CHILDREN WITHOUT ADULT CAREGIVERS AND ACCESS TO SOCIAL ASSISTANCE

Workshop Report

Hosted by the Children's Institute, University of Cape Town and the Alliance for Children’s Entitlement to Social Security

20 – 21 August 2003

Report compiled by Solange Rosa and Wieland Lehnert
Acknowledgements

The Children’s Institute, University of Cape Town, and the Alliance for Children’s Entitlement to Social Security (ACCESS) gratefully acknowledge the input of the presenters at the workshop, who contributed in making it a lively and active debate: Prof. Sandra Liebenberg (Community Law Centre, University of the Western Cape), Beth Goldblatt (Centre for Applied Legal Studies, University of the Witwatersrand), Jacqui Khumalo (Thandanani Children’s Foundation), Annette Cockburn, Ronel van Zyl (South African Law Reform Commission), Ashley Martabano (Women’s Legal Centre) and Rodgers Hlatshwayo (National Department of Social Development).

Our thanks too, to the organiser of the workshop, Elizabeth Myburgh (Children’s Institute) and to Matthias Lehnert for assisting with the compilation of the workshop report. The report was edited by Charmaine Smith (Children’s Institute) and designed by Jacci Rudling from Art Design.

And finally, we need to acknowledge the funders who made this workshop possible, namely Atlantic Philanthropies, the Joseph Rowntree Fund and the Open Society Foundation of South Africa.
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Workshop Report

© 2004 Children's Institute, University of Cape Town and the Alliance for Children's Entitlement to Social Security
I. Introduction and overview of the workshop

The workshop began with an overview by Solange Rosa, senior researcher at the Children’s Institute, University of Cape Town, about the general problems faced by child-headed households, and in particular the issues which would be raised during the workshop. She stated that South Africa is facing an increasing orphan crisis as a result of HIV/AIDS, and that the phenomenon of children living without adult caregivers would therefore likely increase as well. It is however an enormous problem that these children are currently not able to access existing social grants, in particular the Child Support Grant (CSG).

The group of children living without adult caregivers basically consists of two categories: street children and children living in child-headed households. Although there was consensus that these two groups are distinct categories in themselves, participants at the workshop agreed at the outset that it would be necessary to consider to what extent both groups should be treated equally or differently in relation to accessing social assistance.

The main purpose of the workshop was to discuss and debate different mechanisms to ensure that children without adult caregivers can get access to social assistance, in particular in the light of the current discussions around the draft Children’s Bill. As background it would therefore be necessary to discuss the general context of children without primary caregivers, as well as the constitutional framework of children’s rights in this respect. The discussion during the second day of the workshop would then centre on two models of how grants could be made available to children: firstly the mentorship model proposed by the Draft Children’s Bill, whereby a mentor supervises a child-headed household, and secondly the possibility of giving children direct access to grants.

II. Constitutional obligations for children without adult caregivers and the CSG

The second presentation of the workshop dealt with the constitutional obligations of the State with regard to social assistance for child-headed households. Sandra Liebenberg, of the Community Law Centre at the University of the Western Cape, and Beth Goldblatt of the Centre for Applied Legal Studies at the University of the Witwatersrand came to the conclusion that the current exclusion of child-headed households from social assistance is likely to be unconstitutional. They based their argument on the constitutional provisions for socio-economic rights – particularly the right to social security in section 27 – children’s socio-economic rights in section 28 of the Constitution, the right to equality in section 9, as well as the constitutional jurisprudence interpreting those rights. Therefore, when the State implements its duty to provide social assistance to children in the form of the Child Support
Grant, it bears a duty to take into consideration the critical situation of child-headed households in the administration of that grant.

In the discussion that followed it was raised that, not only does the State bear duties, but that responsibility also lies in the communities. This would result in alleviating the burden on the State. During the debate it emerged however that the State definitely has a constitutional duty when the family and the community do not have the capacity to assist children in child-headed households. It was observed that communities already bear great burdens in the context of poverty and HIV/AIDS, and that it is the duty of the State to support the most vulnerable children.

It was proposed that the workshop concentrate on short-term rather than long-term measures because the situation of children without adult primary caregivers is already an urgent one.

Moreover, it was suggested that the current Social Assistance Act already provides for the payment of grants directly to the 'primary caregiver', which means that there is currently no legal - but rather a practical - barrier to paying the grant to children who are themselves 'primary caregivers'.

### Conclusions

- Children living in child-headed households belong to the group of the most vulnerable in South Africa.
- There is a constitutional obligation on the State, based on sections 9, 27 and 28 of the Constitution, to provide social assistance to children living in child-headed households.

### III. The socio-economic context of child-headed households

Jacqui Khumalo from Thandanani Children’s Foundation presented the results of community-based research that the organisation recently conducted in the Pietermaritzburg region in KwaZulu-Natal.

The research revealed that a huge number of people in the region are dying of AIDS. As a result of the death of many caregivers, there are a considerable number of child-headed households. It was pointed out in the discussion that the general prevalence of child-headed households is still denied or unknown in many instances in South Africa. The central finding of
Thandanani’s research was that basic material needs were the most urgent needs of children in child-headed households. Those needs even exceeded the emotional and social needs of those children who experienced the trauma of losing their parents. Particular problems which were mentioned included dropping out of school, shelter, clothing and access to money and general material needs. The economic problems are reinforced by the fact that children often can not find employment or are exploited by their communities. Thandanani’s main task is to assist children in child-headed households by addressing these problems.

Much discussion on the specific problems of making grants available to children through the mentorship scheme ensued, focusing on the practical problems, in particular how to ensure that the head of the household spends the money reasonably and how a mentor is to be found. According to Thandanani’s research, generally the oldest child takes over the function as head of the household, even though sometimes the responsibility is shared by the elder siblings. Examples were given where children themselves expressed the opinion that child-headed households are an option that can cater for their needs and is preferable to moving out and living with relatives.

The mentorship model, proposed in the draft Children’s Bill, was also discussed. It was introduced as a model that could make use of existing structures on the ground. The model was considered necessary to provide safeguards against the abuse and monitoring of children. Even though non-governmental organisations (NGOs) play an important role, they seem to be over stretched, but it is clear that the mentorship model requires support by NGOs, as well as the Department of Social Welfare. She spoke of Thandanani’s successful experience with an informal mentorship programme where community volunteers visit children regularly.

Generally, the role of NGOs and the affected communities was regarded as important in identifying children and assisting them. Moreover, support should be given to such organisations such as Thandanani Children’s Foundation, which was seen as a particularly successful example of community-based assistance for children in child-headed households.

A considerable part of the discussion also dealt with general problems experienced by poor children, which are experienced particularly severely by children in child-headed households. The school fees policy is still an obstacle to many children attending school regularly, and is particularly true for children in child-headed households. It is difficult if not impossible for the children to be exempted from paying fees. Ms Khumalo explained how, absurdly, cross-subsidising between government departments is occurring, such as where social grants obtained from the Department of Social Development are used to pay for school fees.
Besides education, housing was also raised as a major problem. Children in child-headed households often face the problem that they are chased from their houses by relatives who pretend to have inheritance rights or other rights to the property. Legal assistance is critical to avoid this.

Another major problem for children accessing grants is the lack of relevant identification documentation. In Thandanani’s research there was one sibling heading a household who was over 18 years old and who was able to access the grant for his siblings. But many other children in the same situation were not able to access the grant due to a lack of documentation. The lack of documents was seen as a major, general obstacle for children accessing state grants.

### Conclusions

- Economic problems of children living in child-headed households have the highest priority for children compared to other, particularly emotional, needs.
- Children themselves expressed that living in child-headed households may be in their best interests.
- NGOs and communities play an important role in identifying the prevalence and the needs of children in child-headed households.
- School fees, housing problems and the lack of identification documents are major obstacles for children in ensuring that their basic socio-economic needs are met.

### IV. Street children

The next presentation by Annette Cockburn, an independent consultant with many years of experience working with street children, highlighted the situation of street children and their experiences in relation to access to social security. The central point of her presentation was that it was not in the best interests of the child to pay grants directly to street children. The reasons for this were, in her opinion, that the availability of financial means would keep children on the street. She emphasised that children would probably not use the money in their best interests and would not spend it on food, clothing and school fees but rather on fast food, video games or even drugs. Another problem with giving the grants to street children directly would be the extreme difficulties to administer the grants when in fact there is no database on street children in South Africa at all.
There was general consensus amongst the workshop participants that street children should not access grants directly. The difference between child-headed households and street children is that in most of the towns and cities, there are facilities which support street children, which render the provision of social grants not as urgent as for children living in child-headed households. Even in more remote areas there are, according to Annette Cockburn, at least basic facilities.

For street children, preventative measures are a crucially important way to prevent children from going on to the streets, since there are always severe reasons for children leaving their homes. Apart from social interventions, an important measure is to assist families in general, and in particular in providing children with basic needs like food, clothing and school fees. The importance of material assistance for families was regarded by many participants as another strong argument for extending the Child Support Grant to children under the age of 18.

Another option for assisting street children could be to support organisations that work with street children. Such support is, according to the participants, still too restricted at the moment. Moreover, it is important to keep in mind that communities have an important role to play in preventing children from becoming street children, and those preventative measures are in the end often more effective than assisting children on the streets.

Conclusions

- It is not in the best interests of the child to pay grants directly to street children.
- Main reasons: - It would keep the children on the street.
  - Children would not spend the money in their best interests.

V. General discussion on context and assessment

The following general discussion focused on the issue of how it would be possible to determine which children should be eligible to access grants directly.

The first point of consideration was to what extent children living without adult caregivers should be legally recognised. It was firstly pointed out that the State has a positive obligation to link children with parental care (cf. sec. 28 (1) (b) of the Constitution). There may however be circumstances under which the provision of parental care can not be realised. It was therefore agreed that the reality of the existence of children living without adult caregivers calls for the legal recognition of that household form. It is obviously not in the best interest of the child in general to live without an adult caregiver. Under certain conditions, in the absence
of better alternatives, it may however be in the child’s best interests to live without parental caregivers. As long as the best interests of the child are respected and protected, children living without adult caregivers should be accepted as a household form.

The general recognition of child-headed households still leaves us with the problem of how to assess whether it is indeed in the best interest of a particular child to live within that household form. The method of assessment must ensure that a lengthy procedure does not create new obstacles for children accessing assistance of any kind. There was a general consensus that children functioning as primary caregivers in practice should generally be recognised in that capacity and should therefore also be able to access social assistance grants directly. The case becomes more difficult with younger children living on their own, for whom a mentor system would be more appropriate. It is clear that the question of assessment requires a very sensitive and well thought-out approach.

Who falls into the category of children without adult caregivers was another point of discussion.

The following diagram gives a general picture of the different groups:

In addition, some ambiguities in the definition in the draft Children’s Bill were identified, and which should be clarified.
VI. South African Law Reform Commission: Background to mentoring proposal

The next presentation was given by Ronel van Zyl, who has been working for the South African Law Reform Commission (SALRC) and was involved in the drafting of the Children’s Bill. She firstly gave a brief overview of the current legislative situation for children in need of care under the Child Care Act, and also looked at social assistance available to children as stipulated in the Social Assistance Act, no. 59 of 1992. She then more broadly discussed the proposals of the SALRC in the draft Children’s Bill. She emphasised the proposed recognition of child-headed households and the mentorship model. She explained that the mentorship model as proposed by the SALRC gives responsibility to NGOs or organs of the State, to which mentors would be accountable, because of fears that the grant money may be abused by mentors.

VII. Children accessing grants directly

The next presentation was by Ashley Martabano from the Women’s Legal Centre, who discussed the possibility of children accessing grants directly. She firstly analysed the existing legislation as well as the draft Children’s Bill and came to the conclusion that current legislation in fact does not exclude the possibility that children could access grants directly for themselves, or on behalf of other children in their care. It would also be possible for NGOs to

Conclusions

- Child-headed households are generally not desirable but they are a reality which must be legally recognised.
- There may be strong reasons for the existence of child-headed households, and in the absence of better alternatives it may be in the best interest of the child to live in such a household.
- The assessment as to whether a child-headed household is in fact in the best interests of the individual child requires a sensitive approach but must not result in an obstacle to accessing social grants.
- The mentor system is a useful alternative for children who are factually unable to administer the grant.
receive a grant on behalf of children. It was emphasised that the draft Children’s Bill provided for the recognition of child-headed households and stated that child-headed households may not be excluded from social security. Even though legislation does not exclude the possibility that children access grants directly, it should be made absolutely clear in legislation that children have this entitlement so that it does not depend on the interpretation of the legislation by administrative bodies.

Ms Martabano emphasised the importance of giving due weight to the view of children in international law. She then mentioned several cases where the government has already recognised that children have the capacity to decide over matters affecting them, e.g. the termination of pregnancy or consent to medical operations. The draft Children’s Bill would give children over the age of 12 the right to consent to HIV-testing, which is regarded as a much more far-reaching decision than administering a grant. She was therefore of the opinion that in cases where children take care of siblings or other children, there should be no question as to their eligibility to receive the grant. In terms of age restrictions she considered as a good example the model related to HIV-testing in the draft Children’s Bill, where a minimum age is provided but children are included under that age if they are sufficiently mature.

Further, she expressed doubt as to whether the mentor system could be comprehensively realised immediately. She therefore argued that it should be possible for children to administer their own affairs at least as an interim measure. Also, a mentor or counsellor should not be compulsory for accessing the grant because these administrative barriers would exclude too many children in need.

