
**Submission by the Children's Institute,
University of Cape Town
on the draft Social Assistance Amendment Bill, 2016**

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By Paula Proudlock
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For queries please contact:

Paula.proudlock@uct.ac.za or 083 412 4458

The Children's Institute welcomes the opportunity to comment on the draft Social Assistance Amendment Bill. This submission is focussed on the amendments of sections **6, 12A and 32** of the Social Assistance Act.

We intend to submit a supplementary submission on the other sections of the Amendment Bill in January 2017 once we have had more time to consult with partners in civil society. Please let us know whether further submissions will be accepted.

Statement of support for the amendments to ss6, 12A and 32

The amendments to sections 6, 12A and 32 all relate to creating an enabling legislative framework for the payment of a larger Child Support Grant (CSG) to orphans living with relatives. We have named this proposal the "CSG Top-Up" for ease of reference.

If appropriately designed and effectively administered - the CSG Top-Up has the potential to further the best interests of two categories of vulnerable children. These include:

- approximately 1 million orphaned children¹ (including orphaned children in child headed households) and
- hundreds of thousands of abused, neglected and exploited children.

The CSG Top-Up, complemented with an amendment to the Children's Act, could provide the much needed solution to the crisis of backlogs and lapsing of grants in the foster care system. In terms of a High Court order, a comprehensive legal solution to this crisis must be in place by December 2017.²

In terms of international law, the two committees of experts monitoring South Africa's progress in implementing the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, have both recently recommended that the state prioritise reform to address the backlogs and lapsing of grants in the foster care system.³ The UN Committee specifically urged the state to "expedite the revision of the Social Assistance Act aimed at introducing an extended support grant for families caring for orphans".⁴

For the above reasons the **Children's Institute supports the amendments to sections 6, 12A and 32 of the Act.**

¹ There were approximately 1.2 million double and maternal orphans in 2014. These include 652,971 double orphans (both parents dead) and 561,647 maternal orphans (mother dead). See Hall K and Sambu W (2016) Demography of South Africa's children. In Delany A, Jehoma S & Lake L (eds) (2016) *South African Child Gauge 2016*. Cape Town: Children's Institute, University of Cape Town. Pg 108. Because the new CSG Top-Up will be means tested, not all will qualify. Furthermore, some maternal orphans are being cared for by their fathers and will therefore also not qualify. We have therefore used the figure of 1 million as an estimate of the numbers that would potentially qualify for the CSG Top-Up.

² *Centre for Child Law v Minister of Social Development and others* (North Gauteng High Court) Case number 21726/11. Order of 10 May 2011a. Reported in Government Gazette, 20 May 2011. Available: http://www.justice.gov.za/legislation/notices/2011/20110520_gg34303-n441-childact.pdf.

³ African Committee of Experts on the Rights and Welfare of the Child (2015) *Concluding Recommendations on the Republic of South Africa's Initial Report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child*. Addis Ababa: ACERWC. Para 44. United Nations Committee on the Rights of the Child (2016) *Concluding Recommendations on the Second Period Report of the Republic of South Africa*. Geneva: UNCRC. Para 54.

⁴ Above. Para 54. [UNCRC]

Proviso with regard to statement of support:

Our support is dependent on being satisfied that the proposed amount, eligibility criteria and proof required will further the objectives of the reform.

The substance of the CSG Top-Up proposal lies in the details such as the amount, eligibility criteria and proof required. The amendment bill does not provide any insight into these details. We understand that these will be contained in the regulations. However, in the absence of this information, it is difficult for civil society to substantively engage in the reform process. We therefore request that the Department make these proposed details public as soon as possible to enable an informed debate.

The CSG Top-Up has so far been supported by civil society due to its potential to ensure that the majority of orphans receive an adequate grant without delays, and abused and neglected children receive improved protection and care services. However, if the details of the proposal are such that these objectives cannot be achieved – we will be unable to support the proposal as it is likely to cause more harm than good.

In deciding on the details we urge the Department to consider the international and constitutional law principle that the state should not take any regressive action in relation to socio-economic rights.

