerned stakeholders in order to ensure that appropriate steps are taken in instituting the CRM process. This signifies the need for children to be part of all matters and decisions that affect them. Experience has confirmed that most decisions at care facilities are taken on behalf of children without their consent or input;
- (3) Guidelines and processes based on children's input: This provides that the CRM processes must be child-friendly and open to contributions from children and other stakeholders. Space is provided for children's effective participation in the construction and operation of a process that directly involves them. This will ensure that they are familiar with the instrument, thereby guaranteeing their confidence to use it freely;
- (4) Staff training: This refers to the need to train caregivers and other stakeholders on the processes and procedure of the complaints mechanism and how to communicate with children. It promotes awareness, education and communication procedures on how the staff can engage and help children in care make good use of the complaints procedure in expressing their views.
- (5) Complaints handling infrastructure: The complaints handling process must be structured so that it is easy, safe and child-friendly. This is very important because it can help build children's confidence and desire to use the instrument to make their voices heard. Children will not be willing to lay complaints under difficult and intimidating circumstances. If they feel unsafe, they would rather bury their emotions and remain silent. It is for this reason that the process should be crafted to be child-friendly;
- (6) Raising awareness: Children, their caregivers and other stakeholders must be made aware of what they can complain about and the manner in which such complaints can be made. This ensures that children in residential care and their caregivers know about children's right to be heard, and the process of lodging complaints which can help limit abuse and the violation of their rights;
- (7) Lodging complaints: Complaints lodged by either children or adults must be well documented. There must be a clear and standard form of receiving complaints from adults or children. With adults, a written letter of acknowledgement is issued, while complaints lodged

by children are recorded in a complaints register. Keeping data on all complaints submitted is important for recollection and review purposes. Also important to note, is the proposed timeframe for reporting and receiving a response on the complaint lodged;

(8) Complaints resolution: This includes provisions to ensure that all complaints lodged are formally or informally resolved. This may be positive or the opposite of children's expectations. Whatever the case, it is recommended that a response be given with a specified timeframe in the best interests of the child. When children lodge complaints they are anxious to hear the outcome; hence it is important to set timeframes so as to minimise anxiety and emotional problems;

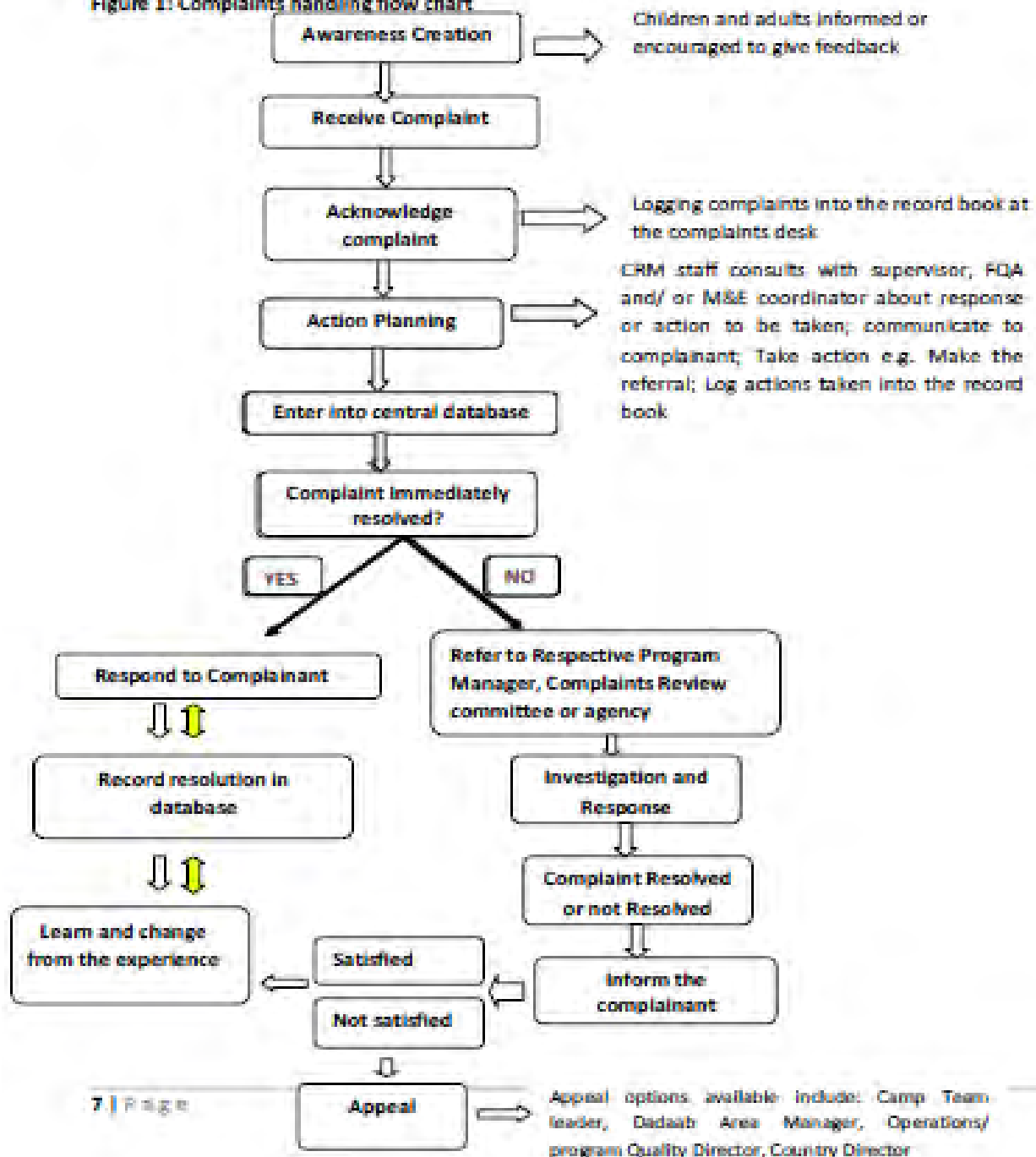
(9) Response to complaints: In situations where the response to the complaint is not satisfactory, the complainant may appeal the outcome. This provides grounds for children or their representatives to achieve maximum and satisfactory attention as a matter of right to their complaints,

(10) Review of the CRM: There must be provision for the continuous capturing of all information concerning the complaints procedure in order to integrate positive changes where necessary.

In summary, the CRM or complaints procedure must be designed in such a manner that it ensures an effective referral system so that any decisions taken are a true reflection of children's best interests. A standard complaints record book must exist to capture complaints at all times. To enhance the management of complaints, it is advisable to maintain operational staff to effectively collect and "solicit complaints; manage the complaints database and engage coordination and follow up on complaints". Awareness of the existence of the CRM is crucial and guidance on how to complain should be encouraged so that children are confident and excited about doing so. A timely response and solution are vital because this assures children that their concerns are important and are being attended to (Save the Children, Kenya, 2011:10). See the flow chart below.

Fig 4.1: Complaints handling flow chart by Save the Children Kenya (2011:7)

Figure 1: Complaints handling flow chart



The content and processes of the complaints procedure at the Dadaab camp in Kenya are in line with the requirements for a standard complaints procedure regulated by Article 12 of the CRC, as discussed in chapter two. While the effectiveness and level of implementation of the CRM are not known, its content and operational processes suggest that it is an instrument that can assist children to adequately express their views. South Africa can learn some lessons from Kenya's complaints procedure that are highlighted below.

