



Alliance for Children's Entitlement to Social Security

Submission on the Draft Children's Bill

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For attention:
Department of Social Development

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Submission to the Department of Social Development on the Draft Children's Bill

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Alliance for Children's Entitlement to Social Security (ACCESS)

Endorsed by: Child-line South Africa, South African Council of Churches, South African Catholic Bishop's Conference, Gender Advocacy Programme, The Johannesburg Child Welfare Society, Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN), South African Society for the Prevention of Child Abuse and Neglect (SASPCAN)

A Comprehensive Social Security System for Children

1. INTRODUCTION

The Children's Bill¹ has a critical role to play in giving effect to the constitutional right to social security for children in terms of section 27 of the Constitution² and children's specific socio-economic rights under section 28 of the Constitution. As an Alliance³ of 400 organisations who work with children living in poverty, we would like to contribute our views on the Draft Children's Bill ('the Bill').

The Bill in its current form is substantially different to the Draft Bill⁴ proposed by the South African Law Reform Commission ('the SALRC Draft Bill'). We would like to state at the outset our grave concerns at the considerably watered down version of the Bill especially with regard to comprehensive social security for children. The motivation for having a new Children's Act was to bring together all aspects regulating children's lives together under one umbrella and, in addition, to broaden the conception of the protection of children to include preventative and other intervention measures that address poverty and other issues which contribute to children's vulnerability. By removing social security aspects of the Children's Bill, the original conception of a composite Bill with the capacity to alleviate poverty and prevent children from falling into situations of vulnerability has been whittled away.

¹ As gazetted on 13 August 2003.

² Constitution of the Republic of South Africa, Act 108 of 1996.

³ ACCESS is a national Alliance of 400 NGOs, CBOs, and FBOs in the children's sector. ACCESS believes that South Africa must build a comprehensive social security system for children and families in order to prevent children from suffering the hardships of poverty.

⁴ South African Law Reform Commission, Draft Children's Bill 2002.

In addition, the Committee of Inquiry into a Comprehensive Social Security System for South Africa (COI) made numerous critical recommendations with regard to social security for children which have not yet been incorporated into any piece of legislation.⁵ The tabled Social Assistance Bill currently before Parliament does not incorporate the COI recommendations. The Children's Bill thus presents a valuable and timely opportunity to include and elaborate upon these recommendations.

2. SOCIO-ECONOMIC BACKGROUND

The Taylor Committee Report stated that South Africa's social safety net has its roots in a set of apartheid labour and welfare policies that were racially biased and based on an assumption that everyone is employed or would soon be employed. Furthermore, between 45% and 55% of the population live in poverty. This translates into 20 to 28 million people living in poverty⁶.

In 2002, it was estimated that 11 million children (between the ages of 0-18) are living in dire poverty in South Africa on less than R 200 per capita per month (R245 in 2002 real terms), and therefore living on less than half the minimal R400 per capita per month required to meet their basic needs⁷, and 14.3 million children are living in poverty on less than R400 per capita per month (R490 in 2002 terms).

“It is estimated that in 2002 about 11 million children under 18 years in South Africa are living on less than R200 per month and hence are desperately in need of income support.”⁸

And child poverty appears to be increasing. The analysis of the October Household Survey data (1995 & 1999) by Ingrid Woodard for IDASA shows that child poverty rates have increased. Between 1995 and 1999 the rate of child poverty in South Africa (on a poverty line of R400.00 / month per capita) increased from 64.7% to 75.8%, and the rate of children in *dire* poverty (calculated on a poverty line of R200.00 / month per capita) increased by 19.2%, from 38.9% to 58.1%.

In 1996, 33% of working age adults were unemployed. The rate for 2001 was 37%. Given the size of the unemployment problem in South Africa; full employment or significant improvements to the unemployment rate, and improvements to wage levels of the working poor, are not at all likely to happen in the short to medium term.

Another reality to bear in mind is the impact of HIV/AIDS, particularly on households already burdened by high poverty levels.

⁵ See Report of the Committee of Inquiry into a Comprehensive Social Security System for South Africa, 'Transforming the Present – Protecting the Future', March 2002 (Taylor Committee Report).

⁶ Whether it is 20 or 28 million depends on the poverty measure that is used.

⁷ IDASA did not attempt to estimate the minimum level of income needed to provide a decent standard of living for children to find the poverty line. The Committee of Inquiry recommended the amount of R400 per capita as a useful poverty line for South Africa (CoI 2002:62). The amount of R200/month per capita was chosen to indicate those children in dire poverty i.e. who are *ultra-poor*.