The discussion after the presentation confirmed that the entitlement of children to directly access grants should be clearly stated in legislation. It was therefore suggested that the right to a grant should primarily vest in a child and not necessarily be linked to a primary caregiver. This would include the general possibility that children could claim the grant on their own behalf. Participants also agreed that the mentor should not necessarily be a condition for accessing the grant because this could be an obstacle for children. Generally the grant should only be denied if there is evidence of misspending.

Finally, the issue of fraud and possibilities to prevent it were discussed. Fraud was regarded as an important factor that might discourage Government from implementing the idea of making grants directly accessible. It might be possible that children apply more than once or more than one child per household applies for grants for all children in the household. Even though the problem of possible fraud was recognised, participants agreed that the possibility of fraud should not result in setting up too burdensome conditions for children who want to have direct access to the grant. One speaker argued that the number of children who would
qualify for access and the possibilities of fraud could not justify the restriction of access for many children in need. Another participant suggested as a mode to prevent fraud that, after proof that the primary caregiver is deceased, the right to access might automatically pass to the eldest child, or whoever is the head of the family, even though this might be a question of capacity of the administration.

Conclusions

- Even though current legislation allows an interpretation which could give children direct access to social grants, the entitlement of children to directly access the grant should be clearly stated in legislation.
- The right to a grant should primarily vest in a child and not necessarily be linked to a primary caregiver.
- The mentor should not necessarily be a condition for accessing the grant because this could be an obstacle for children.
- The problem of possible fraud was recognised but participants agreed that the possibility of fraud should not result in setting up too burdensome conditions for children who want to have direct access to the grant.

VIII. Presentation by Government

Mr Rodgers Hlatshwayo, representing the national Department of Social Development, made a presentation on the government’s position. He outlined that an internal departmental team has been set up to look at proposals for addressing the needs of children living in child-headed households. The policy outcome would include a social work component. Mr Hlatshwayo also stated that Government was concerned about the issue of fraud in relation to children accessing grants directly, but no possible solutions have yet been identified to address the issues of fraud as well as child-headed households not having access to social assistance. He also informed the workshop that the definition of ‘primary caregiver’ in the Social Assistance Act was to be amended to restrict the definition of ‘primary caregivers’ to people over the age of 16.
IX. General discussion about access to grants for child-headed households

The final discussion of the workshop dealt with general matters around access to grants for child-headed households. Alternatives to the proposed mentor system in particular were considered. Issues like age limits, alternative proof of identity and the problems around assessment were also discussed.

It was pointed out, that from a broader perspective, there is a need for a comprehensive system of social protection and support for families at risk. No child should be excluded from a grant because of the family status. Generally, children should be assisted pro-actively to access the grants.

The idea that the grants should follow the child was supported. Thus, it was suggested that in future all grants should be in the name of the child rather than in the name of a primary caregiver, so that the death of a primary caregiver does not automatically terminate the entitlement to a grant. Otherwise a mechanism must be established to ensure the transfer or the change of the name of the applicant.

Regarding the accessibility of grants to children in child-headed households, the discussion focused on the two different models which were discussed in the course of the workshop: direct access for children and the mentorship model.

It was agreed that children should be eligible to directly access the Child Support Grant if they meet the criteria of a ‘primary caregiver’. To prevent abuse or fraud, a smart card system was suggested by Thandanani Children’s Foundation.

The mentor system should be used where it is in the best interest of the child in cases where children lack the factual capacity to administer the grant themselves. Not only NGOs or organs of the State but also schools and individuals were suggested as possible mentors. The role of individuals was considered to be particularly important in rural areas which are reached poorly by NGOs or the state administration. Individuals should however be trained appropriately before they take over the responsibility for children. The role of communities and schools regarding the identification of children in need of a mentor was emphasised. The question whether an age limit for the direct access of the grant should be set or whether it is better to decide the suitability of a child on a case-by-case basis was controversial but it was agreed in the end that no age limit should be set.

It is important to ensure that as few as possible child-headed households have to undergo a time consuming assessment to examine whether it is in their best interest to stay without an adult primary caregiver. It was suggested that the assessment should not be performed by
the authority handling the grants application but rather by a social worker or a NGO. Children could be referred to NGOs, who would be able to assist the children. Another way to facilitate the access of children in child-headed households could be that a letter from an NGO which is working with those children would be sufficient to make the grants available to those children.

X. Way forward

The discussion concluded with the consideration of the implementation of different, practical strategies to achieve the goal of providing access to social assistance to children without adult caregivers.

It was agreed that a simultaneous, multi-pronged approach should be taken. An important method is to influence the legislative process and to include clauses which would provide for the right of children in child-headed households to access grants. Possible placement of these provisions would be in either the Social Assistance Act or the Children’s Bill. Targeting children in child-headed households might also be achieved by a broader approach of developing a general social security policy.

An important way to influence the legislative process is through submissions to the relevant parliamentary committees and lobbying the Portfolio Committee on Social Development and government ministers. Support should also be sought from international bodies like United Nation’s Children’s Fund, the United Nations Development Programme or Save the Children, as well as from other social partners.

Lastly, access of children without adult caregivers to social assistance might be supported by litigation. The current legislative position could be challenged on the basis of the constitutional obligations of the State.

Conclusions

- ‘Grants should follow the child’: all grants should be in the name of the child so that the death of a primary caregiver does not automatically terminate the entitlement to a grant.
- Children should be eligible to direct access of the grant if they meet the criteria of a ‘primary caregiver’.
- The mentor system should be used where it is in the best interests of the child when children lack the factual capacity to administer the grant themselves.
XI. Conclusion: General outcomes of the workshop

The following points are a summary of the conclusions from the presentations and discussion during the workshop and reflect the general consensus of the participants of the workshop:

- There are circumstances where it is in the best interest of the child to live without adult caregivers. Child-headed households should therefore be recognised and supported.
- A lengthy and cumbersome procedure of assessment whether it is indeed in the best interests of the child to live without an adult caregiver, should be avoided as far as possible.
- Even though current legislation can be interpreted in a way that it permits direct access to grants for children, it must be laid down in legislation unequivocally.
- The mentor system is generally a useful option for the support of child-headed households even though several problems in the practical implementation must be considered.
- Direct access to grants for children is an option under certain conditions, in particular for children who are factually taking care of their siblings as head of a household.
- The group of street children must be distinguished from children in child-headed households, and it is not in their best interests to give them direct access to state grants.
- As a general issue, the new draft of the Children’s Bill was criticised for the removal of important clauses which unfortunately prevents a comprehensive social security policy approach for all children.
Workshop Papers

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Presentations

Access to social assistance for children without adult primary caregivers, Solange Rosa, Children’s Institute, UCT

Constitutional obligations to provide social assistance to child-headed households, Prof Sandra Liebenberg, UWC Community Law Centre & Beth Goldblatt, Centre for Applied Legal Studies, WITS

Context for child-headed households, Jacqui Khumalo, Thandanani Children’s Foundation

Context for street children, Annette Cockburn, independent consultant

Children living without adult caregivers and access to social assistance, Ronel van Zyl, South African Law Reform Commission

Direct access to grants for child-headed households, Ashley Martabano, Women’s Legal Centre

Departmental research and perspectives, Rodgers Hlatshwayo, Department of Social Development
Access to social assistance for children without adult primary caregivers
Solange Rosa, Children’s Institute, University of Cape Town

Problem Statement

- Children without adult ‘primary caregivers’ cannot access social assistance from the Government - in the form of social grants.
Background

By December 2002, roughly 900 000 children under the age of 18 in South Africa were estimated to have lost a mother, the majority of these to HIV/AIDS, and that figure is expected to rise to roughly 3 million by the year 2015, in the absence of major health interventions. (Dorrington et al: 2002)

Socio-Economic Context

The majority of children whose biological parent(s) have died are cared for by:
- relatives primarily in informal care arrangements;
- formal foster care;
- adoption;
- residential care;
- living in so called 'child-headed households' and on the streets.
Socio-economic Context

- There is no comprehensive national data on the prevalence of child-headed households at this point in time. (HSRC, Household Survey: 2002)
- However, several studies provide anecdotal data of the existence of child-headed households in South Africa. (NMCF; Thandanani Report)
- In the context of increasing numbers of orphans as the HIV/AIDS pandemic progresses, it is likely that South Africa will face increasing numbers of children living without adult caregivers.

Socio-economic Context

- Children living in child-headed households and on the streets are particularly vulnerable without the care and support of parents or substitute parents.
- Require support to meet their various basic needs, including financial, emotional, psychological, health, education etc.
Socio-economic context

- Most modes of support for these children take the form of providing substitute parental care, such as the expansion of institutional care and the promotion of formal and informal foster care.
- However, this workshop is particularly concerned with the provision of financial support to children within the context of living without adult caregivers.

Children who live without adult caregivers – as so-called ‘child-headed households’ or on the streets - are currently not able to access financial support from the government, in the form of social grants.
Why?

- In practice, only children living with an adult primary caregiver can apply for a Child Support Grant (CSG);
- Children must be placed in formal foster care in order for the Foster Care Grant (FCG) to be payable; and
- Formal placement options for children in need of care and protection are inadequate, and not always appropriate, to cater for orphaned children.

Social Assistance For Children Without Adult Primary Caregivers

- Child Support Grant

The CSG was introduced in 1997 to help to alleviate the poverty felt by many in South Africa. As recommended by the Report of the Lund Committee on Child and Family Support, it replaced the State Maintenance Grant with a flat-rate child support benefit to be “paid, via the primary care-giver, to all children who qualify in terms of a test of the care-giver's means”. (Lund Report: 1996)
Child Support Grant

The Social Assistance Act No. 49 of 1992 defines a primary care giver as:

In relation to a child, means a person, whether or not related to the child, who takes primary responsibility for meeting the daily care needs of the child, but excludes:

- A person who receives a remuneration, or an institution which receives an award, for taking care of the child; or
- A person who does not have implied or express consent of a parent, guardian or custodian of the child

Child Support Grant cont.

Definition of primary caregiver intended to give recognition to the reality of different family structures in South Africa, and the role that a range of persons other than their biological or legal parents, such as grandparents, aunts and uncles etc, play in children’s lives in providing for their daily needs and was based on the principle of follow-the-child.

Child Support Grant cont.

- The definition does not necessarily exclude minor children who are playing the role of primary caregiver with respect to minor siblings, cousins or other children, because it does not stipulate a minimum required age for the primary caregiver, but in practice these minor primary caregivers are precluded from accessing social grants.

Foster Child Grant

- Where children are fostered, whether by relatives or others, under an order of court, these caregivers are officially appointed custodians or foster parents, and are thereby entitled to access a FCG for the care of the child.
- The FCG was introduced to provide financial support to caregivers, and as an incentive to ensure that foster placements are available for children in need of care.
- The FCG is currently an amount of R500 per month.
- Regular reports must be submitted by the social worker throughout the child's foster placement to ensure renewal of the court order and continuation of the grant.
Foster Child Grant

- A child looking after other children in a child-headed household would have to be designated a foster parent through a court process in order to access the FCG.

Constitutional Obligations

- Under section 27 of the Constitution, the State is obliged to provide social security to everyone, including social assistance if they are unable to support themselves and their dependants.
- Per Grootboom, the Government has an obligation to progressively provide social assistance to everyone, including children, via a programme that is reasonable and does not exclude the most vulnerable in our society.
Constitutional Obligations cont.

S 28 (1)(b) states the child’s right to “family care or parental care, or to appropriate alternative care when removed from the family environment.”

Section 28 (1)(c) states the child’s right to “basic nutrition, shelter, basic health care services and social services”.

- Primary duty of support in respect of children is on their parents.
- Per Grootboom, where children are orphaned and living alone without adults, it is the State’s obligation to adopt measures to ensure fulfilment of its primary obligation to support these children.
- The socio-economic rights of children in section 28(1)(c) are not qualified by the same limitations of ‘availability of resources’ and ‘progressive realisation’ as those in sections 26 and 27. Although section 28 does not specifically include children’s rights to social security or social assistance, it is under this provision that the State is obliged to provide for the basic needs of children.

Constitutional Obligations cont.

Section 28(2) A child’s best interests are of paramount importance in every matter concerning the child.

- A number of factors mentioned in the literature and research on the context of child-headed households and children infected and affected by HIV/AIDS give the State direction in assessing what the best interests of these children may be in these circumstances:
  - That it is generally in the best interests of children to remain together with their siblings.
  - That it is generally in the best interests of children to remain in their communities.
Constitutional Obligations cont.

Section 9 - Unfair discrimination

- The Constitution provides that discrimination against a group of people is presumed unfair if it is based on one of the listed grounds in section 9(3).
- The equality clause outlaws both direct and indirect discrimination.
- The government, in providing social assistance to children via a mechanism which requires children to have adult primary caregivers, indirectly discriminates against children who are orphaned and have no adult caregivers. The discrimination would arguably be unfair on the grounds of age, social origin and birth.

Responses of Government

- Various policy documents of the government address the issue of children infected and affected by HIV/AIDS.
- These policies are silent on a mechanism for children without adult caregivers to access social assistance.
- Foster care as a response does not recognise the existence of CHH or adequately address their need for financial support.
Model Options

1. **Mentorship Model**
   - Mechanism to support children living without adults.
   - Provides legal recognition for child-headed households as a placement option for orphaned children.
   - Adults are appointed as ‘household mentors’ over a cluster of child-headed households by the Department of Social Development, a recognised NGO or the court.
   - ‘Household mentor’ is able to access grants and other social benefits on behalf of the child-headed household.
   - ‘Household mentor’ may not make decisions in respect of the siblings without giving due weight to the opinions of the children.
   - The proposed ‘household mentor’ is accountable to the Department of Social Development or a recognised NGO or the court.