4.2.5 Lessons to be learned by South Africa

Aside from providing for and putting in place a standard complaints procedure for children in residential care, Kenya went on to provide for the establishment of independent bodies to manage and oversee the effective implementation of children's rights in the country. The NCCS is supported by the DCS to manage and oversee the effective implementation of children's rights and welfare across the nation. Unlike South Africa, where all regulated children's provisions are administered by the Department of Social Development, in Kenya, the NCCS and DCS are mandated to handle all children's issues and then report back and advise the Kenyan government accordingly. This eases the pressure and workload of the government and ensures timely and appropriate services to children as provided for by law.

As noted in chapter three, the South African Department of Social Development is severely overloaded to the extent that service delivery is compromised. Using independent children's bodies to handle children's issues is thus important. Although it is difficult to gauge the success of this Kenyan initiative, one can conclude that because children's services are being managed independently, accountability and productivity can be easily measured. The fact that Kenya has been ranked among the top 10 countries in Africa in terms of compliance with the requirements of Article 12 of the CRC (Maroun & Grasso, 2006:11; African Child Policy Forum, 2008), gives one reason to believe that the use of independent bodies to manage children's services could be a contributing factor.

Another important factor that could be considered by South Africa is the content and complaints process of the CRM in Kenya. It was noted that the Save the Children CRM in Kenya was established with children's participation in order to ensure that the content and complaint process reflect children's views and are child friendly. Unlike in South Africa, the complaints process highlights the need for awareness of its existence among children and notes that a child-friendly environment is required, who should be involved, the turn-around time for a response or solution to complaints, training of staff and most importantly, the need for review when the complainant is not satisfied with the response. These factors could encourage and positively contribute to effective child participation in the complaints process – an important lesson for South Africa.

4.3 Canada (British Columbia)

4.3.1 Introduction

Canada is a constitutional monarchy situated in the north of the American continent and run by a federal government with ten provinces and their independent legislative assemblies. It is a democratic nation with a legal system that was established in accordance with British common law intertwined with the French civil code (Lundy, Kilkelly, Byrne & Kang, 2012:7; Innocenti Research Centre, 2009:1-2). This system provides for a division of power between the federal and provincial levels (Denov, 2004:1-20; Turpel-Lafond, 2012:29-32; Lundy, Kilkelly, Byrne & Kang, 2012:71; Innocent Research Centre, 2009:2). Canada signed and ratified the CRC in 1990 and 1991, respectively (Lundy, Kilkelly, Byrne & Kang, 2012:71).

As a federal state with a common law system, Canada is governed by the Constitutions Acts of 1867 and 1982. This common law system has not incorporated the CRC, implying that there is yet no provision for children's rights, including the right of the voices of children in residential care to be heard and their views to be given due weight in matters that affect them (Lundy, Kilkelly, Byrne & Kang, 2012:71).

However, it is interesting to note that, the provinces have been mandated to introduce laws for children's welfare, which by implication enables children's rights, welfare and protection laws to be enacted by the independent provincial legislatures (Canada, Third & Fourth State Party Reports to the UN Committee on the Rights of the Child, 2012, Para. 314). In British Columbia for example, legal measures have been adopted to provide for and facilitate the implementation of Article 12 in residential care facilities (Canadian Coalition for the Rights of Children, 2011:22; Turpel-Lafond, 2012:30). The complaints mechanism in this province is the focus of this study because of its meaningful content and comprehensive complaints handling process that are in line with the requirements of Article 12 of the CRC.

According to Lundy, Kilkelly, Byrne and Kang (2012:71), the population of children in Canada in 2010 was about 6,920,000, or 20 per cent of the total population of the country. This included children in residential care. Mulcahy and Trocmé (2010) also note that between 2002 and 2007, the population of children in care across Canada was about 67,000 with a "rate of 9.2 children in care per 1000 children". Aside from their out of-home circumstances,

these children are often under immense pressure to deal with a variety of social ills. Davidson (2010:405) observes that such children's life experiences are characterised by violence, abuse and fear. This underlines the importance of hearing the voices of children in care by means of a complaints procedure as provided for by Article 12 of the CRC. Unfortunately Canada has not yet domesticated this requirement into its national law (Martinson, 2014:9).

Although, there is no clear provision for children's right to be heard at the national level, British Columbia provided laws for the voices of children in residential care to be heard by means of a complaints procedure. In so doing, it also introduced independent bodies like the office of the Representative for Children and Youth that is mandated to work with children to ensure that their voices are heard, and their welfare improved. Furthermore, the Office of the Ombudsman is mandated to ensure that children are fairly treated in a manner that guarantees their rights and protection by the authorities (Representative for Children and Youth, 2010: iv)

4.3.2 Canada (British Columbia's) legal framework for the right of children in residential care to be heard by means of a complaints procedure

In order to accommodate the provisions of Article 12 of the CRC, Canadian legislation for children's rights has been associated with the provisions of the Canadian Charter of Rights and Freedoms, which, to some extent, has had some impact on federal law (Innocenti Research Centre, 2009:3; Lundy, Kilkelly, Byrne and Kang, 2012: 71). However, these efforts have fallen short of the country's obligation as a member of the CRC to fully incorporate the legal requirements of Article 12 (Innocenti Research Centre, 2009: 12-13; Turpel-Lafond, 2012:29).

Building on the above discussion, it can be implied that there is no formal legislation at federal level that enforces the right of children in residential care to be heard and for their views to be given due weight. The Committee's General Comment No. 12 (2009) advocates that state parties must take responsibility and provide for children to be part of decisions-making in matters that affect them (Bell, 2008:29). The absence of federal legislation in this respect may result in children's rights as well as the requirements of the international instrument being violated (the Committee General Comment No. 12, 2009).

It is further noted that due to the absence of provisions for children's rights at the federal level, there is also no Commissioner or Ombudsperson for children at this level. Conversely, some provinces have established Children's Commissioners and Ombudsmen to promote children's rights, including the right of those in care to be heard and for their views to be given due weight as required by the CRC (Canadian Coalition for the Rights of Children, 2011:22). It is unclear why Canada decided to ignore her international obligations to the CRC in terms of Article 12 at federal level but appreciates its importance and applicability at the provincial level. Article 12 might be more effective if it were to be incorporated at federal level.

Since it is allowed by federal law, British Columbia promulgated laws that enable the voices of children in residential care to be heard by means of a complaints procedure (Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General), 2004 SCC 4, 2004; Lundy, Kilkelly, Byrne & Kang, 2012:71-73; Canadian Coalition for the Rights of Children, 2011:22). Sinclair (2004) agrees that children and youth participation in decision-making must be real - therefore it must be legislated.

4.3.3 Complaints procedure as a tool for hearing the voices of children in residential care in British Columbia

In accordance with the requirements of Article 12 regarding a complaints procedure for children in care, British Columbia regulated for children's right to be heard in residential care in its Child, Family and Community Service Act of 1996, Chapter 46, Part 4, section 70(1). Section 70(1)(b)&(c) provides that children in care have the right to express their views and be informed about any decision to be taken that concerns them. Such consultation must take into consideration their ability to express their opinion in all matters that affect them. Section 70(1) (m) provides for children's privacy during discussions with a legal representative or any other person that may be assigned to assist children under the "Representative for Children and Youth Act, the Ombudsperson, a member of the Legislative Assembly or a member of Parliament".