⁸ Streak J. 2002. *Child Poverty Monitor*. No.1. IDASA.

The Taylor Committee Report also showed that 60% of the poor do not have access to any form of social security cash grants or benefits.

Social Security policy reform must take cognizance of all the above realities. The COI's recommendations were based on an analysis of these and other socio-economic realities.

3. A COMPREHENSIVE SOCIAL PROTECTION PACKAGE

After looking at all the evidence, the Committee proposed that South Africa should create a comprehensive package of 'social protection'.

“Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.

Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state.”

The COI talks about a **package** of social protection interventions and measures. The notion of a package is emphasised as it is not desirable for a person to have to choose between basic needs. For example, a poor parent should not be expected to have to choose between feeding the family or sending their children to school. Both are basic needs that must be provided for by the package of comprehensive social protection.

The COI looked at addressing income poverty - a situation where people have no income or insufficient income to meet their basic needs – and recommended three universal⁹ cash grants:

- Basic Income Grant (BIG)
- Child Support Grant (CSG)
- State Old Age Pension (OAP)

The Report recommends that everyone must get at least a certain minimum income transfer to reduce or eradicate destitution and starvation. This would mean that all people would get an income transfer, whether it be through the vehicle of the CSG, BIG or OAP. The bottom line is that eventually (by 2015) everyone should get basic income support through one of the three grants.

The Committee also proposes a package of services to enable everyone to live and function in society. These services should be provided to everyone (universal) or may have eligibility criteria attached to them and only provided to certain categories of people:

⁹ Universal means that everyone receives the grants.

- Free and adequate public health care
- Free primary and secondary school
- Free basic water and sanitation
- Free basic electricity
- Accessible and affordable public transport
- Access to affordable and adequate housing
- Access to jobs and skills training

In addition, people with special needs should also be provided for in the social security system. 'Special needs' refers to people with disabilities and children in compromised home environments. The Committee proposes that the adult disability grant, care dependency grant and the foster child grant should remain and be reformed in order to enable more children in need to benefit from them. All three grants should continue to be targeted grants which would mean that they would continue to have eligibility criteria.

The Committee proposes a phased in approach for the Comprehensive Social Protection package. It stresses that first priority must be to address income poverty by ensuring that poor people have access to a minimum level of income.

The Committee proposed a timetable for a programme of phasing in universal social assistance:

- 1. 2002 - 2004: Children first through extending the CSG**
- 2. 2005 - 2015: Income Support Grant (solidarity grant/BIG) extended to all South Africans**

The COI Report into a comprehensive social security system was considered in public hearings held by the Portfolio Committee on Social Development held in June 2003 and by Cabinet in July 2003. Many of the overlapping policy decisions regarding social security broadly, and specifically in relation to children, have not yet been made or properly consulted upon. This leaves legislative reform on this issue like a ball up in the air to be bounced around from bill to bill, department to department and policy to policy, without ever landing anywhere.

4. LEGISLATIVE REFORM OF THE SOCIAL SECURITY SYSTEM

The current social security system for children in South Africa is clearly inadequate in its capacity to address the socio-economic realities highlighted above. It is governed piecemeal in various acts, including the Social Assistance Act 59 of 1992, the South African Schools Act 84 of 1996, the Child Care Act 74 of 1983 and various other acts and is by no means comprehensive.

A noble attempt was made in the SALRC Draft Children's Bill to present a variety of provisions to create a basic social security scheme for children, which took cognizance of the

dire poverty in South Africa and the needs of the most vulnerable children. The current Draft Children's Bill, however, has had most of these provisions removed from it. The Department has reported that these provisions are better placed within the Social Assistance Act¹⁰, but the Social Assistance Bill, that was tabled in Parliament in early September 2003, does not incorporate the provisions left out of the Draft Children's Bill.

The Social Assistance Act currently makes provision for three main grants that can be accessed for the benefit of children, namely the child support grant, the care dependency grant and the foster care grant.

There are many shortcomings of this social assistance scheme for children. For example the limited eligibility of children for the child support grant due to age¹¹ and caregiver income restrictions; difficulties in accessing the foster care grant due to cumbersome court procedures; and the fact that the care dependency grant is only for those children who suffer from severe disabilities and require permanent home-based care.