There are important considerations to bear in mind in the design of the CSG Top-Up to ensure that it can achieve its objectives and to avoid it being regressive:

(1) The amount of the top-up needs to be large enough to bring the benefit close to the current FCG amount, yet not too far from the standard CSG amount.

It should also be based on some objective measure that relates to its purpose. What this amount is needs further debate. The examples below highlight some of the issues to consider.

- A 25% top-up will equal R90 in 2016 and take the total benefit to R450. This is just R8 above the food poverty line but only half of the FCG (R890). This low



amount is likely to be challenged as regressive. If the Department decides to allow social workers and beneficiaries the choice between the CSG Top-Up and the FCG - a CSG Top-Up of such a low value is unlikely to achieve the objective of encouraging social workers and beneficiaries to use the CSG Top-Up instead of the FCG. What is likely to happen in such a scenario is that beneficiaries will apply and receive the CSG Top-Up while undergoing the longer FCG application process. This will not relieve the pressure on the child protection system but rather exacerbate it.

- A 65% top-up will equal R234 and take the total benefit to R590. This would be above the food poverty line but below the Stats SA lower bound poverty line of R701. This may be viewed by a court as sufficient enough not to be regressive, but only if the considerations discussed in section 2 and 3 were also met.
- A 100% top-up will equal R720. This would be just above the Stats SA lower bound poverty line. However this introduces greater inequity between orphans and non-orphans who arguably have the same income support needs.

(2) The CSG Top-Up should benefit a significantly larger group of orphans than those currently benefiting from the FCG.

This is probably the most important consideration to bear in mind. Because the CSG Top-Up amount will be lower than the FCG, the Top-Up is at risk of being litigated against for being regressive. It would take only one aggrieved relative to make a case. The state's only justifiable defence will be to show that the CSG Top-Up is (or soon will) reach significantly more beneficiaries than the FCG and introduce other benefits for vulnerable children. Reaching more beneficiaries than the FCG would also ensure that the proposal achieves its primary objective of providing orphans with access to a grant of adequate value without delays.

Reaching high numbers of orphans with the CSG Top-Up is possible because:

(a) There are currently already substantially more orphans receiving the CSG than the FCG. In 2014, 60% of maternal orphans were receiving a CSG compared to 7% receiving the FCG; while for double orphans, 40% were receiving the CSG and



34% were getting the FCG.⁵ Those orphans already on the CSG would be able to start receiving the Top-Up quickly with the submission of the required additional proof.

(b) The CSG application process is simple and efficiently administered. The CSG Top-Up would use the same system but with added requirements to prove orphan status and family relation. As long as the added requirements of proof are not onerous, the application process will be much more accessible for beneficiaries than the FCG.

To ensure maximum take-up quickly we recommend:

(i) For those orphans already on the CSG - the regulations should prescribe a simple process to enable the primary care-giver to receive the Top-Up amount without having to go through a whole new application process. They should just be required to submit the additional proof required to prove the child is an orphan and they are a family member.

(ii) Both double orphans and maternal orphans should qualify. Restricting the CSG Top-Up to double orphans only, will be regressive for maternal orphans. This is because maternal orphans would have to rely on the CSG of R360 instead of the FCG of R890 which they currently are entitled to apply for in terms of the Children's Act. Furthermore – there is no justifiable reason to exclude maternal orphans from the CSG Top-Up. The vast majority of maternal orphans are in the same position as double orphans in that they “have no surviving parent caring for him or her” (The majority of maternal orphans, like double orphans, live with their relatives and not their fathers). The majority of both maternal and double orphans therefore meet the requirements of the definition of orphan in the Children's Act. Because the majority of paternal orphans are living with their mothers, they do not qualify as “orphans” as defined in the Children's Act and there is a valid legal reason not to include them as beneficiaries of the CSG Top-Up.