The above sections give children the right to consult privately with legal experts or a children's representative for assistance and guidance in addressing abuse, violation of their

rights, and any other issues that concern them. Furthermore, section 70(1)(o)(i)&(ii) provides that children shall be informed of their rights and the procedures for such rights to be enforced in accordance with the “Child, Family and Community Service Act of 1996” or the “Freedom of Information and Protection of Privacy Act”. These provisions give children the right to be informed about their rights including their right to be heard, and their right to access all information deemed necessary for their welfare, safety and protection, including the steps and approach to be taken when pursuing such rights (Child, Family and Community Service Act of 1996).

The complaint resolution process is also provided for in section 93(1) under B.C. 527/95 (Joint Special Report on Hearing the Voices of Children and Youth, 2010:10). Based on the Child, Family and Community Service Act of 1996 mentioned above one may agree that it sets in motion the establishment of strategies to promote children’s right to be heard and to be part of any decision that affects them. However, a common challenge with legislation is its applicability and implementation. Unless children, staff and other stakeholders are educated on the applicability of legislation, it becomes worthless. Turpel-Lafond (2012:30) adds that it is essential that children receive “all necessary information and advice” so that they can make informed decisions that reflect their concerns and seek redress for possible wrongdoing. Dealing with legal matters that concern children can often be very challenging, which is why it is recommended that people working with children in care institutions must be well trained and versed in their needs and legal rights (the Committee, 2009; Odhiabo & Maina, 2011:8).

To improve on the complaints procedure in British Columbia, the authorities ordered a review of the existing complaints procedure as a standard quality assurance process. Upon completion of the review process a revised complaints resolution process was established in accordance with the recommended best practice mechanisms for complaints handling and other forms of dispute resolution (Representative for Children and Youth, 2010:24-25).

4.3.4 Content of the Complaints Resolution Mechanism in British Columbia

The current framework for the complaints procedure for children in residential care in British Columbia is based on the recommendations made after the 2009 review. The review report recommended that the following key elements should be part of the revised complaints mechanism: Awareness, accessibility, timelines for complaints handling, fairness,

transparency, accountability and quality assurance (Representative for Children and Youth, 2010:4). It pointed out that a child-centred complaints resolution process must enable children to know that:

(1) They can complain about services; (2) if they are not sure of who to talk to or how to proceed, they can contact the office of the Representative for Children and Youth; (3) and if they are unhappy with the process or response they receive to their complaints, they can contact the Office of the Ombudsperson; (4) The process needs to start and be completed within 30 days of a complaint; (5) decision makers should not be involved in the issues under complaints; (6) young people should be engaged in providing information about how to make the process accessible; (7) the process needs to be simplified; (8) The Ministry of Child and Family Development must have a province-wide system to track complaints; (9) a comprehensive quality assurance regime is required for continuous learning, and (10) the Ministry of Child and Family Development needs to make sure that delegated Aboriginal Agencies follow complaints resolution standards.

It was necessary to include these elements in the revised complaints resolution process due to the recognition that children's concerns and participation in matters that affected them in the past was not effective and child-centred. In the past children could not express themselves, their participation in decisions concerning them was limited, children were only informed about certain decisions that affected them after they had been made, and access and administrative processes were not favourable to children (Representative for Children and Youth, 2010:14). The diagram below shows the sequence and flow of complaints in the revised complaints mechanism for British Columbia.

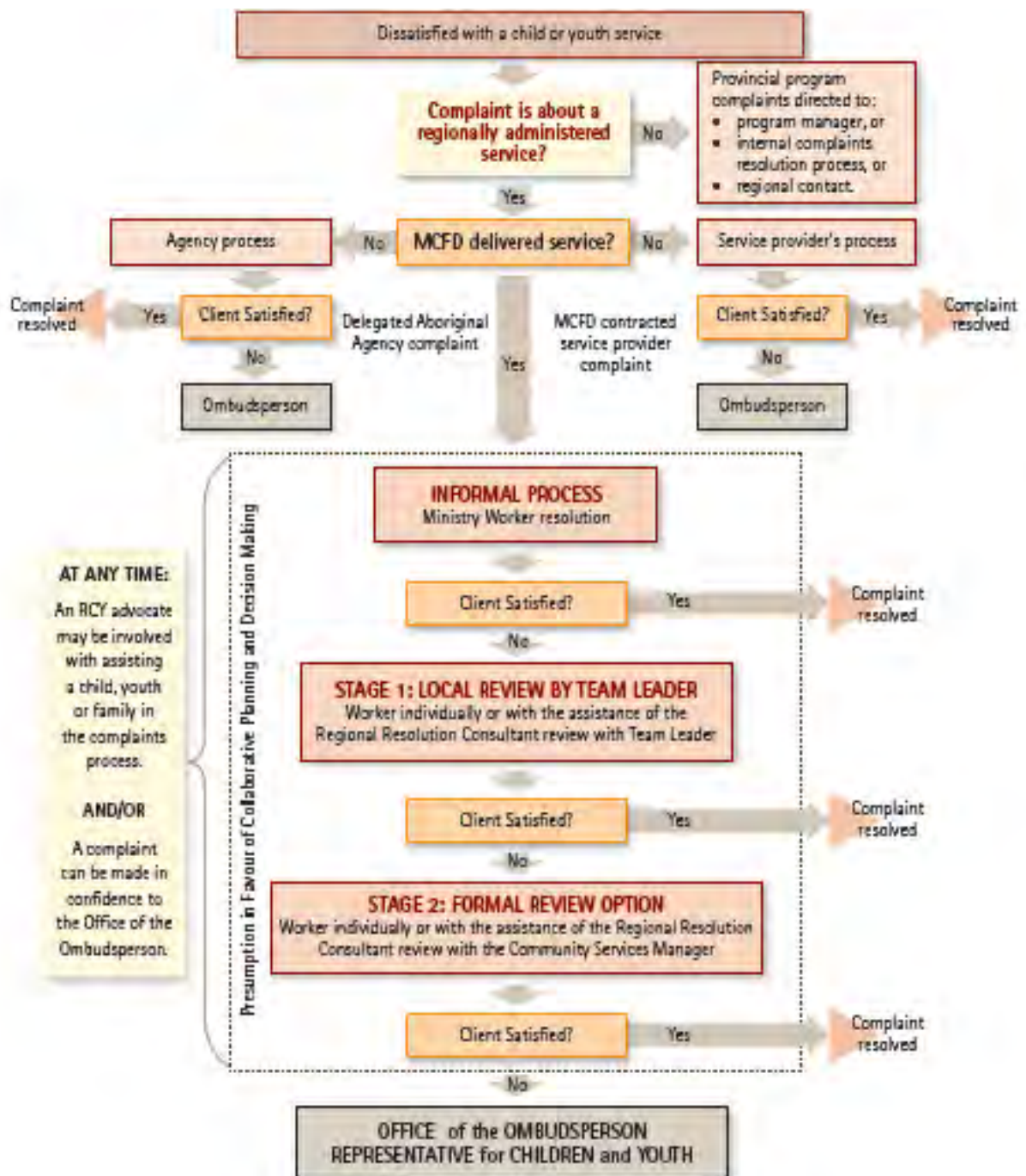
The Complaints Resolution Process in British Columbia, Canada

Awareness and presentation of complaints: Armed with knowledge of the right to lodge complaints, children may lodge complaints whenever possible. When a complaint is lodged staff associated with the process assesses the complaint to determine the right office to address it. If the child's complaint is to be addressed at provincial level it is sent to the programme manager, the internal complaints resolution process or the regional contact office. If it is considered that the complaint should be addressed at a higher level, it is sent to the Ministry of Children and Family Development (hereinafter referred to as MCFD). In the event that the complaint is handled at the provincial level, it will be investigated and evaluated for a possible response, through the service provider's process. If the outcome is