The result of these shortcomings is that the following groups of vulnerable children have no access to social assistance despite clearly being vulnerable and in dire need of support:

- Poor children between the ages of 9 and 18 years, who are cared for by their biological or by other care-givers. In the context of the AIDS pandemic increasing numbers of children are likely to be in the care of people other than their biological parents;
- Many poor children between the ages of 0 and 18 years whose caregivers do not pass the means test. The means test does not take account of the number of people living off the income or the extra vulnerabilities faced by the family such as HIV/AIDS. Furthermore, the means test threshold has not increased since 1998 despite increases in inflation and the cost of living;
- Children without adult caregivers (children living in child headed households and streetchildren);¹²
- Children with moderate disabilities and chronic illnesses who need assistance;
- Children living with HIV and AIDS.

These shortcomings need to be addressed through legislative amendments so as to ensure that the government fulfills its obligations to children under the Constitution.

The Department of Social Development, in a briefing to the Portfolio Committee on Social Development, has indicated that the Social Assistance Bill will not be making any policy shifts but is merely being tabled in order to remove the assignment to the provinces. This

¹⁰ Social Assistance Act No. 59 of 1992.

¹¹ Children under 9 can access the grant. In April 2004 and April 2005, children under 11 and 14 will be able to access the grant.

¹² See B. Goldblatt And S. Liebenberg, *Giving Money to Children: The Constitutional Obligations to provide Child Support Grants to Child-headed Households* 2003, (unpublished paper); and S. Rosa, *Access to Social Assistance for Children without Adult Primary Caregivers*, August 2003 (unpublished paper), presented at workshop hosted by the Children's Institute and ACESS on 'Access to social assistance for children living without adult primary care-givers', held in Cape Town from 20-21 August 2003.

means that the social security provisions proposed in the SALRC Draft Children's Bill that introduce policy shifts will not be included in the new Social Assistance Act.

The SALRC Draft Children's Bill, proposed a social security scheme which included the introduction of various new grants aimed at benefiting children and accommodating those in vulnerable situations. The SALRC was of the view that there are currently inadequate prevention and early intervention strategies in our children's legislation, as the entire Child Care Act 74 of 1983 is weighted towards taking children away from parents into one or another form of alternative care.¹³

The Commission stated that:

“Submissions received and sources consulted by the Commission revealed not only the strong links between poverty and neglect, but also the apparent rising incidence of extreme forms of poverty - and consequent neglect - amongst children...

In summary, bearing in mind the rationale in the decision in **Government of the Republic of South Africa v Grootboom**, and bearing in mind the links between neglect and abuse of children and poverty in present day South Africa,¹⁴ it is suggested that the constitutional obligation regarding the prevention of child abuse, malnutrition and neglect contained in section 28(1)(d) of the Constitution requires a more concerted effort to provide social security to children in dire poverty than obtains at present.”¹⁵

The Commission therefore recommended provision of **‘a concrete legislative framework for preventive and early intervention strategies to combat child abuse and neglect’**, in addition to tertiary intervention strategies, such as removal of children in need of care into formal alternative care.

The SALRC discussed the pros and cons of the legislative placement of the social security system for children in the Social Assistance Bill and the Children's Bill. They stated that the advantage of placing the children's grants in the new child care legislation would be:

- To promote a comprehensive approach to key issues affecting children's lives, and have the benefit of linking children who are extremely vulnerable to the means to address that vulnerability.

Arguments in favour of the grants system remaining within the context of overall social security or social assistance legislation included:

- Especially as regards non-court related grants, such as the CSG, it might be preferable to include all detail, regulations and conditions in one piece of legislation, to promote uniformity of policy and practice amongst those who implement payment of the grants at the local level.

¹³ SALC Discussion Report, p. 1269.

¹⁴ J Sloth-Nielsen ‘The child's right to social services, the right to social security, and primary prevention of child abuse: some conclusions in the aftermath of *Grootboom*’ 2001 (16) **SAJHR** 317.

¹⁵ SALC Discussion Report, p.1271.

Whilst the Law Commission deferred to the COI deliberations, it was of the opinion that a ‘via media’ approach was possible. With this approach, child related grants would ideally be created and defined in the new Children’s Bill, as well as the conditions under which they must be paid, however, administrative details concerning the administration of grants could be included in social assistance legislation.¹⁶

Recommendation:

We therefore strongly recommend that a coherent social security scheme for children be placed in the Children’s Bill, and cross-referenced with other pertinent pieces of legislation, in a ‘via media’ approach. Children’s grants and their eligibility criteria should be created and defined in the Children’s Bill, and administrative details concerning the administration of grants should be included in the Social Assistance Act.