Model Options

2. **Children accessing grants directly**
   - Children of a certain age could access the Child Support Grant directly on behalf of other child/ren, if they are in fact, the primary caregiver of the child/ren.
   - Nothing in the current law which precludes this from happening.
Children without adult caregivers and access to social assistance

Workshop Report

Purpose of this Workshop

This workshop seeks to:

- Analyse the problems experienced by children who live without adult caregivers in accessing social assistance, in particular the child-support grant;
- Outline the constitutional obligations of the State towards children living without adult caregivers, in respect of social assistance;
- Present a number of mechanisms for debate and discussion amongst stake-holders and decision-makers on how to ensure that children living without adults are able to access social assistance;
- Facilitate an appropriate policy choice to be made and pursued through the legislative process;
- Assist to identify the most appropriate legislative avenue for incorporating that policy choice.
Constitutional obligations to provide social assistance to child-headed households
Beth Goldblatt* and Sandy Liebenberg*

Introduction

This paper argues that the Social Assistance Act which defines ‘primary care giver’ (PCG) for the purpose of the child support grant (CSG) can be interpreted to mean that PCGs who are themselves children, should be able to access the grant. Alternatively, and preferably however, an amendment should be made to the legislation to the effect that children who are PCGs are entitled to be given the CSG. These arguments are based on a reading of the Act in line with the Constitution¹ and other laws and based on a particular understanding of the social context in which this issue arises.

South Africa’s Constitution is founded on the recognition of the need to address inequality and achieve social justice (Preamble). The Bill of Rights is premised on the values of dignity, equality and freedom (s 7). The following rights have been identified as the key rights to be used in support of the above argument: equality (s 9); social security (s 27); and children’s rights (s 28).

Before looking at each of these rights in detail, we wish to discuss certain contextual and legal arguments that would inform any constitutional claims.

The history of the CSG and the notion of the primary care-giver

The child support grant is one of the grants in South Africa’s social assistance programme.² It originated in the recommendations of the Lund Committee on Child and Family Support (August 1996). Its primary purpose is to provide a regular source of income to assist the caregivers of children living in poverty to meet the basic needs of the children in their care.³ The Lund Report identifies some of the benefits of case transfers, including the fact that they are based on a system of entitlement (as opposed to ad hoc discretionary programmes), they

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¹ The Constitution of the Republic of South Africa Act 108 of 1996 (‘the Constitution’).
² The CSG was introduced in the Social Assistance Act 59 of 1992 by the Welfare Laws Amendment Act 105 of 1997, to replace the State Maintenance Grant.
³ See Executive Summary, pp. 4 - 5 of the Lund Report.
give poor people leverage, they can be cost-effective and can have multiplier effects on the incomes of the poor. In comparing case versus in-kind benefits, the Report observes:

“Cash benefits on the whole are easier and cheaper to deliver than in-kind schemes…Furthermore, when delivered efficiently, they hold out greater possibilities than do most other development initiatives that resources will go into the pockets of the really poor, rather than being skimmed off by middle-men.”

The Report is clear that alternative development and other programmes and policies targeted at children in poverty are “extremely valuable complements” to the social security system. However they cannot be regarded as substitutes for social security, but “can be part of a multi-pronged strategy for intervention.”

One of the innovative features introduced by the Lund Report is the concept that the payment of the grant should not depend on biological ties and common law relationships where a duty of support towards a child exists. Instead it should be based on a factual assessment of the person who is assuming primary responsibility for the daily care needs of the child. As expressed in the Report, the payment of the child support grant to the primary care-giver of the child “resolves the problem of how to define the family in such a complex and multi-cultured society. It says that children, however many in a household, of whatever status, are important and need to be protected.” [emphasis added]. The recommendation that the grant ‘follow the child’ also underscores the functional definition of the primary care-giver by recognising the reality that children living in poverty may have successive care-givers. It is interesting that the Report also views the goal of family preservation can best be achieved by focusing on the child, rather than the nuclear family, in the face of changing family forms.

This functional concept of the person entitled to claim the CSG was adopted in the Social Assistance Act with certain safeguards. These include that the primary care-giver has the implied or express consent of a parent, guardian or custodian and that it can be claimed on behalf of a maximum of 6 non-biological children or children who have not been legally

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5 Lund Report, p. 47.
6 Lund Report, p. 91.
7 See further in this regard, Lund Report, p. 18. This is particularly important in the context of HIV/AIDS where many children lose the benefit of the child support grant with the death of their primary care giver instead of the grant being transferred to whoever, as a matter of fact, assumes primary responsibility for the care of that child. See Giese et al Health and Social Services to Address the Needs of Orphans and Other Vulnerable Children in the context of HIV/AIDS, Children’s Institute (UCT) 106. [hereafter referred to as the ‘Children’s Institute Report’]
8 Section 1 of the Social Assistance Act 59 of 1992 defines the ‘primary care-giver’ as “a person whether related or not related to the child, who takes primary responsibility for meeting the daily care needs of the child, but excludes – (a) a person who receives remuneration, or an institution which receives an award, for taking care of the child; or (b) a person who does not have implied or express consent of a parent, guardian or custodian of a child.” The factual nature of the assessment as to who is the primary care-giver is also supported by s 4 which requires the DG to be satisfied that the claimant is the primary care-giver of the child. The regulations to the Act also impose duties on recipients of the CSG to ensure that the child has accommodation, is properly fed and clothed and receives immunisations and other health services where these are available without charge (Reg. 20).
adopted.\(^9\) The definition of ‘implied consent’ in the regulations includes the absence of any objection from the parent, guardian or custodian to the child remaining in the custody of the primary care-giver of that child “on account of such parent, guardian or custodian being deceased.” \(^{10}\) This is significant in the case of children without adult care-givers in the context of HIV/AIDS.

### The social context of children without adult care-givers

Although the Lund Report did not directly address the question of the payment of grants to children on behalf of other children (e.g. siblings), it acknowledged the profound effects of the AIDS epidemic on family life and household composition, including a change in the productive role of younger children, with them having to leave school to care for younger siblings.\(^{11}\) As many subsequent studies have documented, young children who have lost a parent or other primary adult care-giver are in a particularly vulnerable situation. This is particularly the case because they usually lose access to the practical, financial and emotional care as well as protection provided by their parents or other primary care-giver. They are also vulnerable to discrimination, exclusion from basic services, and difficulties in maintaining school attendance.\(^{12}\)

In their seminal study on orphans and other vulnerable children in the context of HIV/AIDS, the Children’s Institute caution that “idealising particular care arrangements, or rejecting others outright, inappropriately stereotypes the nature of household forms.”\(^{13}\) It fails to take into account of the complexity of children’s experiences with different contexts. Thus children living with relatives in the context of orphanhood is not necessarily a better option for children than living without adults:

> “If adequately supported (a crucial caveat), children living alone can find themselves safer than if living with adults.” \(^{14}\)

They accordingly advocate that, “although widely considered to be an anomalous household form, children living without adults should be viewed within their broader contexts and, where appropriate, supported in their current living arrangements.”\(^{15}\) This supports a contextual evaluation of what living arrangements best promote the well-being of children when faced...
with the loss of their parents or other primary adult care-givers. However, “the crucial caveat” of adequate support for children living alone should be noted.  

The South African Law Commission (SALC) has also proposed the recognition of child-headed households as a placement option for orphaned children in need of care subject to a link to suitable adult and state support.  

The SALC furthermore recommended that the CSG must be administered in such a way that it reaches child-headed households. In the case where “a child may be too young and immature to be entrusted with total responsibility for his or her siblings,” the Law Commission recommends putting place a system of ‘household mentors’ who would be able to access grants and other social benefits on behalf of the CHH.

The changing nature of family forms

An important argument for the recognition of minor PCGs is that while they may lack capacity in law, in practice they are performing ‘adult’ functions. The nature of family life is shaped (inter alia) by the historical and socio-economic conditions in any society. In South Africa, the history of colonialism and the creation of a migrant labour system has had devastating effects on family life.  

Millions of children live apart from their parents in many types of family arrangement. While grandparents, aunts and other adult relatives are often the PCGs of children whose mothers are elsewhere, many children are left in rural areas without adults to care for them. Older children often perform all or some of the functions of a PCG. They buy food, prepare it, dress and feed younger children etc. There is also a gender dimension to the shape of South African family life. Many thousands of fathers abandon their children and take neither physical nor financial responsibility for them. Thus, even where a child has a father who is alive, when s/he loses a mother, s/he is often effectively parentless.

In recent years our courts and the legislature have begun to recognise new types of family and family arrangements that do not fit within the traditional definitions. Thus, gay and lesbian

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16 In its General Comment No. 3 (2003) on HIV/AIDS and the rights of the child, the Committee on the Rights of the Child encourages States parties (to the CRC) “are encouraged to provide support, financial and otherwise, when necessary, to child-headed households”. This is in recognition of the factual reality that the preferable option of enabling siblings to remain together in the care of relatives or family members “may not be available due to the impact HIV/AIDS has on the extended family.” UN doc. CRC/GC/2003/1, para. 31.

17 SALC, Discussion Paper 103, Project 10, Review of the Child Care Act. This is further supported by the Law Commission’s broad, inclusive definition of the family which “should be relationship focused and should entrench a non-traditional approach to family relations.” SALC Discussion Paper, Ch 8, 193. Also see the broad definition of ‘family member’ in the December 2002 Draft Children’s Bill.

18 Ibid, p. 562. The notion that the CSG can be paid to a third party to administer on behalf of the child is already contemplated in the Social Assistance Act. Thus s 8 of the Act empowers the DG if he is of the opinion that a beneficiary has misspent his or her grant or if he deems it expedient for any other reason to “appoint a person to receive the grant on behalf of the beneficiary and to apply it, subject to the prescribed conditions and such further conditions as the DG may determine for the benefit of that beneficiary.”

relationships have now been recognised and protected in many cases.\textsuperscript{20} Unmarried fathers have also been acknowledged as having been unfairly treated.\textsuperscript{21} Customary and Muslim marriages and domestic partnerships have also been given greater rights.\textsuperscript{22}

Judge O’Regan J\textsuperscript{23} has said the following:

…families come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms. (footnote omitted).

Ackermann J\textsuperscript{24} made similar statements in a leading case dealing with the rights of same-sex life partners:

It is important to emphasise that over the past decades an accelerating process of transformation has taken place in family relationships as well as in societal and legal concepts regarding the family and what it comprises. Sinclair and Heaton, after alluding to the profound transformations of the legal relationships between family members that have taken place in the past, comment as follows on the present:

“But the current period of rapid change seems to ‘strike at the most basic assumptions’ underlying marriage and the family.

…”

Itself a country where considerable political and socio-economic movement has been and is taking place, South Africa occupies a distinctive position in the context of developments in the legal relationship between family members and between the state and the family. Its heterogeneous society is ‘fissured by differences of language, religion, race, cultural habit, historical experience and self-definition’ and, consequently, reflects widely varying expectations about marriage, family life and the position of women in society.”

(footnotes omitted).

The developments in the legal meaning of family is an international trend which finds support in the theoretical writings of some of the leading family law thinkers internationally.\textsuperscript{25} For

\textsuperscript{20} NCGLE v Home Affairs 2000 (1) BCLR 39 (CC), Satchwell v Min of Justice (add cite), Du Toit (add cite), J&B (add cite)), Langemaat v Minister of Safety and Security 1998 (3) SA 312 (T).
\textsuperscript{21} Fraser v Children’s Court, Pretoria North 1997 (2) BCLR 153 (CC).
\textsuperscript{22} The Recognition of Customary Marriages Act 112 of 1998; Amod v MVAF (CGE intervening) 1999 (4) SA 1319 (SCA); see Discussion Paper of the SALC on Domestic Partnerships (forthcoming).
\textsuperscript{23} In Dawood and Another v Minister of Home Affairs and Others 2000 (8) BCLR 837 (CC), at para 31.
\textsuperscript{24} In NCGLE v Minister of Home Affairs, op cit, at para 47.
\textsuperscript{25} See Sinclair, J (1996), The Law of Marriage at 5-15 for a discussion of this trend and the leading writers commenting on it.
example, Martha Minow argues for a functional approach in determining whether parties to a particular family relationship should be afforded legal protection. This approach looks beyond biology and marriage by considering the way in which particular people function as a family. (For example, a grandmother who looks after a child for many years and is then denied access to the child by its natural parent should be treated as a functional parent for certain legal purposes). Minow says that certain people may not fit a formal legal definition of a family. “Instead, what is important is whether the group of people function as a family: do they share affection and resources, think of one another as family members, and present themselves as such to neighbors and others?” This approach leads to greater fairness and would bring the law more closely in line with reality. It is also more likely to harmonise the law with the positive values of our Constitution.

Children as rights holders

South African law says that a child only reaches legal majority at the age of 21 years based on the general legal principle that since persons’ juristic acts are dependent on their expressions of will, it is desirable that only persons who have a reasonable understanding and judgment should have capacity to act.

International law has played an important role in highlighting that despite a variety of different legal approaches to minors capacity in different jurisdictions, the notion of a minority status is a ‘legal construct’. In any event there have been many inroads into this idea by way of common law and statute.

Between age 7 to 21 children can contract with the assistance of parents;

Children over 10 must consent to adoption;

Age of puberty – girls 12, boys 14. Can marry – girls below 15 and boys below 18 must get consent of parents and minister of HA;

Age 16 – can make own will;

Age 15 – can witness a will;

Criminal and delictual liability – presumption that they are responsible from age 14;

Mutual bank depositors – Age 17;

27 At 270.
Insurance policy – can take one out and deal with the proceeds – Age 18;
Age 15 – may consent to medical treatment;
Age 18- can approach high court to be declared a major;
Post Office Act – minors over 7 can open accounts and make deposits.30

Within the sphere of contract law, children can become ‘emancipated’ from their guardians, whether expressly or tacitly, and can enter into transactions, conduct business etc. While this occurs as a product of the guardian’s will, it reflects a functional approach in the law based on the recognition that children sometimes function effectively as adults and should be allowed to do so in law.31

Ngwena notes32 that recognising a child as legally competent in certain circumstances is an ‘expression of the respect for self-determination and an affirmation of the child’s dignity as a human subject, not object. Recognition of the child’s autonomy is an unambiguous acceptance of the fact that, developmentally, childhood is not a static condition.’