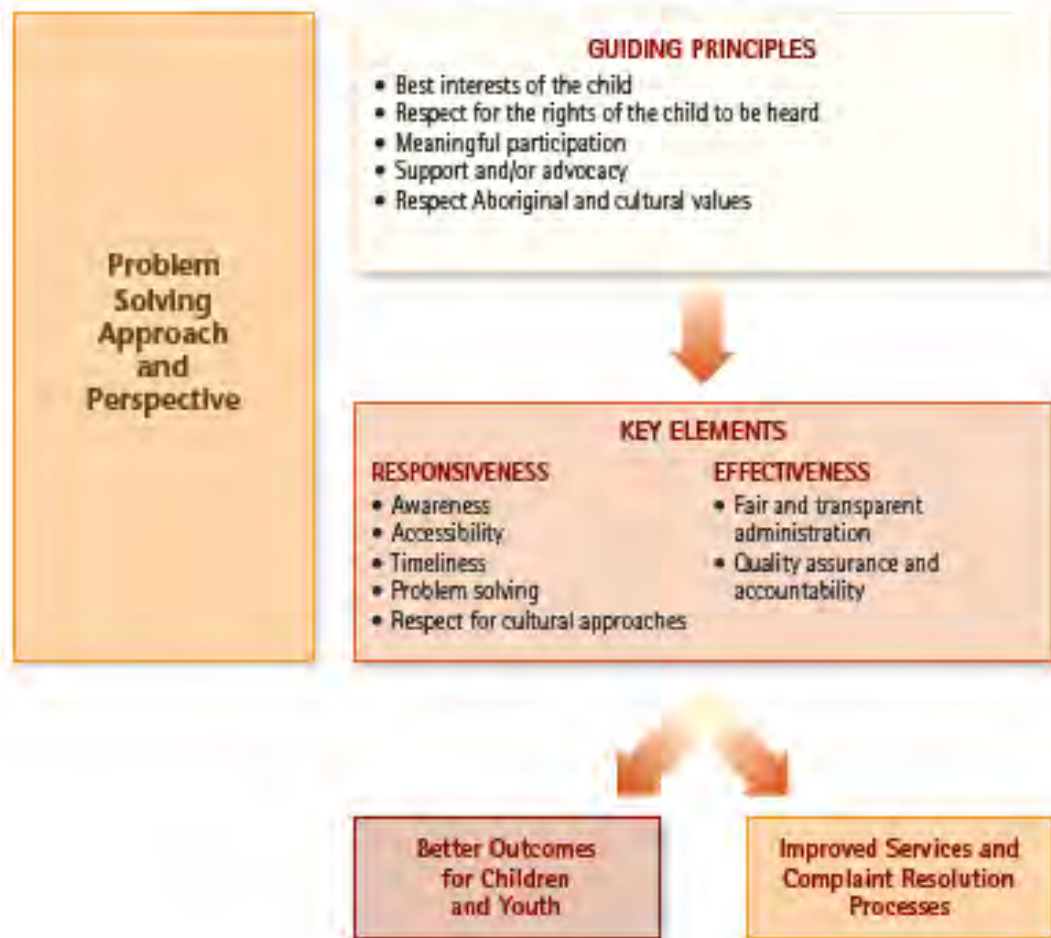
positive, and the child is satisfied, the matter is considered resolved. In the event that the matter is not concluded to the child's satisfaction, it is forwarded to the office of the Ombudsperson for further deliberation and complaints resolution (Representative for Children and Youth, 2010:11).

In a case where the complaint is addressed at a higher level than provincial level, the complaint is sent to the MCFD. At this level the complaint is examined and evaluated with the hope of reaching a positive solution. If the complaint is not resolved at this stage, it is forwarded to either the service provider's process or alternatively sent to the agency process for further investigation and evaluation. If a conclusive response is achieved and the child is satisfied, the process is considered resolved. However, if the complainant is not satisfied, it is sent to the Ombudsperson. If the outcome of efforts at the level of the MCFD is positive but needs further attention, it will be sent to the informal process (Ministry worker resolution). If it appears that the complainant is satisfied with the outcome at this level, the process is considered resolved. If not resolved at this stage, the matter is forwarded for local review by the team leader (Worker individually or with the assistance of the Regional Resolution Consultant's review with team leader). If the complainant is satisfied with the outcome, the process is closed. If the outcome is negative, the matter is sent for formal review (Worker individually or with the assistance of the Regional Resolution Consultant's review with the Community Services Manager). If the complainant is satisfied with the outcome at this stage, the matter is considered resolved. However, if the outcome is not accepted by the complainant, the matter is sent to the office of the Ombudsperson or Representative for Children and Youth (Representative for Children and Youth, 2010:11). See the flow chart below.

Fig 4.2 Flow chart for the Child-Centred Complaints Resolution Approach in British Columbia (Representative for Children and Youth, 2010:11)



Framework for a Responsive and Effective Child-Centred Complaint Resolution Approach



A practical illustration of the complaints resolution process discussed above is reflected in the case of a 13-year-old youth in a care facility in British Columbia. In the said case, the youth disagreed with certain terminology used in his care plan. When he raised the matter with the authorities at the facility, he felt that his views were not taken into consideration. He solicited the assistance of an advocate, who took the matter to the Regional Office of the Representative for Children and Youth for review. The social worker, leader, manager and director of the facility were all involved. The youth was then informed that the matter would be reviewed with him every three months and if he still felt that his views were not considered, he should contact his advocate for further review (Representative for Children and Youth 2010:13-14). This case clearly demonstrates an effective complaints procedure that is structured in a manner that provides space for children in care to be heard and for their views to be given due weight, thereby promoting their right to development.

Based on the information above, British Columbia's complaints procedure for children in residential care is commendable in terms of the requirements of the international instruments discussed in chapter two. It is a model for hearing the voices of children in residential care in British Columbia. A key point to note is the establishment of the Office of the Representative for Children and Youth and the Office of the Ombudsperson set up to manage children's issues and help them enjoy their rights, welfare and participation in matters concerning them.

4.3.5 Lessons to be learned by South Africa

Based on the legal provisions for children to be heard, and to be part of all matters affecting them in British Columbia, and the content and complaints resolution process established above under sections 4.3.2 and 4.3.4, South Africa can learn a few lessons from British Columbia. In British Columbia, the law provided for the establishment of independent bodies to manage and coordinate all children's services in order to protect children's rights and welfare and promote effective service delivery. The Office of the Representative for Children and Youth is mandated to work with children to ensure that their voices are heard, and their welfare is maintained. The Office of the Ombudsman is mandated to ensure that children are fairly treated in a manner that guarantees their rights and protection by the authorities. Using independent bodies to manage and oversee the implementation of children's rights and welfare and effective service delivery appears to be an important means of assisting the state to ensure that children's rights are effectively implemented. This initiative is similar to those of Kenya and the UK which may imply that it is a worthwhile endeavour to help maintain and discharge children's rights, welfare and other related services. Unfortunately this practice has not yet been implemented in South Africa despite recommendations from concerned individuals and other institutions for such facilities to be established to promote children's rights.

