

The Orphanages and Other Charitable Homes (Supervision and Control) Act, 1960 Main Features, Critique and Challenges¹

Introduction:

The task of caring for the vulnerable and marginalized sections of society is extremely challenging and requires enormous dedication and professionalism. There are thousands of genuine organizations that have crafted the lives of children who have excelled as happy and capable human beings. These children have drawn from their inherent resilience as well as the nurturing they received in such homes. Any legislation that attempts to register and monitor residential care should promote and affirm the positive achievements of genuine organizations that respect and nurture children.

However it is more important to recognize the widespread misuse of power by NGO welfare workers (as well as state authorities) that are backed by the presumption of ‘good faith/good intention’. The vulnerability and powerlessness of the child are clear ingredients for abuse and exploitation of institutionalized children. This provides the mandate for the state to evolve suitable mechanisms to prevent and penalize neglect and abuse of children in residential care.

There is a denial of autonomy for children on the whole, and more so for those who are assumed to be in need of care and therefore institutionalized. The negative impact of institutionalization on a young growing person, in addition to the non-recognition of the child as a ‘person’ and rights holder necessitates a support structure beyond the institution to enable the child’s effective re-integration into the community.

It is important to note that there are several legislation under which NGOs may get registered (Society’s Registration Act 1860, the Indian Trusts Act, the Indian Trusts Act, 1882). This presentation hopes to provide a brief overview and critique of the Orphanages and Charitable Homes Act 1960, highlighting certain challenges for the Board of Management that has been set up in Karnataka.

Though the Act talks mainly of certification (at the point of entry for purposes of recognition), it also speaks the language of ‘monitoring’ (as read into Section 7, 8 and 9).

Main Features of the OCH Act (1960)

Objective: The Preamble of the Act states the object as being –‘to provide for the supervision and control of orphanages, homes for neglected women or children and other like institutions and for matters connected therewith.’

Comment:

¹ Paper prepared by Arlene Manoharan, Centre for Child & the Law (CCL), NLSIU, Bangalore and presented at a meeting to discuss the ‘Implementation of the OCH Act 1960’, organized by KSCCW in collaboration with the Department of Women and Child Development (DWCD), GoK on 16th December 2005

- The usage of the term ‘children in need of care and protection’ is recommended in line with internationally recognized terminology.
- The word ‘control’ reveals that there is scope to include monitoring and quality control within its purview and should not be interpreted to mean ‘policing’.

Scope: The Act applies to the whole of India except Jammu and Kashmir and to all children who have not completed the age of eighteen years. As per Section 3, the Act does not apply to a hostel/boarding attached to an educational institution, protective homes under IPTA or other statutory institutions. It overrides anything inconsistent with any other instruments governing recognized homes.

Comment: It will also cover children residing in all alternate forms of residential care including foster care.

Monitoring Authority: Board of Control:

The Act provides the space for democratic election to the Board from Managing Committees and setting up of Selection Committee (SC) to nominate and select other members. The functioning of the Board should be such that it functions in a highly professional manner and attracts the voluntary and active support of the child rights movement, families and communities to ensure that children and vulnerable women are protected.

Functions of the Board (Section 7): The functions of the Board are to supervise and control generally *all* matters relating to the management of homes in accordance with the provisions of this Act and Rules, to be bound by such directions as the State Government may give and to inspect facilities coming under the purview of the Act (as a Board or any single member authorized by it in writing).

Funds of the Board: Section 10 provides for funds of the Board, which shall consist of contributions, subscriptions, donations or bequests made to it by any person, and grants made to it by the State Government of any local or other public body. This fund is meant for administrative costs.

Staff of the Board: Section 11 states that ‘subject to the Rules, the Board may appoint such officers or employees as it may think fit and determine their functions and conditions of service.’

Delegation of powers: Section 12 states that subject to the control of the State Government, the Board may by general or special order delegate to the Chairman or any other member or any officer thereof such of its powers and functions under this Act as it may deem necessary...’.

Comment: In Karnataka for example, by passing a special government order, the Child Rights Monitoring Cell that has been set up under a previous GO² could be empowered with certain responsibilities to implement this Act. In Tamil Nadu, such a Cell has been visualized in the Rules itself. (See Rule 2 (d))

² Copy of this GO was unavailable at the time of writing this paper.