The right to social assistance in the Constitution

The right to social security as a human right widely recognised in international law as part of the body of rights collectively concerned with people’s material well-being.33 It is also a constitutionally recognised right in section 27(1)(c). In the landmark Grootboom case, the Constitutional Court indicated that rights need to be “interpreted and understood in their social and historical context.”34 It therefore appropriate to commence with a brief examination of the social and historical context of social assistance in South Africa, in particular the child support grant, before proceeding with a more detailed analysis of the obligations imposed by the relevant constitutional provisions.

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32 (note 29 above) at 133.
33 See for example, the Universal Declaration of Human Rights, arts 22, 25; the International Covenant on Economic, Social and Cultural Rights, arts 9, 10(2) and (3), arts 11, Convention on the Elimination of all forms of Discrimination against Women, arts 11(1)(e), 11(2)(b) and 14 (2), the Convention on the Rights of the Child, arts 26, 27(1) – (3), the Convention on the Elimination of All Forms of Racial Discrimination, art 5 (e) (iv). In terms of s 39(1)b) of the Constitution, international law is an important guide in interpreting the rights in the Bill of Rights. In S v Mahwanyane, the Constitutional Court affirmed that even non-binding international law could be used as a guide in interpreting constitutional rights. Also see: S. Liebenberg “Social Security as a Human Right” in Circle of Rights. Economic, Social & Cultural Rights Activism: A Training Resource, International Human Rights Internship Program and Asian Forum for Human Rights and Development, 200.
34 Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC), para. 25.
Social assistance in context

A distinction is usually drawn between social security (contributory and usually liked to formal employment) and social assistance (needs-based, non-contributory and paid directly from public funds). Particularly in developing countries the western model of the residual role of social assistance (as a safety net when social insurance schemes or private savings fail), simply does not fit. This is due to the systemic poverty and inequality that is our legacy combined with high levels of structural unemployment. Many persons are employed in so-called ‘a-typical employment’ (which is really a misnomer) characterised by low wages, minimal benefits, and no security. At least in the South African context, social assistance plays a critical role in poverty alleviation. The Ministry of Finance has acknowledged that social assistance is the largest single redistributive programme of government. In many poor households, grants often represent the only form of income, and support.

The ‘Taylor’ Committee Report on a Comprehensive Social Security System for SA emphasised the importance of conceptualising social security as constituting an essential component of comprehensive ‘social protection’ as opposed to merely a safety net. Social protection is defined as providing “…the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn contribute to social and economic development.”

Understanding the right to social assistance

Section 27(1)(c) read with (2) provides:

Everyone has the right to have access to –

....

(c) social security, including, if they are unable to support themselves and their dependants appropriate social assistance

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Although there has been no constitutional case to date dealing directly with the right of access to social security, there have been three landmark Constitutional Court cases dealing with the...
interpretation of the socio-economic rights protected in sections 26, 27 and 28. The foundations of the constitutional jurisprudence on these rights were laid in the Grootboom case.

Who is the bearer of the right to social assistance?

There are three main questions that arise in relation to the bearer of the right to social assistance. This right is conferred on “everyone” and the Constitutional Court has held that this includes adults and children. While it would normally be an adult (‘the primary care-giver’) in the case of the child support grant who claims the grant on behalf of the child, the absence of an adult primary giver, does not mean that the child’s entitlement to the grant lapses. A second question concerns the group who is regarded as being “unable” to support themselves and their dependants. The underlying purpose of the right to social assistance is to ensure that persons living in poverty enjoy access to a minimum income, sufficient to meet basic subsistence needs so that they do not have to live below minimum acceptable standards. It follows that that the right should belong to all those who are unable (whether through disability, age or, in the case of adults, the inability to find employment) to gain access to the income necessary to secure their basic subsistence needs. Finally, I have also argued, for similar reasons, that the concept of dependency in this context should be a factual one, and not confined to situations where a duty of support is formally recognised by law.

The State’s obligations in relation to this right

The Court will not prescribe any particular social programme to government, but will enquire into whether the programme is reasonable. A number of criteria were established in order for a government programme to be considered reasonable. These include that the state must:

- Establish a co-ordinated and comprehensive programme that is “capable of facilitating the realisation of the right.”

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39 Soobramoney v Minister of Health, Kwa-Zulu-Natal 1998 (1) SA 765 (CC); Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) (hereafter ‘Grootboom’); and Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC) (hereafter ‘the TAC Case’).
40 The Court explicitly held that “[o]ne if the ways in which the State would meet its section 27 obligations would be through a social welfare programme providing maintenance grants and other material assistance to families in need in defined circumstances.” (para. 78).
41 This is a fundamental objective set in the White Paper for Social Welfare (February 1997), Ch. 7, para. 27.
43 Grootboom, para. 41.
44 Grootboom, paras 40 – 41.
- Ensure that policies and programmes are reasonable both in their conception and their implementation⁴⁵; and
- Ensure that the programme does not exclude those in desperate need and living in intolerable conditions.⁴⁶

To quote from the *Grootboom* judgment:

“A programme that excludes a significant segment of society cannot be said to be reasonable….A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality and freedom. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. *Those whose needs are most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving the realisation of the right.*”⁴⁷ [emphasis added]

In the *TAC* judgment, the Court again emphasised the point that a programme aimed at the realisation of socio-economic rights will not pass the constitutional test of reasonableness if it excludes groups in especially vulnerable circumstances.⁴⁸ This case concerned access to a programme that prevents or reduces mother-to-child transmission of HIV, including the antiretroviral drug, Nevirapine, by HIV-positive women and their infants living in poverty. Government’s policy, which restricted access to Nevirapine to 18 pilot sites, was found to be unreasonable because it was rigid and inflexible thereby excluding a particularly vulnerable group from a life-saving drug.

Children living without adult care-givers in poor communities (whose resources are also depleted due to the ravages of the AIDS epidemic) are for the most part in an extremely vulnerable situation. This vulnerability is due both to the combination of a lack of adult protection and care and the circumstances of extreme poverty in which they live. Their survival and development needs are, by any account, “most urgent” and their enjoyment of a range of other rights are in peril, for example, the rights to nutrition, education, and health care.⁴⁹ Their inability to access the child support grant deprives them of a critical state programme that was specifically designed to meet the basic needs of children living in poverty. There are no other state programmes designed to meet these needs that are based on a system of legislative entitlement, and are as extensive in their reach and the amount of resources going directly to the beneficiaries.⁵⁰

⁴⁵ *Grootboom*, para. 42.
⁴⁶ *Grootboom*, para 43 – 44, 68.
⁴⁷ *Grootboom*, para.44.
⁴⁸ *Minister of Health and Others v Treatment Action Campaign and Others*, paras. 78 – 79.
⁴⁹ See also the argument developed by Solange Rosa in respect of s 28(1)(f), pp. 20 – 21 of the Discussion Paper (August 2003).
⁵⁰ See the arguments above regarding the advantages of cash benefits as documented in the Lund Report.
Children’s socio-economic rights

Another relevant constitutional right is the right of every child “to basic nutrition, shelter, basic health care services and social services” in s 28(1)(c). This provision is not qualified in similar terms to ss 26(2) and 27(2). Although the right to social assistance is not directly included in this provision, the child support grant is clearly a major programme through which these basic needs of children are met.

On the face of it this right imposes a direct obligation on the state to ensure that these basic needs of children are met. In *Grootboom*, the Court held that sections 28(1)(b) (the right to family care or parental care, or to appropriate alternative care when removed from the family environment)) and section 28(1)(c) must be read together. Thus the primary obligation to meet these entitlements of children rest on their parents and families. It is only when child lack family care (e.g. if they are removed from their families or abandoned) that the state incurs an obligation to provide shelter (and by implication the other rights in s 28(1)(c)) to children. In the *TAC* case, the Court held that the state’s duty to provide health care services also arises “when the implementation of the right to parental or family care is lacking.” This includes situations where parents are too poor to access private medical treatment and are thus dependent on the state to make health care services available to them. However, despite this interpretation, the Court proceeded to apply the reasonableness test developed in respect of the right of everyone to have access to health care services in s 27(1)(a) read with (2).

It is nevertheless arguable on the *Grootboom* reasoning that the State incurs a direct obligation to provide for the basic material needs of children living without adult care-givers. This duty arises because children are deprived of their primary sources of support and care. The child support grant is a critical mechanism for meeting the state’s obligations towards poor children. Where children lose their primary care-giver, this should not signify a deprivation of the resources necessary for their continued survival and development. On the contrary, it signifies a heightened need for mechanisms to be put in place to ensure that these children continue or begin to enjoy access to the child support grant. However, even if the reasonableness test is read into the provisions of s 28(1)(c), I have argued above that a

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51 Section 28(3) defines a child as a person under the age of 18 years.
52 On the meaning of the term, ‘social services’ in this context, see the discussion by Julia Sloth-Nielsen, ‘The child’s right to social services, the right to social security, and the primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*’ (2001) 17 SAJHR 210, 225 – 226.
53 *TAC case*, para. 79.
54 Ibid.
55 *TAC case*, para. 122.
56 See the Children’s Institute Report on the severe consequences for children of an interruption of the child support grant when their primary care-giver dies (para 5.3.2.4, p. 106).
blanket exclusion of children living without adult support from the child support grant would not pass the test laid down in the *Grootboom* and *TAC* judgments.

### The right to equality in the Constitution

Equality is both an underlying value and a fundamental right in the Constitution. The right reads as follows:

**Equality**

9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The refusal by the Department of Social Development to provide a CSG to a minor PCG could violate s 9(1). Here it must be shown that the different treatment of adults and children is not based on a ‘rational connection to a legitimate government purpose’. According to the test set out in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) and *Harksen v Lane NO* 1998 (1) SA 300 (CC).

The test is set out in *Harksen v Lane NO* at para 38.

There are a number of listed grounds that seem applicable to the issue of minor PCGs.

**Age:** The fact that a PCG is a minor does not mean that s/he is not fulfilling the functions of a PCG. The Act sets no age limit on PCGs. It is unfair discrimination to give a grant to a 21

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57 According to the test set out in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) and *Harksen v Lane NO* 1998 (1) SA 300 (CC).

58 The test is set out in *Harksen v Lane NO* at para 38.

59 *Larbi-Odam v MEC for Education (North-West)* 1998 (1) SA 745 (CC).
year old but not to a 20 year old or 16 year old or even 14 year old who is performing the identical functions of a PCG. The contextual evidence discussed above regarding the actual responsibilities that children are fulfilling on a daily basis because of migrancy, poverty and orphanhood, supports this argument. In addition, the growing recognition by the law that families and their members must be judged by the functions they perform rather than according to some inflexible standard, also supports this argument.

Pregnancy: It is arguable that some of the state’s refusal to provide CSGs is due to negative perceptions on the part of officials against teenage mothers. By failing to recognise and accept that minors are entitled to become pregnant and do often take responsibility for their children, is to discriminate against them.

Social origin: Poverty, HIV/Aids and migrancy create the conditions within which children look after children and take financial and other responsibilities for younger children. The failure to recognise this and assist such children is to discriminate unfairly against them because they come from poor backgrounds.

Birth: The refusal to assist orphans or children of teenage mothers or children of parents who have AIDS results in discriminating against these children by reason of their birth.

All of the above grounds intersect with gender since it is primarily women who are the PCGs. They also intersect with race since black South Africans are more likely to be poor.

Having proved unfair discrimination, and hence a violation of the equality right, the limitations clause (s 36) still needs to be considered to assess whether it is reasonable and justifiable to limit the right. (The general limitations clause is also applicable to the right to social assistance and children’s socio-economic rights discussed above). During the unfair discrimination test, possible arguments by the state might be issues of principle regarding the legal age of majority and the inability of children to take the responsibility for controlling and using money on behalf of other children. The state might raise the issue of the lack of a cut-off age under which a CSG cannot be given. At the limitations stage, the state is likely to raise practical arguments about the lack of administrative and/or financial capacity of the department to assess whether a child is capable of using the CSG properly or monitoring his/her use of the grant. However, the state bears the burden of showing a sufficiently weighty purpose for limiting the rights, and must comply with the elements of the proportionality test. This includes establishing that less restrictive means have been considered for achieving the state’s purposes other than a rigid, blanket exclusion of children without adult care-givers from the CSG-programme. In the circumstances, and given the range of proposals for

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61 See NCGLE v Home Affairs re intersectional grounds (add para no).
ensuring that this group of children are able to enjoy the benefit of the CSG-programme, it is
doubtful whether the state would succeed in establishing that its current approach is
“reasonable and justifiable in an open and democratic society based on human dignity,
equality and freedom.”

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

This Act arose from a mandate to the government in s 9 to create national anti-discrimination
legislation requirement in the Constitution. The Act gives content to the equality right and
provides detailed mechanisms for people to approach the courts when they claim they have
suffered discrimination.62 The Act contains the same grounds of unfair discrimination as are
found in the equality right plus five additional grounds. Of these, three are particularly useful:

Socio-economic status: This could be used in the same way as social origin described
above.