Another important lesson that South Africa may consider is the manner in which the content and process of the complaints resolution process is carried out. Unlike in South Africa, the content and process of British Columbia's mechanism explicitly mentions the importance of ensuring that children are aware of their right to be informed, the existence of the complaints procedure, and how it can be accessed and used; their right to contact the Office of the Representative for Children and Youth and the Office of the Ombudsperson if they need to

do so, and time-lines for a response to complaints. For purposes of clarity, the process includes information about the various levels at which complaints are dealt with. The need to improve the complaints procedure is also part of the information provided; this occurs through periodic review of the complaints resolution process as a standard quality assurance exercise to update the current complaints procedure. The reporting process is straightforward and logical and can be followed easily. This level of very vital information is lacking in the South African complaints procedure, and needs to be incorporated.

4.4 United Kingdom

4.4.1 Introduction

The UK, which includes England, Wales, Northern Ireland and Scotland, is a constitutional monarchy. England, Wales and Northern Ireland have a common law system, while Scotland has a mixed common and civil law system (Lundy, Kilkelly, Byrne & Kang, 2012:115). Individual jurisdictions will occasionally be used to highlight specific concerns. The UK signed and ratified the CRC in 1990 and 1991, respectively (Lundy, Kilkelly, Byrne & Kang, 2012: 115).

With regard to children in care, it is important to note that the increase in the number of children in residential care is not new to contemporary society. Dansokho, Little, and Thomas (2003) estimate that about 80,000 children in the UK are placed in different types of boarding houses “each night per school year”. Little, Kohm, and Thompson (2005:3) state that about 10,000 children are placed in different residential facilities provided by child care agencies across the UK. This figure speaks for itself. Therefore, hearing the voices of these children is of great importance for their social well-being, human rights and development. To ensure the rights and well-being of these children, the UK, through collaborative efforts and the coordination of its four member countries, established measures that provide for the voices of children in care to be heard and for their views to be given due weight in all matters concerning them by means of a complaints procedure. This endeavour is discussed in detail in section 4.4.3 after a discussion of the UK’s legal framework.

4.4.2 The UK's legal framework for the right of children in residential care to be heard by means of a complaints procedure

According to Lundy, Kilkelly, Byrne and Kang (2012:115), the UK has no written constitution but functions through the principles of parliamentary sovereignty and the rule of law. In terms of its international obligations, the authors add that, the UK has yet to incorporate the requirements of the CRC into its domestic laws. Deliberations on the decision to incorporate the CRC are on-going, to the extent that the four Children's Commissioners in the UK, and the Westminster Parliament's Joint Committee on Human Rights have all "recommended that the UK Government incorporates the CRC in their domestic laws" (Lundy, Kilkelly, Byrne & Kang, 2012:116).

On a more positive note, through a mix of legislative provisions and policy initiatives, the UK has been able to provide for the rights, welfare and protection of children to a considerable level in accordance with the CRC (Lundy, Kilkelly, Byrne and Kang 2012:115). Winter (2011:396) maintains that the UK has fared quite well in providing local statutes and other domestic frameworks that promote children's welfare, safety and development. This is further supported by earlier legislation where the country made tremendous efforts to enhance and provide for children's rights including their right to be heard by means of a complaints procedure in residential care institutions as provided for in the Children's Act, 1989; Children's Act, 2004 and Every Child Matters (The Children's Plan, 2007:8; Williams, 2002:26). Section 26(3) of the 1989 Children's Act provides that, "every local authority" is obliged to ensure that there is a procedure through which complaints can be made to them by any child or children under their care or the care of others (Williams, 2002:26). These efforts have been reinforced by the provisions of the 2006 Children's Act which also compel the authorities to promote the views of children to enhance their development (Early Childhood Forum, 2007:1). Although the UK has not yet incorporated the CRC into its domestic laws, the enactment of these statutes provides instruments through which children's rights, safety and protection can be achieved.

From the standpoint of individual member countries, children's right to be heard and for their views to be taken seriously is upheld through the enforcement of the following statutes: In England, section 1 of the 1989 Children's Act emphasises the paramouncy of children's welfare and section 55 of the Borders, Citizenship and Immigration Act 2009, provides for

the implementation of children's welfare and makes provision for children's rights (Lundy, Kilkelly, Byrne and Kang, 2012:118). The right of children to be heard, including those in residential care, is provided for in section 24D of the Children's Act 1989 which requires all local authorities to provide advocacy services and a complaints procedure for children and young people in the country (the Children's Act, 1989). In Wales, the rights of Children and Young Persons (Wales) Measure, which is now part of Welsh Law empowers stakeholders to deliver services to children in care, including the establishment of a complaints procedure through which children can make their voices heard (Lundy, Kilkelly, Byrne and Kang, 2012:123). Section 24D of the Children's Act 1989 that requires all local authorities to provide advocacy services and a complaints procedure for children and young people, including those in care, is also applicable in Wales (the Children's Act, 1989). The importance of these regulations for children as mandated by the CRC has been articulated by the Children's Rights Commissioner through awareness campaigns across the nation (Fortin, 2013:53).

Aside from providing children with the possibility of and a platform to lodge a complaint, the provision also provides for children and young people to acquire the services of an advocate to address issues relating to service delivery and living conditions. This provides for legal representation for children and young people so that their views and concerns are considered and acted upon on time (section 24D or 26, of the Children's Act 1989).

With regard to children's right to be heard, section 24D of the Children's Act (1989), which applies in England and Wales, provides that in situations where children intend to lodge a complaint with the assistance of a legal representative, the authorities must ensure that such assistance is provided to them. Most local authorities have provided independent advocacy for children during the process of lodging a complaint (section 24D of the Children's Act, 1989). A common practice which has emerged based on the provisions of section 24D of the Children's Act, 1989 is the use of a children's complaints officer in any complaints process that involves children. The responsibility of the complaints officer is to: (1) Work with the children by helping them understand the impact of their opinions and how the complaints procedure operates; (2) Ensure that children are well informed about the available advocacy services and the means of sourcing such services; (3) Interact with children and their legal representatives on the matter under the complaints process and ensure that the right advice for

possible solutions or alternatives to address the issue in an appropriate manner is acquired. Furthermore, a complaints officer's duties may include the following:

(1) keep a written or electronic record of complaints made; (2) the procedure followed and the outcome; (3) arrange for the investigation of the complaint; (4) appoint an independent person to assist in the complaints process; (5) monitor the progress of the complaint process; (6) keep the child making the complaint and key people informed at all stages; (7) ensure timescales are adhered to; and make observations and suggestions to the local authority on any action to take following an investigation (section 26A of the Children Act 1989).

In Northern Ireland, the children's rights set out in Section 3(1) of the Children (NI) Order 1995 emphasises the paramouncy of children's welfare and best interests. Similarly, the Northern Ireland Commissioner for Children and Young People (NI) Order 2003 was established to promote the effective implementation of regulations for the rights, welfare and protection of children in Northern Ireland. Article 3(7) of the Safeguard Board Act was established in 2011 to ensure and facilitate communication between stakeholders and the Children's Commissioner for Children and Young People, in line with the need to hear the voices of all children including those in residential care in accordance with the requirements of Article 12 of the CRC (Lundy, Kilkelly, Byrne and Kang, 2012:127).