Below we address, specifically, aspects of social security for children in the current Bill as well as those proposed by the SALRC. Where specific clauses in the Bill are commented upon, deletions are indicated with ~~striketrough~~ and additions are underlined. We have also incorporated motivations for our suggested re-drafts.

5. COMMENTS ON CHILDREN’S BILL

5.1 General comments - Social Security Scheme

The SALRC recommended that social security for children be regulated by the Children’s Bill and drafted a recommended scheme.¹⁷ Other social security provisions can also be found in other provisions in the SALRC Draft Bill. The Social Security Scheme for children in the SALRC Draft Bill included:

- (a) a universal child support grant;
- (b) a foster and court-ordered kinship care grant;
- (c) an informal kinship care grant;
- (d) an adoption grant;
- (e) an emergency court grant;
- (f) a supplementary special needs grant;
- (g) a subsidy to enable children with disabilities to obtain assistive devices;
- (h) fees to non-governmental organizations contracted to the State who, in terms of this Act, carry out services on behalf of the State;
- (i) subsidies to non-governmental organizations performing activities to implement programmes and projects giving effect to this Act;
- (j) a subsidy to encourage the provision of early childhood development services.
- (k) Access to free and subsidised state basic services for children in alternative care¹⁸ and impoverished children¹⁹.

¹⁶ South African Law Commission Discussion Paper 103, p. 1279.

¹⁷ Section 340(2) of the SLARC Draft Bill.

¹⁸ Section 188 of the SALRC Draft Bill.

Below is a summary of and comments on this proposed social security scheme.²⁰

(a) Universal Child Support Grant

The proposed child grant provided for in the SALRC Draft Bill is a grant which would be payable on a universal basis in respect of all children who are South African citizens and are resident in the Republic. This means that all children under the age of 18 years would be eligible to access this grant. This grant would be payable to the primary caregiver of the child, and according to the Report, it is recommended that this grant should not be means-tested.

The COI also recommended that the CSG should be extended to *all* children under 18, as a first phase of the BIG. The movement towards a universal income grant was motivated by the Committee as “*the most efficient, developmentally most effective and fairest way forward is to abolish all means tests and to recover the costs through increases in tax*”. However, if means tests are to be retained then the COI recommends some rationalization, fairness and efficiency in the system.

Recommendation:

We strongly recommend the inclusion in the Children’s Bill of a universal (non means-tested) child support grant for *all* children under 18 years.

As the first phase (2004) towards a universal system, we recommend that the means-tested child support grant be extended immediately to poor children under 18 years and that the current means test be simplified and adapted to ensure that at least all vulnerable children can access the grant.

Motivation:

Currently the CSG is only available to children under the age of 9 – to be incrementally increased to age 14 over the next 3 years – and is subject to the means test. As per the Department of Social Development, as of August 2003, 3,4 million children (+/-25%) of the 14.3 million poor children receive the Child Support Grant. This leaves the remainder of poor children without any form of income support. The CSG has been lauded by the Government as their most effective poverty alleviation strategy and we therefore suggest that by extending the CSG to all children under the age of 18, this strategy will go a lot further in alleviating the poverty felt by the majority of South Africans.

Apart from the age limit, the administrative requirements around the means test are so complex and cumbersome that they serve to exclude many of the poorest children from

¹⁹ Section 232 (1)(xiv) and (xvi) of the SALRC Draft Bill.

²⁰ Based on a summary written by Daksha Kassan, a researcher at the University of the Western Cape’s Community Law Centre, for ChildreFirst, 2003.

accessing grants. Furthermore, the means test threshold has not been increased since 1998 despite the fact that inflation and the cost of living has increased every year. The means test also does not take into account the number of people living off the caregivers income - a caregiver of 6 children is subject to exactly the same means test as a caregiver of only 1 child, an obviously inequitable situation.

Given the fact that the impact of HIV/AIDS on children is exacerbated in contexts of poverty and that in heavily AIDS affected communities, the burden of care is experienced collectively, it is essential that our response to the needs of HIV/AIDS affected children be integrated into a national poverty alleviation strategy. The most equitable, appropriate and administratively feasible option is the full extension of the child support grant to all children.

The COI Report and the SALRC Draft Bill also recommend that the procedure for accessing the CSG must be simplified, especially for children who have been orphaned and children living in child headed households. They recommend further that child-headed households should be assisted by NGOs or CBOs to allow for adult supervision in the application and spending of the grant. See below for suggested amendments to the Children's Bill in this regard.