Recognition of Homes: No person can maintain a home unless recognized under this Act, with a three month time period before which an application may be made. If the Board refuses recognition, the grounds have to be communicated to the person and he/she should be given an opportunity to be heard. No fee to be charged for recognition and the certificate is non-transferable.

Contents of certificate: As per Section 16 the certificate shall contain basic information of the home, number of homes, minimum standards, and other conditions or particulars as may be prescribed. The proviso clause and sub clause (2) and (3) of Section 16 also mention that the Superintendent of a Home for women should ordinarily be a woman, and that persons of both sexes shall not ordinarily be housed in the same institution.

The minimum standard clause in this Section states – ‘the minimum standards regarding boarding, lodging, clothing, sanitation, health and hygiene which, having regard to the conditions of the locality in which the recognized home is situated and its resources should be complied with in the home.’

Critique: This Section lists areas for compliance in addition to the Rules made under Section 29. 2. g) - i.). We must recognize that other than stating that minimum standards need to be adhered to, the Act is not really laying down any minimum standards and leaves it to the discretion and rule making power of the States to determine these.

Effect of the Act on instruments governing recognized homes: In this context it is useful to look at Section 4 of the Act which has specified that ‘the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any instrument governing a recognized home. Since the Beijing Rules (though not legally binding) have been adopted in 1985 much after this enactment, Section 16 should incorporate the principles for institutional management as well. Further the Supreme Court judgement in *Vishaka vs State of Rajasthan* provides for international law to be applicable even if not yet incorporated into domestic law. This provides the opportunity to incorporate relevant provisions of the UNCRC while implementing Section 16³.

Core standards and non-negotiables: The minimum standards clause has a lacuna in sub clause (e) that makes it possible for the location and the resources to influence decisions on minimum standards. It could mean that if a child has the misfortune of being admitted into a home in an impoverished locality and there are insufficient funds, the standards could be lower. This is a clear case of violation of Article 2 (non-discrimination principle) of the UNCRC. The Board should therefore work towards notifying certain core non-negotiable standards as well as other recommended standards. The Board should only allow compromises on the latter, and that too only when justified.

Revocation of certificate: As per Section 17, the Board may, (without prejudice to any other penalty) may revoke the certificate on certain grounds including non-compliance with conditions of certificate, unsatisfactory management that is ‘highly prejudicial to the moral and physical well-being of the inmates, or if in the opinion of the Board, it is

³ (See *Vishaka and others vs State of Rajasthan* (1998) 3 Butterworth’s Human Rights Cases 261).

unsuitable for that purpose. Similar to situations where the Board may refuse a certificate, here too, the person/organization shall be given an opportunity to be heard and to appeal.

Status of inmates on revocation: As per sub clause (3) of Section 17, the Board may direct that the inmates be restored to the custody of parent, husband or lawful guardian, transferred to another recognized home or entrusted to the care of any other fit person.

Surrender of certificate: The manager may also surrender the certificate issued giving six months notice.

Management of Recognized Homes: The Act places a responsibility on all such institutions to set up a Managing Committee, whose members, powers and functions etc are to be specified in its constitution.

Duty of the Manager of such Homes: Section 21 of the Act specifies that the Manager has a duty to comply with all the requirements of this Act, rules, regulations, directions and orders there under, in respect of every woman or child admitted into the recognized home until the woman is rehabilitated or the child completes the age of 18 years or until the certificate ceases to have effect. Section 22 then qualifies this responsibility by stating that the inmate may be discharged earlier if he/she is fit to be so discharged. Sub clause (2) provides for the inmate to give consent through a declaration prior to such discharge, marriage or entrustment, as the case may be, and, *if the inmate to be given in marriage is a minor*, unless the Board, or officer as the case may be has, after recording the reasons in writing, given its or his approval.

Comment: This section is similar to the JJA 1986 whose main thrust is institutionalization till the child reaches 18 years and not focusing on the non-institutional approach of right to family and community based care.

Protocols to be followed in situations of abuse, neglect or exploitation of inmates: Section 23 of the Act calls for a written report to be sent to the Board explaining the cause of death.

Comment: The Board should evolve information packages for NGOs on this issue. The Managing Committees should be instructed to file a Police complaint as well as a report to the Board in all cases where there is *prima facie* evidence of abuse, exploitation or neglect by its own staff. Failure to report such cases should be awarded a penalty and this should be provided for in the Rules under this Act.