With regard to the right of children in residential care to be heard, sections 26(2)(3) and 76(2)(3) of the Children (Northern Ireland) Order 1995 provide that the authorities must ensure that children in residential care or their representatives are allowed to express their views and feelings on all matters affecting them, while being mindful of their age, maturity, and cultural and language orientation. Section 6(1)(2) of the Children (Northern Ireland) Order 1995 requires that every authority provide a mechanism to facilitate representations and complaints from children and other members of the public about unsatisfactory services that may be directed to the appropriate authorities. Complaints and representations shall be conducted in accordance with the appropriate regulations set by the local authorities (the Children (Northern Ireland) Order 1995).

In Scotland, section 16 of the Children (Scotland) Act 1995, emphasises the paramouncy of the welfare and best interests of all children in matters affecting them. The rights and protection of children is provided for in the Commissioner for Children and Young Peoples (Scotland) Act, 2003. The Commissioner is mandated to promote all children's rights,

including their right to be heard by means of a complaints procedure and their welfare in accordance with the requirements of Article 12 of the CRC (Lundy, Kilkelly, Byrne and Kang, 2012:120-121). With regard to children's right to be heard, section 6(1) of the Children (Scotland) Act, 1995 provides that the authorities and all other responsible persons or entities must ensure that children are provided with the right to express their views in any decision-making that affects them if they wish to do so, while taking into consideration their age and maturity. In this respect, children of 12 and above must be considered to be mature enough to be able to form their own views (section 6(1) of the Children (Scotland), Act, 1995).

In addition to the above provision, section 16(1)(2) of the Children (Scotland) Act, 1995 provides that children's welfare and best interests must be paramount during any judicial processes concerning them, with their age and maturity being taken into consideration. The authorities must ensure that children are allowed to state whether they wish to express their views and opinions. Children must be allowed to express their views if they chose to do so and such views must be taken seriously without reservation (section 16(1)(2) of the Children (Scotland) Act, 1995). These provisions imply that all children in residential care, regardless of their circumstances or social status, have the right to express their opinion or views on all matters affecting them, either by themselves or with the assistance of a representative if they so desire. These rights must be provided to all children without reservation.

The Office of the Commissioner for Children and Young People was established to effectively promote and implement the rights of children and young people across the UK and in this case, Scotland (Commissioner for Children and Young People (Scotland) Act 2003, s4). Under this statute, the mandate of the Commissioner is:

- (1) Promoting and safeguarding the rights of children and young people, having regard to the UN Convention on the Rights of the Child;
- (2) Promoting the best interests of children and young people as a primary consideration;
- (3) Promoting the views of children and young people on all matters affecting them;
- (4) Encouraging equal opportunities;
- (5) Involving children and young people in the work of the Commissioner;
- (6) Carrying out investigations into whether service providers have given due regard to the rights, interests and views of children and young people;
- (7) Producing and publishing reports on the Commissioner's work and investigations (Commissioner for Children and Young People (Scotland) Act 2003, s4).

In addition, the Commissioner is required to ensure that the best interests and welfare of children and young people in “residential and foster care” are maintained, including access to independent and national watchdogs for children’s services (Commissioner for Children and Young People (Scotland) Act 2003, s4). The creation of an independent office to manage and oversee the effective implementation of children’s rights is important.

In terms of the complaints procedure for children in residential care, the Social Work (Scotland) Act 1968, s5B and the Social Work (Representations Procedure) (Scotland) Directions 1996 check; Circular SWSG 5/1996 provides that local authorities must establish complaints procedures in line with statutory regulations and guidelines. The mechanism must provide space for independent reviews to address situations where complainants are not satisfied with the complaints handling process (Social Work (Scotland) Act 1968, s5B; Social Work (Representation Procedure) (Scotland) Directions 1996 check; Circular SWSG 5/1996).

With reference to the above legal provisions for children, Winter (2011:398) contends that despite efforts to address children’s issues across the UK, concerns remain regarding effective implementation due to the lack of proper awareness and training of social services professionals on children’s rights. Closing this gap through sound awareness campaigns, and training and education on the importance of children’s rights, including their right to be heard in residential care, may increase respect for children’s human rights (Winter, 2011:398). Caregivers and other stakeholders should be informed and taught about the importance of helping children in residential care to express their views and opinions by means of a complaints procedure.

4.4.3 Complaints procedure as a tool for hearing the voices of children in residential care in the UK

The Children’s Act, 1989, as regulated by section 26 and 24D for Representation Procedure (Children) Regulations 1991 (S.I.1991/894) as amended, provides for a complaints mechanism and processes for children and other stakeholders. A reliable complaints procedure for children in residential care in the UK is obligatory since its implementation has been mandated by law. However, adopting the child-friendly complaints procedure recommended by the international instruments discussed in chapter two requires that children’s ability to understand its contents and applicability is respected (the Committee’s

General Comments No. 5, 2003). An ineffective complaints mechanism, coupled with a rigid and controlling culture in residential care may be counter-productive and therefore disadvantageous to children in care (Davidson, 2010:407).

Several authors (Denov, 2004:1-20; Lundy, Kilkelly, Byrne and Kang, 2012:116; Noel, 2005) have noted that, the lack of a reliable complaints procedure may be the result of a lack of interest in abiding by the requirements of the international instruments or barriers due to local culture and legislation. On a more positive note, the UK has been conscious of the need to ensure a reliable complaint mechanism for children in care, and has initiated periodic reviews of the content of its complaints mechanism. These aimed to ensure that the complaints mechanism meets the standards of the CRC, and that the concerns raised by the UN Committee on the Rights of Children about the mechanism are addressed (the Children's Plan, 2007: 8).

Some of the inefficiencies in the complaints mechanism in the UK are highlighted by Williams (2002:32-33), who found that only 20 per cent of children in residential care register complaints because they do not have access to child-friendly information and are not aware of their right to complain. The author adds that the few children that make the effort to complain said that this was not effective due to embarrassment, shame and their lack of ability to relate their painful experiences in cases of abuse or bullying. Children are sometimes afraid of what might happen to them if they complain about a staff member (Williams, 2002:32-33).

In response to Williams' findings, the British government came up with a revised complaints procedure that includes legal aid for children. Every Social Services Authority must appoint a qualified or experienced Children's Complaints Officer who is not staff or a line manager to facilitate complaints processes in care institutions. Upon receipt of a complaint the said officer will have to see the affected child, then talk with the appropriate manager, after which the necessary measures will be taken to address the situation (Williams, 2002:34). These forms of government intervention should be applauded as they give children the liberty to make their voices heard through complaints without fear of victimisation. They also inspire feelings of empowerment and development in children, as they know that the government has their best interests at heart.

Given the dynamics and diversity associated with children in residential care in terms of age, gender and needs, addressing their issues efficiently without a reliable and efficient complaints procedure is almost impossible (Kendrick, Milligan & Furnivall, 2004; Meltzer & Lader, 2004; van Beinum, 2008). Thus, an effective complaints procedure is crucial in UK care institutions. This is discussed in the following section.

4.4.4 Content of the complaints mechanism in the UK

Based on the provisions for complaints procedures discussed above under section 4. a standard complaints mechanism was established and the complaints process is presented below. In practice the complaints process operates in stages, comprising of stage 1, for problems that may lead to immediate or early resolution; stage 2, for problems requiring formal investigation by the authorities, using independent persons; and stage 3 for problems that may lead to review with independent persons (sections 26 and 24D, Representation Procedure (Children) Regulation 1991(S.I.1991/894) of the Children's Act, 1989).