Family responsibility: This form of unfair discrimination occurs where a person suffers harm
because of their responsibility towards others. It might be stretching this ground a bit but one
could argue that it is the refusal to give grants to PCGs who are minors means that they suffer
precisely because of the responsibility they are taking towards other family members. (Note:
the definition of this ground says that the person suffering must be ‘liable’ for care and support
of their family members. It is debatable as to whether this means legally liable or liable in
some other way).

Family status: This is unfair discrimination because of the type of family that a person comes
from for example, children whose parents have died of AIDS or who are looked after by
children or who are orphans etc and are treated unfairly as a result of this status.

Conclusion

In conclusion, a rigid and inflexible policy that excludes all children without adult care-givers
from accessing the child support grant is susceptible to constitutional challenge for being
unreasonable. A more flexible, nuanced approach is required which takes into account the
actual and varied circumstances in which children without adult-givers live. In certain
circumstances, it may be appropriate for children to access the grant directly on behalf of both
themselves and younger siblings in their care, and in other cases a system of paying the

grant to a ‘household mentor’ as proposed by the SALC would be more appropriate. At the very least, it is incumbent on the state to make a serious and concerted effort to ensure that children without adult care-givers are not deprived of the financial support conferred by the child support grant.

In order to ensure that the child support grant programme is reasonably implemented in respect of children without adult care-givers, it is imperative that the Act and regulations are amended to include proactive measures for ensuring that this group of children gain effective access to the child support grant. This includes measures for identifying children without adult care-givers, assessing their needs and putting in place suitable mechanisms for ensuring that they receive the benefit of the child support grant. Clearly this will require additional resources and capacity. However, this investment is required in order to honour our constitutional commitments to vulnerable children.

Note that the government is both mindful of its obligations under the Constitution and aware that the South African reality of child headed households must be accommodated in providing services and support. The Minister of Social Development (Business Day, 1 August 2003, 4) has ‘expressed outrage at municipalities that charge households headed by children the usual rates and taxes’. He said ‘minors are obviously unemployed and cannot even afford to feed themselves and their siblings … they cannot be expected to pay rates and should not be subjected to water and electricity cuts’.

Arguably, the Social Assistance Act can be interpreted to allow child headed households to obtain the CSG. But, amendments will be preferable to clarify the law for officials and deal with some of the detailed mechanisms for special treatment of these households. The legislation may need to expressly override the common law which generally regards children as lacking full legal capacity.

Issues:

- Some of the difficulties with a non-specific functional test for PCGs is the capacity of officials to administer this. We need to consider this. Also, are there cost factors?

- The issue of school children collecting grants during school time needs to be addressed. Certain practical steps might address this situation such as Saturday collection days, greater encouragement to people to use alternative methods of collection of the grant such as post offices and banks, etc.
Context for child-headed households
Jacqui Khumalo, Thandanani Children’s Foundation

Thandanani

- Thandanani means Love One Another and the organization aims to bring hope to the lives of the children
- The organization is aware of the issues facing children particularly those in Pietermaritzburg
- We are committed to ensuring these issues are addressed by empowering communities put children’s issues on their agenda in terms of development

Why we do it

- To ensure there is a future
- That children’s issues are dealt with by all the relevant stakeholders
- That children are given a voice where their problems are concerned
- To develop better methods of working with children
- To ensure that children’s issues are put on the agenda
- To make a difference in children’s lives
Introduction

- 13 out of every 100 children aged 2 to 14 years have lost a mother, father or both parents to AIDS
- 3 out of every 100 households are child headed
- 1 out of every 3 children between the ages of 15 and 17 may have lost their parents by 2015
- With the growing number of orphans who came through to TCF, this came with the realization that more children were now taking the responsibility for taking care of their homes when their parents die
- TCF commissioned a study to find out the extent of problems faced by child headed households
- This research argues that many of the problems faced by CHH are in fact common to all vulnerable children. However the lack of parents or caregivers heightens children’s vulnerability and thus requires them as a special group
- The research was aimed at giving the heads of CHH, the opportunity to describe problems facing them in their daily lives
- This research was aimed at finding out what government, other NGO responded to the plight of CHH
Needs of children

- Children faced with poverty and the death of their parents find themselves leaving school in order to reduce the household
- They become vulnerable as they have to ensure that the household continues
- Having food to eat has been identified as a major problem. (over half the households identified food security as their most critical problem)
- 9 out of 10 identified shelter as a major problem
- The children interviewed did not identify emotional needs as a major problem
- 1 out of 5 households felt that they have more problems without an adult living with them
- Nearly half the children were not at school
- In Richmond more children had their own children
### TFC’s responses

- We are TFC have the following highlighted services to try and address some of the problems faced by CHH and are continually revamping our programmes to meet the needs of the children.
- Adult supervision of the children is done by community child care committees (volunteers within the community).
- We are also ensuring that children have a voice in the issues that affect them, this is done through child participation workshops.
- We are also aware that children have sexuality issues that they are faced with and we bridge the gap by conducting awareness, individual counseling and group discussion on sexuality issues.

### Government and NGO support

- The draft guidelines for health and social services recommended a package of service and support to all vulnerable children i.e. grants, free-education, free registration of birth and death, food and health care.
- The Children’s Bill further proposes a new social security system for children i.e. a child grant up to 18, grant for relatives caring for the child, food, subsidized housing, psycho-social support.
- The draft bill also proposes that adult mentors should be provided to supervise and assist Child Headed Households.
- Current models of care include foster care placements.
- Cluster homes.
Conclusion

- Child headed homes have enabled brothers and sisters to remain in their homes together
- Only 1 in 15 children felt that they would prefer to live with an adult
- More than half the households were made up of teenagers and nearly one third were under the age of 12
- In more than half the homes the adult looking after the children had died. In one third of these, the parent had died less than a year ago
- Nearly half the children were not attending school – many because they could not pay school fees
- All the CHH had shelter but most were in homes that were in poor condition
- Less than a fifth of the households had someone working. Most of the households were supported by relatives
Context for street children
Annette Cockburn

1. Introduction

The phenomenon of street children the world over has a common etiology; the children themselves share a common street lifestyle. In their homes, poverty, unemployment, marital instability and alcohol abuse are endemic, and violence is the common method of settling interpersonal problems. In South Africa the situation has been exacerbated by rapid urbanization and inadequate welfare provision – as well as lack of access to resources.

Every host community has produced either government machinery or NGOs to try to control, care for, reform or punish these children. However, it has been shown over the years that street children do not benefit from traditional facilities, and so alternative ways of addressing the problem have had to be sought.

Interventions should be multi-faceted as the child moves through the phases of rehabilitation. We are convinced that there is no one strategy to deal with the problem, and that there should be a range of simple basic services to address the needs of these children both on and off the street. We believe that in South Africa, as in other developing countries, the models of child care should be unelaborated and indigenous in nature.

For every four street children seen on the streets during the day, three are day-time strollers or children “on the streets”, that is, they are supplementing family income and go home at night. The fourth is a child “of the streets” – That is, he will sleep on the streets at night.

Street children have been described as a “muted” group (Swart 1998), a group which is peripheral or marginal to the dominant society. The nature and activities of muted groups are typically outside of the awareness of members of the dominant society, and as such, elements of their nature and their activities are frequently not noticed, or are misinterpreted and misunderstood. As a result, perceptions of muted groups tend to be stereotyped, most commonly consisting of either romanticized or deviant caricatures (Richter 1990).

“Street children are not only running away from persons and abusive situations; they are also searching for people who empathise and for situations in which they will reformulate their sense of self-worth.” (Swart 1993) They find support and camaraderie among their peers on the street, but they are looking beyond what the peer group has to offer. Running away from intolerable circumstances can be evidence of extraordinarily adaptive behaviour.
2. Underlying assumptions and principles

These principles, although articulated as far back as 1998, continue to inform service provision to street children. Happily many of these assumptions have become provisions in the new Children’s Bill, and testify to the significant progress which has taken place in the last five years.

- That street children programmes should not be established without consultation with other role players and should be registered with the appropriate authorities.

- That street children programmes should have formalized infrastructures; *inter alia*, Management committees, affiliation with existing welfare agencies, adequate and appropriate staff and clear criteria for admission.

- That street children shelters should not see the shelter as an end in itself – Shelters should be seen as part of a holistic approach, and access to appropriate non formal education, skills training, school return and more permanent planning should form part of the shelters curriculum.

- That street children shelters should see return and reintegation to the family of origin as a priority. But where this is not feasible, it should be noted that forcible return to a dysfunctional family is counter productive.

- That while street children shelters have historically accommodated awaiting trial juveniles on an ad hoc basis, it should be clearly stated that shelters never have, or would, provide “lock up” facilities.

- That street children programmes should have staff trained in the basic principles of child care but also provide additional training in areas such as substance abuse, the management of violence, HIV education, juvenile justice, etc.

- That changes in the Child Care Act will be made to preclude police cells and prisons as places of safety as well as providing more adequately for the needs of street children.

- That changes to the criminal procedures act will be made as well as changes to the municipal by laws to make it impossible to arrest a child on the charge of loitering or “slenter”.

- That street children programmes including shelters should operate within the paradigm of therapeautic rather than custodial care.

- That services need to be unelaborated, affordable and cost effective.
• That self-referral and an open door policy are non-negotiable principles.

• That the provision of services will be with the express purpose of meeting the needs of the children and will not be designed to “clear the streets”.

• That no research should take place in street children projects for purely academic reasons. This is potentially exploitative of the children.

• That the corner-stone of services to street children is the right of each individual to live his/her life with dignity and develop to his/her full potential.

• That services must be guided by the constitution, legislation and policy framework based on International Human Rights philosophies and principles.

• That prevention be seen as a priority. Services must provide a broad range and continuum of community based services to ensure accessibility and prevent further breakdown of family functioning.

3. Legislative responses to street children

It needs to be said at the outset that the Children’s Bill marks a huge step in the right direction for street children. In previous legislation there were very few provisions made for these children.

Shelters were barely acknowledged and certainly there was no mention of the plethora of other services which have developed over time. Discrepancies in funding between children’s homes and shelters (even when shelters were eventually funded) were enormous. Police cells and prisons were routinely used as “places of safety” for children arrested for all manner of perceived or real infringements of the law. The most readily invoked were the loitering or “slenter” laws.

There were few regulations governing services for Street children and registration was not mandatory. There was no screening of service providers and this led to many “fly by nights” setting up projects which fundraised quantities of money but failed to provide any proper services to these children.

Street children are considered to be amongst the most damaged, deprived and marginalized of all South Africa’s children. Although up to now services have more or less kept up with the number of children on the street (reliable statistics are impossible to obtain because of the
peripatetic nature of these children). However, the HIV/AIDS pandemic will certainly lead to increased numbers of children finding themselves on the street.

In South Africa a multi-faceted model of intervention with street children is emerging; a cost effective indigenous model which acknowledges the many stages of becoming street children, and the slow and painful process of reconstructing shattered lives.

The work of the IMC (Interministerial Committee on Children and Youth at Risk) paved the way for much which is positive for street children in the new Children's Bill. This being said, there are however, some aspects of the new Bill which are causing a great deal of consternation in the sector.

4. Social assistance for street children

The Social Security Chapter in The Children's Bill has been removed, however the issue of direct access by children to social security grants remain a challenge. The SALC Review Report Project 110 December 2002, states

“Street children over the age of 12 should be entitled to receive and administer the proposed universal grant without adult assistance.”

The service providers consulted were vehemently opposed to such a proposal for the following reasons.

- Historically the public have been exhorted not to give money to street children. Giving a child money effectively keeps him on the street. Children refer themselves to shelters and other services when they find themselves without support on the street.
- Providing street children with direct access to a cash grant would generate a host of other problems apart from assisting the child to stay on the street.
- More and more children would arrive on the streets of a city in order to access the Grant.
- 3 out of 4 children presently on the street do not live there. They go back somewhere at night. This would change.
- Reintegrating children with their families of origin is difficult, intensive work. If a child was in a manner of speaking being “paid” to stay on the street, the small incentives to return home would fall away.
- Crime on the street would escalate, theft and assault, already endemic, would increase if there were more material possessions, drugs and money.
• Drug abuse would increase if street children had the means to buy drugs more sophisticated and expensive than paint thinners and glue.

• Administration of such a grant would be well nigh impossible. Repeated attempts to establish a database of street children in this country have been largely unsuccessful. Determination of age, lack of ID documents and the numerous aliases adopted by street children, make them pretty well impossible to track.

• That the Department of Social Development has the infrastructure and the capacity to manage social assistance grants to street children is highly unlikely.