Penalties: As per Section 24, penalties for noncompliance with the Act, Rules, Government orders, regulations and conditions of the certificate, is punishable with imprisonment which may extend to three months, or with fine, which may extend to Rs. 250/-, and in the case of second offences, six months or fine up to Rs. 1000/-. As per Section 27, there is a 'good faith' clause as well. Further, as per Section 28, the state has the power to exempt homes as well, though these exemptions have to be reviewed in consultation with the Board every two years.

Sanction for prosecution: Prior to any prosecution, the sanction of the District Magistrate needs to be taken. This provision serves as a check and balance to the power and arbitrariness of the state over legitimate civil society initiatives.

Persons performing functions under this Act to be public servants: As per Section 26, the members or any person to whom powers have been delegated under this Act will be deemed to be public servants within the meaning of Sec 21 IPC. This enables them to take suo-moto cognizance of crime and take appropriate action.

Exemption clause: Section 28 provides for the State to exempt, subject to such conditions, restrictions or limitations, if any, as it may think fit to impose, such class of homes or home from the operation of all or any of the provisions of this Act. Sub clause 2 provides for a check and balance to this discretion by making it subject to review every two years in consultation with the Board. This calls for a vigilant approach to such exemptions so that this does not end up becoming a lacunae in the law, enabling unscrupulous Managing Committees to get exemptions and thereby a license to operate without adequate monitoring and control.

Rule making powers: Section 29 provides for Rule making powers for each State. Areas include elections to the Board, disqualification for membership to the Board, funds, allowances for the members, appointment of staff, calling of returns and other information by the State Government from the Board and the Managing Committees, details of application form other than those specified in Section 9, maintenance of registers and accounts by the Board and *any other matter*. As in the case of the Rule making process in Karnataka, such spaces need to be claimed and utilized in order to rectify deficiencies in the law on the one hand and flesh out a rights perspective on the other.

Power of the Board to make Regulations: In addition to the Rules that are to be notified by the State, the Board has powers to make regulations not inconsistent with this Act and the Rules. These powers could be used to frame regulations in the following areas – time and place of meetings of the Board, maintenance of minutes, appointment of sub-committees, supervision and control of the management of recognized homes, inspection of homes, calling of returns and other information by the Board from Managing Committees, reception, care, treatment, maintenance, protection, training, welfare, instruction, control and discipline of inmates, visits, communication, leave, discharge, transfer, reports of Managers, and any other matter found fit.

Conclusion: One may conclude this section by stating that the OCH Act is useful in providing space for delegated legislation that could compensate for the inherent weaknesses in the Act itself. Pending a more rights centric and comprehensive law, it is possible to work the Act in the interest of children and genuine child care facilities on the one hand, and to curb and penalize violations on the other.

OCH State Rules - (Karnataka)

Karnataka: A first reading of these Rules will clearly point out that they fail to adequately utilize the powers and spaces for Rules making. The substantive contribution made by these Rules comes far short of the need to create enforceable norms and standards based on a rights perspective and in recognition of the varying needs of the child. The traditional thrust on accommodation and sanitation and the complete non-recognition of the other socio-psycho-familial needs and rights of children.

Discussions with the DWCD have indicated that there are practical problems relating to the implementation of Rule 3 that deals with the issue of elections to the Board from Members of the Managing Committee. The Rules fail to specify the actual details relating to expenses of the staff and the Board. Rule 13 specifies the following factors that need to be taken into account while granting certification. These include a very generalized guideline relating to the character, antecedents, social status, reputation of the applicant, suitability of the applicant, reputation of any institution run by the applicant, character etc of the members of the proposed Managing Committee, accommodation and sanitary facilities, names of other such institutions in the area. The situation seems to be similar in the other two State Rules

It is important to mention that the Government of Karnataka had passed a GO⁴, which is indicative of the Government's willingness to move towards a more detailed normative framework to ensure quality care for children in NGOs. It attempts to build parent's involvement, to provide for the varying needs of the residents in terms of physical arrangements etc though these have not been specified in detail. It calls for the housemother to be trained and attempts to articulate an admission policy. It specifies that siblings should not be separated, provides for regular contact of residents with their families and mentions that play facilities should be provided. This demonstrates the intention to create child friendly homes based in a rights perspective. However, it is clear that a much more detailed and comprehensive provisions incorporating the UNRC, Beijing Rules etc need to be made and these should be given the status of State rules in order to ensure that they are legally binding and enforceable.

⁴ GO number DWCD/71/ma ba e/2002 Bangalore dated 26.6.2002.