(b) (c) and (d) Foster Care Grant, Court-ordered Kinship Care Grant, Informal Kinship Care Grant, Adoption Grant

The above grants were introduced in the SALRC Draft Bill to provide financial support to caregivers who are looking after children that are not their own due to the child's parents being unable or unwilling to care for the child. ACCESS agrees that these caregivers and the children in their care must be provided with access to a grant.

With regards to children who have been abused, neglected or abandoned and subsequently been found to be in need of care by the court, ACCESS supports the continued use of the foster child grant and the recommendations by the SALRC for the reform of the foster placement system in order to make the system and grants more accessible to children in need of care.

However, with regards to providing support to extended families that are caring for children who have been orphaned or otherwise left without a parent, further deliberation needs to be had as to which grants would best form a complementary system that is in the best interests of these children.

The child support grant is available to relatives caring for children that are not their own due to the definition of the primary care giver not being restricted to biological parents and many grannies and aunts are currently receiving the CSG. However, relatives caring for children can also access the foster child grant through formally fostering those children. The difference in amounts of these two grants (R160 for the CSG and R500 for the FCG) means that caregivers prefer to apply for the FCG. However the FCG placement process is complex and can take a year to finalise. It is also not easily accessible for the vast numbers of children living in rural areas as the process involves social workers, courts and many visits to town.

The SALRC Draft Bill proposes the use of the court ordered kinship care grant, informal kinship care grant and an adoption grant to cover these children. However, the differences between the three grants and who would qualify, is unclear.

There needs to be caution around creating perverse incentives and an unwieldy system which will only heighten the complexity of application and administration procedures. We therefore recommend that the Department of Social Development should hold further deliberations with children's sector organisations²¹ to ensure that children being cared for by relatives and biological parents are appropriately supported with a grant that is easy to access.

(e) Emergency Court Grant

The Bill does not provide for emergency social relief for children in distress, other than emergency grants from the court. While the emergency relief from the courts will assist in cases which come to the court's attention, the majority of cases will not present to the court. A grant for such children needs to be legislated for in the new Children's Statute.

We therefore recommend that a grant for emergency relief be created and that families in crisis be able to access such relief.

Motivation:

In view of the fact that many children are suffering from starvation and that there are long delays in accessing the CSG, the state is failing in its constitutional obligation to provide for those most in need.²² The state thus has an immediate obligation to support families in crisis.

We therefore suggest that a system be created so that immediate aid can be offered to these families. This could be in the form of food parcels, transport vouchers and/or a cash grant.

Furthermore, the Department of Home affairs does not have a plan in place to improve their services in order to address the problem of caregivers being unable to easily access their identity documents and the child's birth certificate. Providing these caregivers with temporary social assistance would also assist them to pay the transport costs to and from the offices of Home Affairs and Social Development that they have to incur in the application process for permanent grants.

We therefore recommend that the Children's Statute clearly obligate the state to provide temporary and emergency social assistance, and clearly describe the circumstances in which it will be made available. We suggest that social workers and child care workers (NGOs,

²¹ ACCESS and the Children's Institute will be facilitating a workshop on this topic in October/November 2003 and would welcome participation by the Department.

²² As required per *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC).

FBOs and CBOs included) should be entitled to fill in application forms for families in crisis and to submit the forms and receive and allocate the assistance to the families that they serve.

Finally, the system must be flexible and must not require that applicants have to have bar-coded IDs or birth certificates to access emergency relief.

(f) Supplementary special needs grant

We recommend that the focus of disability grants should be on the needs of disabled children and not on how dependent they are on care, therefore we suggest a change to the name of the current ‘care dependency grant’ to that of ‘special needs grant’ as recommended by the SALRC in their Draft Children’s Bill.

We recommend that the focus of the Special Needs Grant should be on the needs of disabled children and not on how dependent they are on care. With respect to the removal of the requirement that the child be receiving permanent care, it is submitted that this should not be a pre-condition as many children do not have access to permanent care.

If the disability needs to be severe to create an entitlement to the grant, it is submitted that these requirements preclude children from getting the grant due to problems of definition and measurement of severity. This requirement also excludes children with moderate disabilities who may have high needs. Social assistance to children with disabilities should be determined by a needs test, which considers the extra needs and cost incurred by the child due to his or her disability. The HSRC is currently developing a needs-based assessment tool for children and adults with disability for the Department of Social Development. It is therefore critical that the definitions for children with disabilities should be amended to fit the framework of a needs-based assessment.