5. Conclusion

Issues such as support to street children services and to families whose children have left home to live on the street, are outside the scope of this discussion, but clearly these are critical issues as is the necessity for more financial resources to be allocated to primary prevention. So, even if it is unworkable for street children to directly access social security grants, there needs to be a lot more indirect financial support to this group of children. Obviously it is not in the best interests of the child to live on the street and paying grants directly to street children would without doubt keep them there.
Access to social assistance for children without adult primary caregivers
Ronel van Zyl, South African Law Reform Commission

CHILD CARE ACT, 1984

- Chapter 1: Definitions
- Chapter 2: Children’s Courts and Commissioners of Child Welfare
- Chapter 3: Protection of Children
- Chapter 4: Adoptions
- Chapter 5: Places of Safety, Children’s Homes and Places of Care
- Chapter 6: Special provisions regarding Pupils, Foster Children and other Children
- Chapter 7: Contribution Orders
- Chapter 8: Prevention of ill-treatment and unlawful removal of Children, and prohibition of employment of certain children
- Chapter 9: General provisions

CHAPTER 3: PROTECTION OF CHILDREN

- Section 10: Maintenance of certain children apart from parents
- Section 11: Removal of child to place of safety on order of court or sworn affirmation
- Section 12: Removal of child to place of safety pending inquiry
- Section 13: Bringing of children before children’s court
- Section 14: Holding of inquiries
- Section 15: Powers of children’s court after inquiry
- Section 16: Duration of orders under section 15
- Section 16A: Appeals
### CHILD CARE ACT: POWERS OF COURT

- Section 15(1)(b): Foster care
- Section 15(1)(c): Children’s home
- Section 15(1)(d): School of Industries
- Section 15(3): Place of Safety pending implementation of court order
- Section 18: Adoption of children

### CHILD CARE ACT: FINANCIAL MATTERS

- Section 28(1): State must establish and maintain places of safety
- Section 28A: State must establish and maintain secure care facilities
- Section 29: State must establish and maintain government children’s homes
- Section 43(1): Court may order a person to pay contribution towards the maintenance of a child
- Section 56(1): State financial support of child admitted to children’s home
- Section 56(2): Local authority may provide financial assistance to association of persons working in its area for the protection, care or control of children
SOCIAL ASSISTANCE ACT, 1992

- Section 2: Payment of grants
  - Paragraph (d) – child support grant for children under 7 or such higher age as may be determined to primary care giver
  - Paragraph (e) – a foster child grant to a foster parent
  - Paragraph (f) – to prescribed institutions, including places of safety
  - Paragraph (g) – a care-dependency grant to a parent or foster parent

SALRC REVIEW OF CHILD CARE ACT

- Children infected with and affected by HIV/AIDS
  - Plight of child often starts before death of parent
  - Nursing sick parent
  - Heavy domestic responsibilities
  - Care of younger siblings
  - Lack of resources for school fees, books, uniforms
  - Stigmatised and marginalised by community
  - Rejected by relatives
CHILDREN AFFECTED BY HIV/AIDS

- Risk of abuse, neglect and exploitation by relatives
- Get caught up in child labour, delinquency, homelessness, street-life, prostitution
- Risk of malnutrition, illness
- Vulnerable to early pregnancy
- Require social support to help with trauma of sickness and death of parents
- Remain alone to face challenges of life

WHITE PAPER FOR SOCIAL WELFARE

- Enhance capacity of following existing forms of care to meet needs of orphaned children:
  - The extended family (preferred option)
  - Family homes (through support to women in community living with and caring for orphaned children)
  - Foster care and/or adoption
  - Institutional care
- Financial strain, poor living conditions, lack of close relatives problematic
Support for Orphans

- Models of care for orphaned children considered:
  - Independent living by orphans
  - Independent living with external supervision and support
  - Foster care, traditional family care, cluster care of multiple children, collective care of individuals or multiple children
  - Adoption
  - Institutional care, including places of safety, shelters, short-term infant homes, traditional children’s homes

Discussion Paper: Recommendations

- Give legal recognition to child-headed households as placement option for orphaned children in need of care
- Court must be satisfied that suitable adult support is available
- Support structures, such as regular visits by community workers, should be put in place
- Child at head of household must not be forced to abandon his/her education by taking up adult responsibilities
### DISCUSSION PAPER: RECOMMENDATIONS (2)

- Give legal recognition to schemes in terms of which certain adults are appointed as mentors over child-headed households
- “Household mentor” may not make decisions without consulting child at head of household
- “Household mentor” must be able to access grants and other social benefits on behalf of child-headed household
- “Household mentor” must be accountable to Department of Social Development / recognised NGO / Court

### PROPOSED CHILDREN’S BILL

- Clause 136: Child-headed Households
- Clause 151&152: Removal of children to temporary safe care
- Clause 158: Placement of children in child and youth centres
- Clause 161: Issue of contribution orders
- Chapter 13: Foster care and court-ordered kinship care
- Chapter 14: Child and youth care centres
- Chapter 15: Shelters and drop-in centres
- Chapter 16: Adoption
CHILD-HEADED HOUSEHOLDS

Provincial head of department recognises child-headed household if—
- Parent/primary caregiver terminally ill/deceased
- No adult family member available to provide care
- Child has assumed the role of primary caregiver
- Must function under general supervision of organ of state or NGO

CHILD-HEADED HOUSEHOLDS (2)

- Organ of state / NGO may collect and administer social security grant or other grant or assistance
- Organ of state / NGO accountable to provincial HOD or Children’s Court for administration of money received on behalf of household
- Organ of state / NGO may not take any decisions concerning children without consulting child at head of household and other children
Direct access to grants for child-headed households:
A necessary and allowable inclusion in the children’s and social assistance bills
Ashley Martabano, Women’s Legal Centre

This paper addresses the issue of direct access to social assistance for children in child-headed households (CHH), in light of the new Children’s Bill and Social Assistance Bill. While the bills are a step in the right direction, they still lack critical provisions that will help to insure support for one of SA’s most vulnerable populations, children, particularly those in child-headed households.

To outline the paper, I review the international and constitutional grounds for acknowledging child-headed households and providing grants to children, in this case, directly. I then cover some of the most relevant sections of the new Bills which acknowledge the existence of CHHs.

I then present the notions of evolving capacity and informed consent, both of which, upon analysis, support the argument that children often do have the capacity to act as adults, and should be recognized as such. Children acting as guardians of themselves and their siblings demonstrate capacity to accept grants in support of their families. It seems so obvious, yet it is not an uncontested idea.

Finally, I move to more specific sections of the two new bills and support the proposal that though they are in fact a step in the right direction, they are still lacking provisions to expressly address the problems facing child-headed households and their rights, and needs, to access child support grants directly.

I acknowledge at the outset that ideally, child-headed households would be unnecessary, or would at the least have adequate supervision and guardians to ensure their well-being. It is not ideal to reinforce children in adult roles, and there will certainly be instances in which remaining in a CHH is not in the best interests of the child. But we need to take care of these children right now, in what may be the interim between the new constitution and the constitutional ideal, and the best way of doing so is to give child-heads of household direct access to social grants, particularly the child support grant.

First, the international framework. International standards primarily derive from the International Convention on the Rights of the Child (CRC). Though at first child-headed households may seem contrary to the ideals the convention espouses, this may not be the case given the alternatives, as Solange Rosa’s paper suggests. Specifically, the convention guarantees the right to know and be cared for by his or her parents (Article 7), and requires...
states parties to recognize "for every child the right to benefit from social security, including social insurance" and to take "the necessary measures to achieve the full realization of this right." (Article 26). Article 27 goes a step further, requiring states to recognize "the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development." Each of these provisions requires the party states to recognize, protect and provide for the rights of children. Though, like the SA constitution, some provisions require states to act within their means, some are absolute, demanding basic recognition of children's rights.

Secondly, the Constitutional Framework. Child-headed households and child support grants raise several constitutional issues, briefly:65

- **Children's Rights** as guaranteed by Chapter 2 Section 28 of the Constitution. Section 28(1), similar to Article 7 of the CRC, guarantees children the right to 'family care or parental care, or to appropriate alternative care when removed from the family environment.” In addition section 28(2) states, that the ‘child’s best interest are of paramount importance in every matter concerning the child.’ The current version of the Children's Bill incorporates these standards in Chapter 2.

- **The Right to Social Assistance.** Section 27 grants everyone access to social assistance if needed, and requires that the state take reasonable legislative and other measures within its available resources, to achieve the progressive realization of these rights.’ The recent Grootboom and TAC judgements hold that de facto, a program that excludes a significant segment of the society cannot be said to be reasonable. The judgements also state that programs disregarding the particularly vulnerable cannot be reasonable. Children without adult caregivers and their families clearly qualify here as a significant, if not in number, in importance, segment and also a particularly vulnerable group.

- **The right to equality:** As discussed by Liebenberg and Goldblatt, the right to equality is implicated in many ways in the context of child-headed households, and children’s ability to receive child support grants. The different treatment of children and adults (age), pregnancy, social origin, and birth (to parents with AIDS) are among those possibly included under section 9(3). Naturally, as women are primary PCGs, gender is implicated, as is race, as black South Africans are the most likely to be in need of aid. Additionally, one general principle of the new Social Assistance Bill explicitly prohibits unfair discrimination in the distribution of social grants.66 How can

65 For a more detailed analysis of the Constitutional implications, please refer to "Constitutional Obligations to Provide Social Assistance to Child Headed Households," paper presented by Sandy Liebenberg and Beth Goldblatt.  
66 Draft Social Assistance Bill 2003, C.1 §4(a)
it then deny access to children? As Ms. Rosa’s paper suggests, though the act may not deny them access on its face, in practice, an adult is necessary to obtain a grant.67

- **The three rights above are not the only rights relevant to the discussion.** Grants to CHHs also affect those households’ members’ rights to dignity and bodily integrity. Though a child’s right of autonomy is not absolute, it is an evolving right, as supported by informed consent and evolving capacity decisions and literature. If the right were absolute, it would conflict with the motivations for the provisions of section 28 guaranteeing parental care or an alternative, but again, a child does have a constantly evolving right to autonomy as he gains capacity to make important decisions and becomes an adult. It is not the case that at age 18 a child suddenly gains capacity for all aspects of adult life and decision-making. These capacities are ever increasing throughout the child’s life until the point of adulthood, and as such, should be recognized as they are accrued. Finally, if the grant is the CHHs only means of income, and therefore, sole source for food, shelter, and water, then even the right to life is implicated, in addition to the right to housing.

I acknowledge and in NO way discount the rights guaranteed to children by the constitution. Unfortunately, we must remember something we are all too familiar with: the government’s available resources at present are limited, and as such, we are often forced to make due with the current, less than ideal situation. It is this present situation that we must address now because though constitutional guarantees should be paramount, they are not presently being adequately provided for, and in the interim, when we have so many child-headed households in the country, we cannot deny these children and their families assistance while the government puts an acceptable program in place to provide for alternative parental care or supervision of parentless households. Resources are insufficient, and by allowing child heads of households to directly access child support grants with less red tape and bureaucracy, we not only provide much needed support to these families, but at the same time cut the costs of the red tape currently in place.

This paper focuses on the relevant provisions of the new Social Assistance Bill (Draft 2003) and the Children’s Bill making recommendations for small, but important alterations in each. For the sake of the child-heads and the members of their households, child-heads of household must have explicit direct access to social assistance grants. If we believe that government supervision or mentoring of these households is ideal, then this proposal is for the time until that supervision can be effected. Alternatively, if government supervision is not

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considered ideal for CHHs, this proposal would be relevant for the present until that time at which the government has provided for the Constitutional guarantees discussed above.

In determining whether CHHs should be left independent, supervised, or abolished as children are provided alternative parental care, it is important to acknowledge that in fact, child-headed households with proper access to support may in fact be viable social units preferable to foster care or placement in an institution that would separate siblings from each other and their larger community (Rosa, 6). Karin Landgren, in her article ‘Rights-based Approach to the Care and Protection of Orphans,’ published 27 October 1998, says that “strictly speaking, [child headed households] appear[] inconsistent with the Convention [on the Rights of the Child].” She continues, “Governments are supposed to ensure alternative care to such children, not reinforce them in adult roles. And yet, we are finding that supported child-headed households, possibly with community supervision, may be a model form of care.” Perhaps direct access with supervision should be the final goal. More research needs to be done on the subject.

Though the South African Law Reform Commission suggests five methods of making social grants accessible to children, (1) independent living by orphans, (2) independent living with external support and supervision, (3) foster care, (4) adoption, and (5) institutional care, the first two are the most relevant to the present discussion. Though the prospect of direct access to the grants is theoretically for situations without supervision as an interim measure, the model can easily be adapted to a situation where minor supervision or a mentor is involved. For the purpose of this paper, either context may be assumed.

**Language in the current bills**

Some provisions in the Bills are best set out before beginning in depth analysis of direct access to grants. At the outset, it is important to realize that the simple inclusion of Child-headed households in each bill is a significant step forward for Parliament. It represents government's acknowledgment of the existence of child-headed households and is a first step in providing assistance to them.

**The Children's Bill**

Chapter 8, Section 136 of the Children's Bill is most important. It recognises that children may assume the role of primary care givers, and requires that child-headed households are supervised by some organ of the state or an NGO. It does not allow for individuals to perform
this supervisory function, or directly collect funds for a CHH though in practice, each CHH will likely interact with an individual from an NGO or organ of state. This organ of state may collect grants on behalf of the household and may not take any decisions concerning the household or its members without consulting the child at the head of the household, and often the other members as well. In full, the bill states:

Child-headed households

(1) A provincial head of social development may recognise a household as a child-headed household if –
   (a) the parent or primary care-giver of the household is terminally ill or has died;
   (b) no adult family member is available to provide care for the children in the household; and
   (c) a child has assumed the role of primary care-giver in respect of a child or children in the household.

(2) A child-headed household must function under the general supervision of an organ of state or non-governmental organisation
   (a) determined by the provincial head of social development; or
   (b) designated by a children’s court.

(3) The organ of state or non-governmental organisation referred to in subsection (2)
   (a) may collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled; and
   (b) is accountable to the provincial department of social development or the children’s court for the administration of any money received on behalf of the household.

(4) The organ of state or non-governmental organisation referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting –
   (a) the child at the head of the household; and
   (b) given the age, maturity and stage of development of the other children, also those other children.

(5) The child heading the household may take all day-to-day decisions relating to the household and the children in the household as if that child was an adult primary care-giver.

(6) A child-headed household may not be excluded from any aid, relief or other programme for poor households provided by an organ of state in the national, provincial or local
sphere of government solely by reason of the fact that the household is headed by a child. (emphasis added).