The complaints handling process of a standard complaints procedure for children in residential care discussed in this section is considered to be the basic complaints handling model for the UK (sections 26 and 24D, Representation Procedure (Children) Regulation 1991(S.I.1991/894) of the Children's Act, 1989), from which each jurisdiction may formulate their individual complaints procedure to suit the requirements of local statutes. However, it is worth noting that the Representation Procedure (Children) Regulation 1991 was revoked and replaced by the Children's Act, 1989 Representation Procedure (England) Regulations, 2006, which regulate complaints procedures for children and other stakeholders. It provides that all residential homes and similar care facilities must respond to complaints and put in place a written procedure that must comply with the Community Homes Regulations 2002 (the Children's Act, 1989, Representation Procedure (England) Regulations 2006).

The complaints handling process in the UK

Those that may complain due to dissatisfaction with services provided or when their rights have been violated include: (1) children and young people in care with policy guidance on how to complain, including access to advocates, interpreters and signers; and (2) People or professionals who may want to represent or complain on behalf of children (the Children's

Act, 1989, Representation Procedure (England) Regulations 2006). The process of implementing a standard complaints procedure includes complaint receiving, facilitation and mediation, listening and responding to concerns, and providing advice or solutions and guidance on how to proceed with complaints in situations where one is not satisfied with the way the complaint has been handled (the Children's Act, 1989, Representation Procedure (England) Regulations 2006; Williams, 2002:26-35). As discussed below, the implementation process may be informal or formal.

Informal Process: The informal process to handle the complaints of children in residential care consists of a number of steps. If a complainant is not satisfied with the handling of a complaint about inappropriate service delivery, abuse or violation of rights by a staff member or other stakeholder, the complaints handling officer must respond as follows: (1) Advise and assist the complainant to acquire the services of an advocate, interpreter or signer; (2) check whether the complainant was comfortable with the complaint handling officer's service or may need someone else. If someone else is needed, assistance must be provided in that regard (the Children's Act, 1989, Representation Procedure (England) Regulations 2006).

The complaints handling officer must ensure that the person who is the subject of the complaint is not present during the complaint reporting, except where the complainant requests or demands his or her presence; (3) if the complainant is an adult, his or her information must be recorded in the complaints registrar and read out to the complainant. After this, the recorded report is again read out to the complainant for verification and corrections if any; (4) the complaints handling officer or member of staff who is recording the complaint must take immediate action to resolve the problem. Any action taken must be recorded in the record register; (5) if the complainant is a child or young person, the same recording process must be followed, with the necessary appropriate resolution process provided to the satisfaction of the child (the Children's Act, 1989, Representation Procedure (England) Regulations 2006).

If the problem cannot be resolved immediately, or within twenty four hours of the above steps having been followed, the complaints handling officer or staff member must help the complainant to prepare for the next stage. He or she must explain to the complainant what the next stage of the complaints handling process will be. This may include: (1) providing detailed information on the complaints handling process and a brochure if necessary, to the

complainant; (2) facilitating the acquisition of an interpreter in the event of any language barrier; (3) determining the complainant's intentions in relation to the outcome of the problem, which might help to direct the process of resolution; (4) informing complainants that they are allowed to channel their complaints to a person with whom they feel comfortable; and (5) putting in place a variety of possible methods to be used for communication by children and young people in accordance with their age and maturity (Representation Procedure (England) Regulations 2006, of the Children's Act, 1989).

Formal Process: The formal process for handling the complaints of children in residential care is composed of three stages which in turn contain a number of stages. In the first stage, (1) an audience is granted to the complainant upon arrival at the centre as the complaints handling officer proceeds to record the details of the complaint in writing; (2) the appropriate office is notified of the registered complaint; (3) guidance on how to address the problem is requested from the consent manager; (4) a draft resolution is then forwarded to the appropriate department for advice and endorsement; (5) the final resolution is then forwarded to the complainant within the shortest possible time, in the hope that the end result satisfies the complainant (the Children's Act, 1989, Representation Procedure (England) Regulations 2006).

However, in situations where the complainant is not satisfied, the matter proceeds to stage two of the formal complaint process. In this stage, (1) the complaint is investigated by a senior staff member who was not part of the initial process who must carefully and urgently address the matter and then forward his/her findings to an adjudicator; (2) If the outcome is not positive within the stipulated timeframe, an extension is recommended, and the complainant is informed and advised on the way forward and possible timeframe as to when the process might be complete (the Children's Act, 1989, Representation Procedure (England) Regulations 2006).

If the problem is not addressed in stage two, the matter proceeds to stage three of the complaint handling process, with prior notification to the complainant. At this stage, (1) the matter is presented to an independent panel of senior staff who shall meet and deliberate the matter in the presence of the complainant who may be accompanied by an advocate or an alternative representative; (2) a few days after this meeting the complainant must be informed of the ultimate decision, being the last and final stage of the complaints handling process (the

Children's Act, 1989, Representation Procedure (England) Regulations 2006). It is argued that the complaints procedure discussed above is sufficiently comprehensive to help children in care institutions in the UK communicate effectively with stakeholders.

4.4.5 Lessons to be learned by South Africa

South Africa can learn lessons from the discussion on the regulations and statutes under section 4.4.2 above, including the steps to be followed in the complaints procedure in the UK. This study has revealed that the UK has not only provided for children's right to be heard, but has taken steps to ensure that such rights are respected and implemented effectively by stakeholders. To achieve these objectives the UK enacted laws for the establishment of independent children's monitoring bodies across the four jurisdictions to facilitate and promote the implementation of children's rights. The study established that the Commissioners for Children and Young People in the four jurisdictions were mandated to take charge and oversee all issues relating to children's welfare, protection and rights including their right to be heard.

Given the congested care system and overloaded social welfare system in South Africa, the services of an independent monitoring body may be of great assistance in promoting children's right to be heard including their right to be heard by means of a complaints procedure in residential care. A functional social welfare system could be designed that operates with the support of independent monitoring bodies that children in care can safely take their complaints to in the event that the functional structures fail to address their problems. The Human Rights Commission could be adequate within the current framework. However, as suggested by the authors cited in chapter three of this study, the establishment of a Children's Commissioner's office could be considered.

Another important lesson is the use of Complaints Officers during complaints processes to assist children and their representative, if any, throughout the process. As noted earlier, it can be very challenging for children, especially those in disadvantaged circumstances to manage their complaints processes themselves. Based on the discussion in chapter three, it is suggested that Complaints Officers should be introduced in South Africa to assist children to use complaints processes effectively.

A further lesson lies in the structure of the complaints process in the UK. In contrast to that in South Africa, the complaints procedure in the UK is structured in such a way that complaints are classified as “informal and formal complaints” that may be dealt with in the three stages discussed above. This system could help to separate and address major and minor issues at different levels, which might facilitate the complaints handling process. The process and the assistance available to the complainant are well outlined and explained. Worth noting is the independence of the complaints handling process which renders it fair and as such, encourages children to express themselves freely. The procedure is explicit and child-friendly as required by the CRC.

4.5 Conclusion

This chapter discussed and assessed the complaints procedures for children in residential care in Kenya, Canada and the UK in order to identify the lessons South Africa can learn from these jurisdictions. The legal framework of the three countries was assessed and evaluated in order to determine how they modelled the implementation of their complaints procedures in residential care. The chapter highlighted the fact that these countries have commendable complaints procedures, considering their content and processes to address the complaints of children in care.