We also recommend that the disability or chronic illness need not be permanent in order to satisfy the eligibility criteria for the grant, but that in the context of treatment being available for certain conditions, children may only have special needs in respect of their disability or chronic illness for a limited period of time. Again, the assessment as to whether the grant is made temporary or permanent and the length of the time period for a temporary grant should depend on the *special needs* that the child has and may have with respect to that disability or chronic illness, as recommended by the Taylor Committee Report.

This grant was proposed in respect of all South African children who have chronic illnesses (including HIV/AIDS) or moderate to severe disabilities and would be payable to the parent or the primary caregiver of the child. It is further suggested by the SALRC that this grant should be subjected to a means test and be payable in addition to any other grant payable in respect of a child. This grant would be paid only after the child’s circumstances have been assessed in terms of a needs-based assessment procedure. This grant would replace the current care dependency grant, and it is submitted, would provide a more equitable and needs-based grant.

Recommendation:

We recommend the introduction of the Supplementary special needs grant, as per the definition and criteria proposed in the SALRC Draft Bill. The existing Care Dependency Grant (CDG) can be used to create this grant after the necessary changes to the law and regulations.

(f) Subsidy to enable children with disabilities to obtain assistive devices

The SALRC recommended that subsidies be paid to enable children with disabilities to obtain assistive devices such as wheel-chairs. Such subsidies would be paid upon presentation of an invoice substantiating the purchase. A means test would apply.²³

Recommendation:

We recommend the introduction of subsidies for children with disabilities to obtain assistive devices. However, the mechanism for accessing the subsidy needs to be accessible. A system which requires the child's caregiver to pay for the device up front and then to claim the subsidy back may not be accessible to the majority of caregivers living in poverty. Assistive devices like wheel chairs and hearing aids are very costly and the majority of caregivers will not be able to buy them and then claim back from government.

(h), (i) and (j) Fees and subsidies to non-governmental organizations and early childhood development services

The SALRC further recommended that subsidies be paid to designated child protection organisations to promote the implementation of programmes and projects giving effect to the Children's Act.²⁴ The purpose of this subsidy is to compensate these NGO's for the services delivered to children on behalf of the State. These NGO's are essential to the delivery of effective services to children and it is therefore important that they are adequately and sustainably subsidised by the state.

Further, in the case of services in which a major state mandate is being delegated to NGOs, as with the provision of statutory child protection services, the payment of fees, i.e. full costs and not subsidies, is the appropriate and the only viable basis of partnership.

Recommendation:

We strongly recommend that the subsidy system be reintroduced into the Bill.

²³ Section 348 of the SALRC Draft Bill.

²⁴ Section 349 of the SALRC Draft Bill.

(k) Free and subsidised basic state services for children in alternative care and impoverished children

The SALRC Draft Bill provided in section 188 that children in alternative care be eligible for free and subsidised state basic services. However, the Bill no longer contains this provision. Because children in alternative care are currently entitled and are receiving free basic services, the removal of this provision is a retrogressive step that would be considered by the UN Committee on the Rights of the Child as unacceptable.

Recommendation:

We recommend that *all* children should be provided with free and subsidized state basic services.

In the alternative, at least children in alternative care and poor children should be able to access free and subsidised state basic services.

Insert:

Free and subsidised state services

168. (1) A child in alternative care is entitled to –

- (a) free basic education in state schools;
- (b) subsidised school uniforms, shoes and stationary;
- (c) free basic health care;
- (d) subsidised public transport; and
- (e) exemption from payment of any fees when applying for official documents from any organ of state.

5.2 Specific Provisions

1. Interpretation – Definitions

The definition of ‘**primary care-giver**’ in the Children’s Bill is different to the definition mentioned in the current Social Assistance Act and different to the definition in the Social Assistance Bill. It is recommended that for the sake of uniformity, one definition should be utilized and the following from the Social Assistance Act is recommended.

Insert:

‘primary care-giver’ 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) 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 an implied or express consent of a parent, guardian or custodian of the child.²⁵

Motivation:

This definitional notion of ‘primary care giver’ gives some recognition to the reality of different ‘family’ structures in South Africa, in an attempt to address the role in children's lives of a range of persons other than their biological or legal parents, such as grandparents, aunts and uncles etc, in providing for the daily needs of children who are primarily in their care and was based on the principle of ‘follow-the-child’.²⁶ It would also cover the difficulties encountered when the biological parent or the primary care-giver dies, thus allowing another substitute care-giver to apply for the grant on behalf of the child.

In addition, the definition of ‘implied consent’ should be included.

Insert:

‘implied consent’ of a parent, guardian or custodian of the child, is defined as including 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 or absent.²⁷

Motivation:

This would allow minor children who are in fact acting as a ‘primary care-giver’ of children but may not have such consent from parents who have died, or necessarily be able to prove such consent.