Originally, Chapter 25 of the Draft Children's Bill contained sections about the accessibility of social grants by children but these sections were later removed, left to be addressed in the Social Assistance Bill. However, the Commission acknowledged in its Discussion Paper on the Chapter the need to "remove administrative impediments and hurdles caused by over onerous regulations . . . which specify conditions for the payments of grants."68

Under the Current Social Assistance Act's regulations, the formalities required to apply for the Child Support Grant are exactly that, onerous, requiring identity documents that many children do not possess when they become child-heads of household. This formality requiring identity documents has the practical effect of limiting direct access to grants to CHHs where the eldest child is at a minimum, 16 years of age. Despite the Bill's not formally including a minimum age requirement, the current formality requiring identity documents limits the availability of grants to children 16 years of age or older. However, under the current regulations,69 one regulation provides that the director-general may accept alternative proof of any of the documents required in the other subregulations, "including, where applicable, a statement or statements made by the applicant under oath."70 This may be a viable solution for CHHs, but presents a problem of potential fraud on the system. It does not include safeguards to ensure that many children per household claim or that children who are not heads of households or not in CHHs claim. Many suggestions have been made including acceptance of letters of reference from local leaders, teachers, clergy, or social workers, implementation of a biometric form of identification once a child's fingerprint stabilises, or more effective registration at birth. Though none will be 100 percent free of potential fraud, they are better than the alternative of leaving South African children without any access to the crucial funds they need to obtain food, water and shelter.

Social Assistance Bill (Draft February 2003)

Again, the primary achievement is the inclusion of child-headed households in the new Bill itself. Chapter 1 defines "child-headed household" as "a household where"

(a) A parent or primary caregiver of the household is terminally ill or has died;71

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68 See Discussion Paper Chapter 25, at 1277.
69 Apparently, these are soon to be changed.
70 See Regulations No. 417-418
71 Because CHHs do not always result from a parent's or primary caregiver's terminal illness or death, it was recommended at the Workshop that the language be changed to include situations in which a child has been abandoned.
(b) No adult family member lives with and provides care for the children in the household; and

c) A child has assumed the role of primary care in respect of a child or children in the household."

Clearly, the language of the Bill does not preclude a child of any age from assuming the role of a primary care giver, but it does not explicitly allow for any child who may have capacity to assume the role, nor does it provide a means of assessing capacity in children, a crucial provision whose content must be determined and then included. Making capacity turn on age will lead to both the under and over-inclusion of capable children. Some 7 year olds may have assumed the care of their younger siblings despite their young age, and some 17 year olds may still entirely lack capacity due to immaturity. We must develop a method for assessing the capacity of a given child, but in situations where it is clear that a child is already caring for family members, this should not be questionable; capacity should be assumed for the purposes of receiving the child support grant. If it is determined that remaining in a CHH is not in the best interests of the child, then in the long run, other placement should be determined. However, until such time as alternative placement is arranged, a child head of household who has capably run his family should have direct access to the child support grants to which the members of his household are entitled. It is not my position that all children currently in CHHs should remain in them, but merely that all those currently in CHHs have access to the child support grants they so desperately need via the current child at the head of the household.

Next, Chapter 1 of the Draft Bill included the definition of "mentor," only implied in the Children's Bill.72 "'Mentor' means an individual or organisation who has been appointed [by] a relevant provincial department of national department, a designated non-governmental organisation, or the Child and Family Court, to apply for, or collect and administer a grant on behalf of a street child or a child living in a child-headed household." (emphasis added). Two things are noteworthy in this provision: first, an individual is allowed to be a mentor under the Social Assistance Bill, and secondly, the use of the word 'or' instead of 'and' in the context of what the mentor may do may be interpreted as allowing children to apply for the grant on their own, or, in the alternative, after receiving assistance in the application, to collect and administer the grant without supervision. Though this interpretation is not explicit, it is arguably permissible for a child to apply for and/or collect the grant on his own.

Thirdly, Chapter 1 defines primary care giver as "a person, whether or not related to the child, who takes primary responsibility of meeting the daily care needs of the child." There is not

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72 Apparently, subsequent changes to the Social Assistance Bill removed these provisions entirely, but no more recent draft was available.
age minimum included here either, nor is there a prohibition against child primary care givers. However, it should be included in the definition explicitly that a child can be a primary care giver so as to avoid confusion among those who actually administer the bill.

One object of the Act stated in Section 3 of the Bill is "to ensure the efficient, effective, economical, and just administrative action" (emphasis added) in the rendering of social assistance. Providing direct access to grants to the heads of child-headed households will be the most efficient, avoiding a middleman and additional paperwork, effective in getting aid to these children, economical in cutting the costs of additional red tape and a middleman, and just because these children need and are entitled to social assistance.

Finally, Chapter 2 Section 3, the Provision of Social Grants, states that "The minister shall… make… (d) a child support grant to a primary care-giver of a child, (e) a child disability grant to a parent, primary care giver, or foster parent or mentor in respect of a child with a physical or mental or sensory or intellectual disability or chronic illness child." Section 5 requires only that the applicant be the "primary care-giver of a child," again, not including an age or prohibiting a child primary care giver, but not explicitly allowing it. The text of the Social Assistance Bill is promising, but it needs to go further, as addressed below.

Current acknowledgment of the capacity of minors: Local and international contexts

“One of the more noticeable developments relating to children in law has been the reordering of the parent/child relationship and the recognition of children’s autonomy and their ability to make decisions in various spheres, depending on the nature of the decision and the maturity and capacity of the child. For example, Article 12(1) of the United Nations Convention on the Rights of the Child provides that::

‘State 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 shall be given due weight in accordance with the age and maturity of the child.’

"It is now accepted that on account of their age or maturity children are capable of taking even important decisions about their welfare and that any choices that they make should be accorded weight, bearing in mind their capacity.”73

73 Passages written by Michelle O’Sullivan, Women's Legal Centre.
Evolving capacity

The Convention on the Rights of the Child, as mentioned above, acknowledges the notion of evolving capacity. It is a common sense idea; a child's capacity for understanding and decision-making is constantly evolving as he experiences life and attends school. It is not the case that miraculously, at the age of 18, a child suddenly obtains every decision-making faculty he or she will ever require that he did not possess on the eve of his or her 18th birthday. First a child learns how to make small decisions, is he hungry, what does she want to eat or wear. Slowly, decisions increase in complexity as a child gains experience and understanding. A child who is responsible for an entire family has already demonstrated capacity beyond his or her years and should not be prohibited from caring for his or her family because the government wants to determine something that is already evident from his or her current behaviour. Often capacity evolves more quickly when circumstances demand, and a child's capacity must be determined on an individual basis.

Informed consent

Generally, informed consent is a concept used as a safeguard to ensure that important or far-reaching decisions are properly understood when made. It strives to equip the individual to make those choices. However, informed consent is rarely defined, and a person's capacity to consent will vary markedly based on age, maturity, and available information. Sometimes, counselling will be ideal, the only true means to make a consent informed, but this may not always be the case. Some decisions are clear once an individual has the facts. In medical cases, some form of counselling is often necessary to inform the individual of these facts, but it is patently clear to a hungry child who needs to feed his hungry siblings that food is what must be purchased at the store on a given day. In Castell v. Greef, Ackerman J held that in the context of medical negligence, 'informed consent means exercising the fundamental right to self-determination with full knowledge of the risks involved.' Importantly, comparative authority suggests that in relation to capacity, informed consent does not require overall competency for personal functioning, only specific capacity to make decisions concerning healthcare. An analogy is easily made to the child who may not be capable of understanding the implications of terminating medical treatment but who can clearly understand a need for money to provide food and shelter.
Current status of the Law in South Africa

One familiar area in which minors are acknowledged to have capacity to consent is abortion. In the Choice on Termination of Pregnancy Act, Section 5 requires: "the termination of a pregnancy may only take place with the informed consent of the pregnant woman." (emphasis added). Section 5(3) states: "In the case of a pregnant minor, a medical practitioner or a registered midwife, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that termination of the pregnancy shall not be denied because such minor chooses not to consult them." (emphasis added). Here, though counselling is recommended, the law acknowledges that a young woman's understanding of her own body and desires for her future are sufficient to make the decision about terminating a pregnancy on her own.

The current Child Care Act, Section 39(4), recognised the ability of a 14 year old child to consent to medical procedures, but the current proposed bill actually lowers that age to 12. Section 129 of the current bill recognizes children's ability to consent, if they are over 12, and of sufficient maturity and mental capacity to understand the benefits, risks, social and other implications of the treatment or operation, and only with assistance of parents or primary care giver.74

However, the HIV section of the current Children's Bill acknowledges a child's capacity to understand decisions often more difficult than those required to consent to medical procedures. Section 130(2) states that, "[c]onsent for a HIV-test on a child may be given by (a) the child, if the child is:

(i) 12 years of age or older; or

(ii) under the age of 12 years and is of sufficient maturity to understand the benefits, risks and social implications of such a test (emphasis added)

Section 132 similarly provides: "Counselling before and after HIV-testing:

(1) A child may be tested for HIV only after proper counselling, by an appropriately trained person, of-

(a) the child, if the child is of sufficient maturity to understand the benefits, risks, and social implications of such a test; (emphasis added)

(2) Post-test counselling must be provided by an appropriately trained person to -

74 This language presents a potential conflict when we have children under age 12 as primary care givers
finally, section 133, confidentiality of information on HIV/AIDS status of children states:

…(2) Consent to disclose the fact that a child is HIV-positive may be given by -

(a) the child, if the child is

(i) 12 years of age or older; or

(ii) under the age of 12 and of is [sic] sufficient maturity to understand the

benefits, risks and social implications of such a disclosure (emphasis added)

Each section of the Children’s Bill mentioned above clearly accepts that there are cases in
which a young child may be of sufficient maturity to make very important, often life-altering
decisions in his or her life. When compared to having capacity to accept and administer a
grant, the latter seems to require trivial capacity. A minor is deemed capable to elect to have
an abortion at a young age after displaying only a capacity to have intercourse and think
through the decision to terminate the pregnancy. When compared to a child who has already
demonstrated adult capabilities by not merely engaging in illicit acts but by providing for a
family and caring for siblings, it seems incredible that we would not recognise the capacity of
these children to receive social assistance grants.

Distinctions between the aforementioned situations and direct access to
grants

It is important to acknowledge the differences between medical consent cases and child-
heads of household claiming capacity to collect grants. Most noticeably, in medical cases,
there is always a doctor who can assess the capacity of the child to understand and make the
appropriate decision. The bills generally call for not only determination of a child’s status as
head of a household, but provides, as mentioned above, for supervision of child-headed
households. Right now, however, there is no supervision for a majority of these households,
but that does not mean that we can ignore these children until the government has assigned
them a mentor. Also, there is not enough money to go around for every child claiming
assistance; as mentioned earlier, some screening process will need to be put in place.
However, once a child has been determined to be eligible for a grant, he or she should be
able to access it directly and supervision should be waived. It is about recognising the de
facto relationships here where a child is the primary caregiver, whether ideal or not. In that
case, children at the head of the household should be able to access the grants with as little
red tape as possible. They should be able to make a statement that they are a child head of
household, and that should suffice to access the grant. The decision-making power should
not be left to officials or bureaucracy. These children have enough to deal with surviving without parents or other income.

**Conclusion**

Small, but significant changes must be made to the Children's Bill and Social Assistance Bill. They must include a direct link between child-headed households and primary caregivers, explicitly acknowledging that a child, who has demonstrated capacity via his or her actions, can be a primary care giver, and can therefore access the grants for the children in his or her care. As mentioned earlier in this paper, the Commission itself acknowledged the need to remove barrier's to children's access to social assistance. Though it finally determined that the Children's Bill was not the appropriate place to do this, it must at least be done explicitly in the Social Assistance Bill.

The current bills are promising, certainly a step in the right direction. They acknowledge child-headed households and do not prohibit the possibility of direct access to social assistance. However, in light of the present situation, where mentors do not exist and members of CHHs are going without assistance, the bills are insufficient. Though the Social Assistance Bill allows for regulations to be promulgated for administration of the act, and includes these regulations in the definition of 'the Act,' regulations should not augment or expand the act the power or scope of the act; they should merely provide the details of administration, and as such, cannot be relied upon to provide for CHHs. Both statutes need empowering provisions in them to ensure explicitly that CHHs are provided for.

While my interpretations of the Bills may eventually be accepted, they are only one set of potential interpretations, and in this case, the children at stake are too important to allow differing interpretations. The bills must recognise the de facto realities of CHHs and link the definitions and recognition to the administration of each Act. Lip-service is not enough.

All child heads of household should be allowed to access the grants. The South African Social Assistance system took the uncommon approach to assistance by handing out direct cash grants instead of in-kind benefits, and it has been incredibly successful according to studies done here and abroad, particularly in the realm of old-age pensions. Despite worries that money would be spent on non-essential items, the reality has shown the contrary to be true; money is spent on necessities, and the grants are the most efficient way to get crucial assistance to families in need. The analogous situation occurs now with giving direct access to child-heads of household. Direct access is simply the most efficient way of delivering necessary resources to one of South Africa's most vulnerable populations. There must be, even if just an interim measure, direct provisions included either in both acts, or in one with a
direct link in the other, which provide for direct access by child-headed households. The children's bill provides that "In any matter concerning a child, delay must as far as possible be avoided." The addition of extra red tape not only contravenes the constitutional rights of children by often having the practical effect of denying them assistance, but also the direct mandate of the act to avoid delay, while at the same time adding expense to the delivery of assistance.

We propose language in the bills that, "In the event that a child-headed household does not function under the general supervision of an organ of state or NGO (or an individual), or until such time that the child headed household functions under such general supervision- the child who has assumed the role of primary care giver in respect of a child or children in the household may collect and administer for the child-headed household, any social security grant or other grant or assistance to which the household is entitled."