The chapter also highlighted very important lessons that South Africa can learn from other countries in order to improve its complaints procedure for children in residential care. Key points include the common practice of using independent bodies to manage and oversee children’s services instead of them being handled by the state; the use of a Complaints Officer to assist children and their representatives throughout the complaints process; and detailed explanations of the complaint procedures.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Hearing the voices of children in residential care by means of complaints procedures is a means for reliable and effective communication between children in care and their caregivers and staff in order to address children's problems. As discussed in chapter one, the objective is to provide and safeguard the rights and best interests of the child, with a view to enhancing support and the well-being of children in residential care in a manner that upholds their dignity and privacy.

It was established in chapter one of the study that children in residential care are usually deprived of their liberty and right to express themselves which makes them more vulnerable than adults due to their age, physical stature, intellectual abilities and lack of knowledge of their rights. Given the fact that children and youth, especially those in residential care, are among the most vulnerable members of society (Representative for Children and Youth, 2010), supportive measures need to be instituted to help them have a say in matters concerning them.

In accordance with the international instruments discussed in chapter two, South Africa and many other member states have adopted measures to protect children's rights, including their right to be heard by means of complaints procedure in residential care. Although South Africa and most member states have formulated and endorsed their own complaints procedures in line with the requirements of the CRC, the potential exists for member states to establish unreliable and ineffective procedures.

Given that it is crucial to hear the voices of children in residential care, a reliable and effective complaints procedure is of utmost importance. This study therefore aimed to determine whether the complaints procedure in South Africa is able to make the voices of children in care heard and to draw lessons from the three jurisdictions under study in order to improve the South African procedure.

The study's research questions were: (1) what do the international standards require in terms of complaints procedures for children in residential care facilities? (2) What complaints procedures are available to children in residential care in South Africa? (3) Do the existing complaints procedures in South Africa meet the standards of the CRC and the ACRWC? (4) What are the potential challenges to the implementation of the legal framework? (5) What can South Africa learn from Kenya, Canada and the UK in terms of complaints procedures? The aim, objectives and research questions were answered based on the evidence and information gathered, as presented below.

In conclusion, chapter one presented an overview on children in residential care and the importance of hearing their voices in matters that affect them. It was evident that hearing children's voices empowers them and further enhances their protection against abuse and violation of their rights as provided for in international instruments. Due to their vulnerable circumstances, children in care need a reliable complaints mechanism through which they can make their voices heard.

The legal framework for children's right to be heard and its importance was discussed in chapter two. A critical discussion of Article 12 of the CRC, including brief reference to the ACRWC and the OP3 highlighted the legal obligations of member states to adopt legislation that accommodates children's right to express their views in all matters affecting them, and to accord such views due weight. The core of the discussion in chapter two was the provisions of Article 12(1) and 12(2), as elaborated under section 2.2. The focus was on the right of children in residential care to be heard by means of a complaints procedure, and the requirements and key components of the complaints procedure as provided for by the Committee's General Comments No. 5 (2003). The discussion demonstrated that children are very important in society and are capable of making a responsible contribution in matters affecting them irrespective of their age and maturity.

Chapter three presented the South African legal framework for children's right to be heard. It noted that South Africa has regulated for children's right to be heard in accordance with the requirements of the international framework discussed in chapter two. The Constitution and other statutes provide for this right, including the right of those in care to be heard by means of a complaints procedure. Based on these legal provisions it is evident that South Africa has a functional complaints procedure in place. However, the study also revealed some concerns

in that the country's social welfare system is under severe pressure due to a shortage of social services professionals, excessive congestion, caseload backlogs, structural problems, a weak complaints procedure and financial difficulties. It was established that these issues contribute to inadequate implementation and compliance with the requirements of the international instruments discussed in chapter two. Considering these setbacks and the other concerns with the South African complaints procedure highlighted in chapter three, coupled with the fact that there is no provision for Children's Representative Councils in residential care, the following section presents recommendations aimed at improving the complaints procedure and the current system.

Chapter four presented the legal frameworks for children's right to be heard in the three selected jurisdictions, including the regulations for complaints procedures for children in care to express their views on matters that affect them. The discussion provided some important lessons for South Africa. Based on the information presented in chapter four, it was concluded that although South Africa has regulated for children's right to be heard in compliance with the requirements of the international instruments, there is room for improvement. The Committee's General Comments No.5 (2003), provide for a complaints procedure in residential care to help address abuse and violation of children's rights. The Committee recommends that the mechanism should be structured and presented in a manner that guarantees its reliability and encourages children in care to confidently use it to voice their concerns without being exposed to the risk of violence, victimisation and punishment.

It was established that for the above to be achieved, children should be provided with the means and access to interact with an Ombudsperson, Children's Commissioner or other responsible entity that can oversee the operations of all children's institutions, to ensure that proper and appropriate attention is paid to children's concerns. An interesting and important initiative among the three jurisdictions discussed in chapter four is periodic reviews of their complaints procedures as a quality assurance measure of service delivery to children in care. This is unfortunately not the case in South Africa where the content of the complaints procedure has not been reviewed since the adoption of the Children's Act 38 of 2005. Based on this conclusion, the following recommendations are presented to improve South Africa's complaints procedure.

5.2 Recommendations

Based on the information gathered in the study and the conclusion presented above, the following recommendations are made:

South Africa should review its policies and statutes to incorporate provisions for independent monitoring bodies and agents to promote children's right to be heard. This may include the services of the Human Rights Commission, and the establishment of an Ombudsperson and Children Commissioners to oversee, manage and promote the effective implementation of children's rights including the right of those in residential care to be heard by means of a complaints procedure. This will enable the operation and activities of residential care facilities to be monitored to ensure that they respect the law and promote the rights of the children in their care. Article 12 of the CRC requires that children be provided with access to an Ombudsperson or Children's Commissioners for assistance in dealing with their problems and difficulties without the fear of being punished or ostracised in the care institution.

In order to promote children's right to be part of and express their views in matters affecting them in residential care, Children's Representative Councils could be established in residential care facilities so that children can be included in decision and policy making on matters affecting them in line with the requirements of the CRC. South Africa should also consider revising its policies on the complaints procedure so that timely reviews of these procedures as a measure of quality control are instituted in the best interests of children in residential care. As noted in chapter three, South Africa makes no provision for children's privacy and confidentiality during a complaints process. This is not in line with the standard procedures for a complaints mechanism provided for by the CRC. Such measures should be included in the complaints procedure.

South Africa should promote greater awareness of the right of children to be heard and for their views to be given due weight through sensitisation campaigns, as well as providing for proper training of social workers and childcare workers in child care and protection. This would enhance efforts to effectively implement children's rights in the country and could also assist in managing the caseloads carried by social workers, thereby ensuring effective service delivery to children in care. An informed and well trained workforce would facilitate

government's efforts to fully comply with the recommendations of the international instruments on children's right to be heard.

Another major concern highlighted in the UNICEF Annual Report (2012:12-13) is the partial funding of NGOs. As noted in chapter three under section 3.4, insufficient financial support for residential care facilities and other NGOs has contributed to poor service delivery to children in care, and frustrated efforts to effectively provide for children's rights such as their right to be heard in residential care. Furthermore, in line with the suggestions in chapter three, it is recommended that the authorities address the shortage of social workers and other social services professionals in child protection systems across the country. It was also established that there is need for effective deployment of other child and youth care workers, auxiliary social workers and community development workers to remote communities to assist with the implementation of a regulated service to children in care.

Finally, further research should be conducted on hearing the voices of children in residential care by means of a complaints procedure in South Africa. This study found that there is a paucity of academic research on this topic in the South African context.

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