There are no definitions in the Bill of ‘chronic illness’ or ‘disability’. It is submitted that the definitions should ultimately be the same as those used for the purposes of the Social Assistance Act. The following definitions are recommended.

Insert:

“child with a disability” means any child who requires care or support services as prescribed due to his or her physical or mental, intellectual or sensory disability or chronic illness.

²⁵ Section 1 of the *Social Assistance Act No. 59 of 1992*, as amended by section 3 of the *Welfare Laws Amendment Act*.

²⁶ See South African Law Commission Discussion Paper on the Review of the Child Care Act, 2001, Chapter 8 p.181-182; Liebenberg & Sloth-Nielsen, *Summary of Proceedings of Seminar on the Concept of the ‘Primary Care-Giver’ in the new South African Legislation*, UWC, Community Law Centre, 29 August 1997.

²⁷ *Regulation 1* of the Regulations to the Social Assistance Act.

“chronic illness” means a long term health condition which affects the person for at least one year or more, and produces one or more of the following sequelae:

- (i) limitation of function compared with peers,
- (ii) dependence on health care
- (iii) the need for medical or other services more than is normal, and/or
- (iv) requires long term health care

Motivation:

Chronic illnesses which cause impairment/disability, especially HIV/AIDS, should be included in the definition. Ill children are extremely vulnerable and require extra care and assistance.

Insert:

“mentor” means an individual or organisation who has been appointed by the relevant provincial Department of Social Development, a designated non-governmental organisation, or the Child and Family Court, to apply for, collect and administer a grant on behalf of a street child or a child living in a child headed household.

Please see section below. A mentor would be a type of care-giver in the child’s life who applies for, collects and administers the grant for the child concerned.

Chapter 3 – Children’s Rights

The Children’s Rights Chapter in the Draft SALRC Bill was originally intended to supplement the rights which a child has in terms of the Bill of Rights. However, the current Bill has merely restated section 28 of the Constitution, with a small number of extra provisions on harmful social and cultural practices, information on health care and access to children’s courts. It is unclear as to why the elaborated rights were removed by the Department.

Recommendation:

It is recommended that the Children’s Rights sections in the SALRC Draft Bill should be reinstated in the Children’s Bill, including specific aspects of children’s socio-economic rights, especially the rights to social security and the provisions for children with disabilities and chronic illnesses.

Chapter 8 – Protection of children

Child-headed households

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 interventions²⁸.

There is no comprehensive national data on the prevalence of child-headed households at this point in time.²⁹ On the basis of their national household survey on HIV/AIDS, the Human Sciences Research Council (HSRC) argues that:

‘Many community-based assistance programmes report an increase in households headed by children, or consisting only of children, i.e. orphans or children without resident adult guardians. However, no national data on child-headed households has yet been reported.’³⁰

Other studies also provide anecdotal data of the existence of child headed households in South Africa.³¹

The lack of statistical evidence and probable low incidence of child-headed households³² should not, however, detract from the fact that child-headed households exist. Furthermore, 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. This recognition is important in order to guide equitable, appropriate and effective responses of support.

Children living in child-headed households are particularly vulnerable without the care and support of parents or substitute parents, and require extra support to meet their various basic needs, including financial, emotional, psychological, health, education etc. We are particularly concerned with support (financial and otherwise) to children within the context of living without adult care-givers.

²⁸ Dorrington, R., Bradshaw, D., & Budlender, D. *HIV/AIDS Profile in the Provinces of South Africa: Indicators for 2002*, Cape Town: Centre for Actuarial Research, University of Cape Town, 2002.

²⁹ Nelson Mandela’s Children’s Fund, *A Study into the Situation and Special Needs of Children in Child-headed households*, 2001. <http://www.mandela-children.com/english/worddoc/Report.doc>, p. 4. Gow, Jeff & Desmond, Chris, *The Current and Future Impact of the HIV/ AIDS Epidemic on South Africa’s Children*, in Cornia, Giovanni Andrea, *AIDS, Public Policy and Child-Well-Being*, 2002, at p.19 <http://www.unicef-icdc.org> also remark on the lack of statistical information available on child-headed households.

³⁰ *Human Sciences research council (HSRC) study on HIV/AIDS, Household Survey 2002*, p. 68.

³¹ Giese, Meintjes et al, p. 43. The Report notes that this data should not be taken to provide statistically relevant information that could be extrapolated beyond the research.