Future concerns

It now remains to determine how to implement direct grant giving to child-headed households. We must insure against fraud, but currently, a bigger concern is ensuring that all children entitled to social assistance are aware of that entitlement and are able to receive it. The potential alternative methods of identification proposed above will play a large part in implementing direct access. As record-keeping gains efficiency, each child should be registered, and any grant he or she is entitled to should be kept in the child's name, with a link to the primary care giver who will collect the grants. We must determine a method for assessing capacity of children, but accept that a child-head of household has demonstrated the capacity to receive the grant in already taking care of his or her family. Though the issues are by no means resolved, it is clear that child heads of households should be given direct access to any social assistance to which their families are entitled.

75 CH 2, Section 5(7)(b)
Department of Social Development: Departmental Research and Perspective

Rodgers Hlatshwayo, National Department of Social Development

DEPARTMENTAL OVERVIEW ON RESEARCH PERSPECTIVE ON CHILD HEADED FAMILIES AND ORPHANS

1. INTRODUCTION

The paper attempts to give a broad overview on the issue of child headed household and orphans in light of the current research studies undertaken by various organisations and institutions. It covers grounds on what government has initiated to deal with the subject under discussion, and draws out a common thread on observations emanating from the both the Law Commission and the Committee of Inquiry into Comprehensive Social Security. The paper concludes by bringing out key recommendations, particularly from the Law Commission and round off the discussion by giving a process underway in responding to the issues.

2. BACKGROUND

The study recently carried out by Nelson Mandela Children’s Fund\(^1\) places the phenomenon of child headed families in perspective. It deals amongst other things, with the absorptive capacity of the extended families; highlight the underlying assumptions on the notion of extended families, the living conditions and needs of orphaned children. What remains a research challenge is gathering information which will evidence the characteristics of child headed families, for instance, the age, race, gender, urban and rural composition of such families as well as the aggregate number nationally. Lack of this critical data undermines the development of adequate and effective policies.

The literature reviewed\(^2\) on the subject seem to concur on the important role played by the extended families in responding to orphans, however it is also strongly noted that capacity of such families is gradually getting diminished because poverty and the swelling number of orphans.

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\(^1\) A Study into the Situation and Special Needs of Children in Child-Headed Households, 2001 (NMCF)

\(^2\) Includes research done by the Law Commission, NMCF, Centre for Actuarial Research (CARE), The Impact of AIDS on Orphanhood in South Africa: A Quantitative Analysis. Monograph No. 4, October 2001.
NMCF research study on orphanhood captured an experience from a home-based care workers at Melmoth who made a conservative estimates that there are approximately **350 orphans** in the small area of Nomponjwana, and it was estimated that about **10%** of these children live in child-headed households and **95%** of the total were still at school. This is a clear indication that there are still children within communities who remain outside the extended families and this should remain an issue of great concern to government, civil society and communities.

Moreover, a critique is also emerging which seem to suggest that children absorbed by extended families live in conditions, which are **not at their best interest**. Following are some of the reasons cited to strengthen the case that the living conditions of children within families are not conducive for children:

- Most of the homes were simply not coping with the burden of supporting the orphans placed in their care. Their resources were over stretched and the cost of feeding and educating the expanded families was beyond their means.
- Many relatives took on orphans for ‘commercial’ gain; they were more interested in the grants and **in many instances the money received was not used for the care and support of the orphans placed in their care.**
- Some families admitted that they would have preferred not to absorb the orphans but did not have the courage to say ‘no’ because in the African context, they had an obligation to take responsibility.
- Some of the children were subjected to physical abuse by their care givers
- In some cases, husbands and wife took different positions on the issue.

Despite this bleak challenge that face extended families and communities, there is a clear recognition that extended families remain a pillar on which sustainable provision of orphan care and support should be anchored through both community and policy intervention.

3. INITIATIVES

The South African Law Commission was requested to investigate and review the Child Care Act of 1983 and to make recommendations to the former Minister of Welfare for
the reform of this particular branch of the law in 1997. After doing comprehensive research and extensive consultation, the Law Commission has finalised its report containing its final recommendations and the draft Children’s Bill.

The new legislation signifies the emergence of a society where the well being of children is best protected. It codifies children’s rights and responsibilities in great detail and also makes provision for the following:

- An underlying premise in the draft Bill is to keep children out of formal statutory care (institutions) where possible and to raise children within a caring, supportive family and community environment.
- Ensuring a child rights approach and a child protection system. More specifically child participation in decisions affecting them will become a reality. Rather than linking child participation to a specific age, provision is made in the Bill for children of sufficient maturity to understand the nature and implication of life-affecting decisions to participate in such decision-making processes.

### 3.1 MAJOR RESEARCH HIGHLIGHTS

Research issues emanating from both the Law Commission\(^3\) and Committee of Inquiry into Comprehensive Social Security\(^4\) point to the following weaknesses on the current fostering system and childcare approach:

- The option for formal placement of children in need of care and protection (Fostering system) is inadequate to cater for the massive numbers of children who will be affected and infected by the AIDS pandemic.

- Foster care is intended as a specialised service for children who have been removed from their families with the intent of returning them after a period of no more than two years. This possibility of reunification is not practical for children who are orphaned unless otherwise adopted. Hence revision on the programme will be necessary.

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• To qualify for a foster grant, the child has to be placed in the care of foster parents through the children’s court. The process is lengthy and in appropriate for many families who are content with caring for children who are not heir own, but require some form of support.

• Along with the high number of adults dying from AIDS, and reduced capacity of communities to support and care for children, is a changing family structure and care giving patterns where the burden of care falls on those who have the least capacity to provide parenting, support and care for the affected children, i.e the elderly and the young. Hence the disturbing scenarios of grandparents-headed households and adolescent/child/siblings-headed households.

3.2 KEY RECOMMENDATIONS

PROVISION FOR LEGAL RECOGNITION OF CHILD-HEADED HOUSEHOLDS

The Law Commission recommended that children who are ill with AIDS should as far possible remain in the care of their own families, including the extended family network and, failing this, with care-givers in the community (168 part 1 of 3). Hence a recommendations is made which suggest that regulations to allow for in-home support of families affected by AIDS is necessary. Owing to the increasing HIV/AIDS infected adult, it is expected that child headed families will become a familiar phenomenon. In response to this particular challenge of child headed families, the Law Commission recommended the following:

• Legal recognition be given to schemes in terms of which one or more appropriately selected and mandated adults are appointed as ‘household mentors’ over a cluster of child-headed households by the Department of Social Development, a recognized NGO or the court;

• The proposed ‘household mentor’ may not make any decisions in respect of the child-headed household without consulting the child at the head of the

5 A Study into the Situation and Special Needs of Children in Child-Headed Households. 2001 (NMCF)
household and without giving due weight to the opinions of the siblings as appropriate to their age, maturity and stage of development;

- The proposed ‘household mentor’ be able to access grants and other social benefits on behalf of the child headed household; and

- The proposed ‘household mentor’ be accountable to the Department of Social Development or a recognized NGO or the court.

INFORMAL KINSHIP CARE

Creation of the new category of informal kinship care (alongside the current provision for foster care and another new category, that of "court-ordered kinship care"). Informal kinship care would involve a simple administrative process whereby family members of a child who has been orphaned or whose parents are absent or incapacitated could obtain official recognition of their caregiving status and gain access to social security support. This would be achieved without the child having to be found in need of care and protection by the court, and without being their having to be tied in to ongoing supervisory services. Such families could then be targeted for developmental programmes with a different emphasis from those applicable to conventional foster care.

SUBSIDISED ADOPTIONS

The Bill proposes that a person may not be disqualified from adopting a child based on their financial status. In order to facilitate adoptions by poorer persons it is proposed the envisaged national legislation dealing with social security should make provision for the creation of a means-tested adoption grant.

4. CONCLUSION

Having considered the content of the report and proposals tabled by both the Law Commission and Committee of Inquiry into Comprehensive Social Security, the department is in the process of carefully studying the proposals with a view of generating options that will be considered by Cabinet.
In the short term, the project team has been set up to look specifically on the proposals dealing with children in need of care, needy orphans and child headed households. It is expected that parallel to this process a legislative audit on Social Assistance will be undertaken which will provide a comprehensive picture and recommendations of how government is meeting its obligations on providing the socio economic rights of children – specifically right that pertain to social security. Hence the conceptualization and the ultimate output of this project team will take into considerations the bigger picture in terms of legislative review of government as it relates to children.

The critical output of the team would be a comprehensive policy document on foster care and orphans, which effectively summarizes the problem areas as, identified by the Law Commission and demonstrates on how it seeks to address the issue of child headed families. Moreover, it is expected that the output will reflect the service dimension (service transformation) which is one of the critical component of this policy, (i.e., services that have to be rendered by social workers to children and the cost of doing the business).

The document will lay out sufficient policy options with clear description and analysis on social, technical, political and financial feasibility. Allude on the pros and cons of each option in terms of limitations and anticipated consequences in the context of the White Paper on Welfare Transformation and Macro Economic Framework in South Africa.

Amongst other things, the process will entail an audit of the current child benefits (CSG, CDG and FCG) in view of the problem faced by children (Children in need of care, orphans and child headed families). Create synergy and possible integrate the current departmental programmes aimed at children (i.e. Community Home based Programme, Drop in centers etc.). The work will culminate into a solid policy document, which comes out clear on the recommendations and the rational on preferred alternatives, which will facilitate the decision making through governance system. Depending on the recommendations, the process might lead to amendment of the current Child Care Act or the Social Assistance Act.
### APPENDIX I: PARTICIPANTS AT WORKSHOP

**WORKSHOP ON CHILDREN LIVING WITHOUT ADULT CAREGIVERS AND ACCESS TO SOCIAL ASSISTANCE**

Sport Science Institute, Newlands, Cape Town, 20 – 21 August 2003

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</tr>
</tbody>
</table>
## Workshop Report

**Children without adult caregivers and access to social assistance**

<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organization</th>
<th>Contact Information</th>
<th>Address</th>
</tr>
</thead>
<tbody>
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<table>
<thead>
<tr>
<th>Name</th>
<th>Position</th>
<th>Organization</th>
<th>Phone 1</th>
<th>Phone 2</th>
<th>Email</th>
<th>Address</th>
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</thead>
<tbody>
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### APPENDIX II: Workshop Programme

#### DAY 1

<table>
<thead>
<tr>
<th>Time</th>
<th>Session</th>
<th>Presenter</th>
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<tbody>
<tr>
<td>9.00 – 9.30</td>
<td>Welcome &amp; Introduction</td>
<td>Maylene ShungKing</td>
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<tr>
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<td><em>Children’s Institute</em></td>
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<tr>
<td>9.30 – 10.00</td>
<td><strong>Presentation:</strong> Overview of children without adult caregivers lack of access to social assistance</td>
<td>Solange Rosa</td>
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<tr>
<td></td>
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<td><em>Children’s Institute</em></td>
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<tr>
<td>10.00 – 10.15</td>
<td>Q &amp; A</td>
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<tr>
<td>10.15 – 10.45</td>
<td><strong>Presentation:</strong> Constitutional obligations for children without adult caregivers and the CSG.</td>
<td>Prof. Sandra Liebenberg</td>
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<td>Beth Goldblatt, <em>CALS</em></td>
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<tr>
<td>10.45 – 11.15</td>
<td>Q &amp; A</td>
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<tr>
<td>11.15 – 11.30</td>
<td><strong>TEA</strong></td>
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<tr>
<td>11.30 – 12.00</td>
<td><strong>Presentation:</strong> Context for child headed households</td>
<td>Jacqui Khumalo, Thandanani</td>
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<td>12.00 – 12.30</td>
<td>Q &amp; A</td>
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<td>12.30 – 1.00</td>
<td><strong>Presentation:</strong> Context for street children</td>
<td>Annette Cockburn</td>
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<td>1.00 – 1.15</td>
<td>Q &amp; A</td>
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<tr>
<td>1.15 – 2.00</td>
<td><strong>LUNCH</strong></td>
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<tr>
<td>2.00 – 4.00</td>
<td>Discussion of relevant children &amp; context. Problems and possible solutions for children without adult caregivers in accessing social assistance.</td>
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<tr>
<td>4.00 – 4.30</td>
<td><strong>Summary and Close</strong></td>
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<td>4.30 – 4.45</td>
<td><strong>TEA</strong></td>
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# DAY 2

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<tr>
<th>Time</th>
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<tr>
<td>9.00 – 9.30</td>
<td>Summary of previous day</td>
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<tr>
<td>9.30 – 10.00</td>
<td>Presentation: Law Commission background to</td>
<td>South African Law Commission</td>
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<td>mentoring proposal.</td>
<td>Ronel van Zyl</td>
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<td>10.00 – 10.30</td>
<td>Q &amp; A</td>
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<tr>
<td>10.30 – 11.00</td>
<td>Presentation: Children accessing grants directly.</td>
<td>Michelle O’ Sullivan</td>
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<td>Women’s Legal Centre</td>
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<td>11.00 – 11.30</td>
<td>Q &amp; A</td>
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<td>11.30 – 11.45</td>
<td>TEA</td>
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<tr>
<td>11.45 – 12.15</td>
<td>Presentation: Departmental research and</td>
<td>Rodgers Hlatshwayo,</td>
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<td>perspectives.</td>
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<td>12.15 – 12.45</td>
<td>Q &amp; A</td>
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<tr>
<td>12.45 – 1.45</td>
<td>LUNCH</td>
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<tr>
<td>2.00 – 4.00</td>
<td>Discussion of options and best possible way</td>
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<tr>
<td>4.00 – 4.30</td>
<td>Summary &amp; Close</td>
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