Over 66% of births registered with Home Affairs do not include any details of the father.⁶ This makes it difficult to prove or disprove paternal death. (The submission of a death certificate for a father cannot be accepted as conclusive proof without matching with the name of the father on the child's unabridged birth certificate. If there is no father named on the birth certificate there is nothing to verify the death certificate

⁵ Hall K and Budlender D (2016) *Children's contexts: Household living arrangements, poverty and care* In Delany A, Jehoma S & Lake L (eds) (2016) *South African Child Gauge 2016*. Cape Town: Children's Institute, University of Cape Town

⁶ Statistics South Africa (2015) *Recorded Live Births 2014*. Statistical Release P0305. Pretoria: Stats SA#

against.) In many cases it will therefore be impossible to distinguish between maternal and double orphans⁷.

(3) Orphans living with relatives who are currently receiving a FCG should not suddenly lose their FCGs.

This can be achieved if they are allowed to stay on the FCG until they reach the age of 18. This could be facilitated by including a transitional clause to this effect in the Children's Amendment Act. Approximately 100 000 children age out of the system every year⁸ – therefore the FCG numbers should reduce from 470 000 to 100 000 over 3 - 4 years.

(4) To avoid disparity across the country, the Children's Act would also need to be amended and implemented at the same time as the Amendment to the Social Assistance Act.

The amendment should be drafted in such a way to ensure that social workers and courts only use foster care for children who are in need of care and protection (irrespective of orphan status) and refer relatives caring for orphans in need of poverty relief to apply to SASSA for the CSG Top-Up. The amendment would also need to allow Children's Courts to confer guardianship so that relatives have an accessible forum to approach to acquire full parental rights.

If the CSG Top-Up is introduced without the Children's Act being amended at the same time there are two likely outcomes which are concerning:

(i) individual social workers and courts will choose which orphans get a CSG Top-Up and which get a FCG. Due to urban areas being more resourced in relation to social workers, NGOs and courts; there is likely to be an urban bias towards the FCG, leaving rural areas to rely on the lower CSG-Top-Up. Such a situation of disparity will open the new CSG Top-Up to being challenged in court.

⁷ Hall K and Skelton A (2016) *Introducing a Child Support Grant top-up for orphaned children living with family members*. In Delany A, Jehoma S & Lake L (eds) (2016) *South African Child Gauge 2016*. Cape Town: Children's Institute, University of Cape Town pg 93

⁸ Hall K, Skelton A and Sibanda S (2016) *Social Assistance for orphaned children living with family*. In Delany A, Jehoma S & Lake L (eds) (2016) *South African Child Gauge 2016*. Cape Town: Children's Institute, University of Cape Town pg 73#

(ii) A further scenario is that beneficiaries will apply first for the CSG Top-Up and then for the FCG (as is happening currently with the CSG and FCG). This will mean that the second objective of the policy reform will not be met – namely to reduce the foster care case load of social workers and courts so as to enable them to improve services to children in need of protection and care.

(5) To ensure that the reform has benefits for abused and neglected children, social worker time saved by the reform should be re-allocated to cases of child abuse and neglect.

Civil society organisations that provide services to abused and neglected children have been supporting the CSG Top-Up proposal primarily because it will alleviate the unmanageable load of foster care applications and free up social workers and courts to provide better quality services to children in need of protection and care services.

However, if the regulations require a social worker report as part of the CSG Top-Up application process, the reform is unlikely to alleviate the pressure on the under resourced child protection system. Furthermore, beneficiaries will struggle to access social workers, resulting in long delays before orphans will be able to benefit from the CSG Top-Up.

It would be beneficial if the regulations could stipulate that SASSA provide the details of CSG Top-Up beneficiaries to the provincial departments of Social Development so that the families can receive follow up home visits from social service professionals. These follow up visits could fulfil the objectives of assessing whether there are any protection issues (and referring to a social worker if necessary for a formal child protection inquiry) and providing supportive social services such as counselling, parenting skills programmes and assistance with applying for parental rights. If social workers no longer have to manage the administrative burden of foster care applications for poverty relief, they will have more time available to do home visits and provide supportive social services to families in need, including relatives caring for orphans.

Thank-you for considering our recommendations and we look forward to further engagements