³² As Giese, Meintjes et al, p.44 point out “systematic investigation in several countries (including in some of those in which the HIV/AIDS pandemic is more advanced than in South Africa) have confirmed that ‘child headed households’ are rare (Ainsworth, Ghosh & Semali,1995; Gilborn et al, 2001).

Of particular concern is that children who live without adult caregivers – as so called ‘child-headed households’ - are currently **not** able to access financial support from the government, in the form of social grants, for the following reasons:

- In practice, only children living with an **adult primary care-giver** 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.

Under 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. In addition, the State has a responsibility to children who are orphaned and have no parental care. The Government thus has an obligation to provide social assistance to these children, via a mechanism that is practical, reasonable and appropriate.

One of the ways, we recommend, is the mentorship scheme proposed in the SALRC draft of the Children’s Bill. This scheme should apply to children where it is not in their best interest to be living in a child-headed household without adult supervision, *and* where a potential adult mentor is available. Essentially, child-headed households could be assisted by mentors, as required and available, (individuals working in NGOs or CBOs and other responsible individuals) to provide the necessary adult supervision in the application and spending of the grant. However, it is important to stress that children who are in fact performing the function of primary care-giver should be able to claim and access the CSG on their own behalf and on behalf of children in their care. The mentorship scheme should only kick in when children are too young or immature to perform the functions of a primary care-giver, or where there are no adult mentors available in the community.

Section 136 of the Bill provides a definition of ‘child-headed households’ and a scheme by which an organ of state or non-governmental organization may be designated by the children’s court or the provincial head of social development to supervise a child-headed household and may collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled.

The SALRC Draft Bill contained a broader provision which included that **adult mentors** could be appointed by an organ of state, non-government organization or a children’s court. This extended mentorship scheme was incorporated to give recognition to the support that adults in affected communities already provide to children living in child-headed households and enable them to access grants on behalf of these children. In addition, in deep rural areas, NGO’s or organs of state may not be present or sufficiently accessible to provide the kind of support envisaged in the current Bill, thus it is not a realistic option. We therefore strongly recommend that the SALRC model be reinstated in order to also allow for an adult to be appointed as a mentor of a child-headed household, as designated by an NGO or organ of state.

It is unclear why the adult mentor model has been deleted from the Bill, when a similar provision makes it possible under a “**collective foster care scheme**” for a group of individuals, acting as care-givers of the children, and managed by a provincial department of social development or a designated child protection organisation to receive children in foster care.

The Section should be amended as follows:

Child-headed households

136. (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 or has abandoned the household;
- (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 ~~adult designated by organ of state or non-governmental organization~~ –

- (a) an organ of state or non-governmental organization determined by the provincial head of social development; or
- (b) ~~designated by a children’s court.~~

(3) The adult person ~~The organ of state or non-governmental organization~~ 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, or to another organ of state or a non-governmental organisation designated by the provincial head of social development, for the administration of any money received on behalf of the household.

(4) The adult person ~~The organ of state or non-governmental organization~~ 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.

Chapter 13 – Foster Care and care by family members

Section 46(1)(a) enables a children’s court to make an order placing a child in the care of a family member – designated a kinship care-giver. No section in the current Bill stipulates that the kinship care-giver may apply for any grant or other aid in respect of which the child may qualify, on behalf of the child. It is recommended that a specific provision be placed in the Bill, and cross-referenced in the Social Assistance Act, giving kinship carers the right to apply for social assistance on behalf of the children in their care.

Insert:

Responsibilities and rights of foster parents and kinship care-givers

188. (4) The foster parent or kinship care-giver of a child may on behalf of the child, apply to any organ of state for any grant or other aid in respect of which the child may qualify, including a social security grant;

6. CONCLUSION

We commend the Department of Social Development on their consolidation of children’s issues into one comprehensive Children’s Bill. However, we cannot support the Bill if it does not contain a comprehensive social security scheme as outlined above.

The Draft Bill proposed by the SALRC specifically included numerous aspects on social security for children, because based on their work and research, it was concluded that a holistic approach to the care, protection and development of children, should be taken. The SALRC broadened the conception of the protection of children to include preventative and other intervention measures that address poverty and other issues which contribute to children’s vulnerability.

The success of the new child care and protection system depends very much on ensuring that children’s basic needs are provided for. Without a comprehensive social security system, this is not possible. Considering the widespread poverty experienced by many children in South Africa, exacerbated further by the HIV/AIDS pandemic, by removing social security aspects from the Children’s Bill, the Department of Social Development is failing to ensure that children can survive and develop.