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

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Prepared by the Children's Institute (UCT)

Providing for the needs of children in the context of HIV/AIDS

1 Background

Sindi was 12 years old when her mother died of AIDS in 2000. "I looked after my mother until she died and then I looked after the baby. She died of hunger." "The emotional impact of losing her mother and sister has devastated Sindi," comments Sister Grace, the manager of a local faith- based organisation that does what they can to help the struggling family. Sindi now lives with her father, her 3 remaining younger siblings and her father's 76-year-old mother, Pheladi - who moved to live with them after Sindi's mother died.

While her father collects the firewood and water, Sindi is responsible for all the other chores, the care of her siblings and, more recently, of her elderly grandmother. Sindi's drawings reflect her life. She wakes up at 6.00 am to make a fire and warm water for bathing herself and her siblings. While the others wash, she prepares porridge, then sweeps the house before going to school. When she returns from school, she is responsible for preparing the evening meal. "Sindi has had to take over the role of mother," explains her sickly father, "and her school has suffered".

Sindi has already been expelled from school once for not paying school fees and this, together with the responsibility she bears at home and the impact of the loss of her sister and mother, makes her continued schooling unlikely. "As soon as her father dies," Sister Grace fears, "Sindi will give up going to school and take on responsibility for the household full time."

Excerpt from Giese, Meintjes, Croke and Chamberlain, 2003

One of the greatest threats to the realisation of child rights in South Africa and, more broadly, in Sub Saharan Africa is the HIV/AIDS pandemic.

South Africa currently has more people infected with HIV than any other country in Africa[1], and 95% of those who are infected are accounted for within the economically active age bracket, i.e. in the age group between 18 and 64 years. The gender imbalance in HIV infections is striking, particularly amongst women between the ages of 15 and 24 years, where 4 times more women are infected than men. Of direct significance to children is the fact that in South Africa an estimated 3.2 million women of child-bearing age (15 to 49) were living with HIV/AIDS in July 2002. As a result, between 1st January and 31st December 2002, 89 000 children (around 7% of the total number of children born during this period) were infected with HIV, either at birth or through breastfeeding, and 150 000 children lost their mother to AIDS. As of July 2002, an estimated total of 885 000 children in South Africa had lost a mother, and, without the effective implementation of any major new health interventions, this figure is expected to double by 2010[2].

We know however that in the case of a terminal illness such as HIV/AIDS, the impact of orphanhood on children begins long before the death of a caregiver. Hundreds of thousands of children are currently living with, and frequently caring for, sick and dying parents. Many children, like Sindi, are unable to continue their schooling because of the responsibilities for care that they carry. They also face a myriad of other vulnerabilities, including increased risk of exposure to infections and psychological and emotional stress (Giese et al, 2003).

The impact of HIV/AIDS on children is typically felt through the manner in which it exacerbates existing individual and household vulnerabilities such as poverty, abuse, and poor access to schooling. As such, every section of the Bill is relevant to children who may be infected or otherwise affected by HIV/AIDS. For practical reasons, we will restrict commentary in this submission to some key areas which are of particular relevance in the context of HIV/AIDS. However, in reviewing the Bill in its entirety, we need to bear in mind the compounding dynamics of HIV/AIDS and widespread poverty and ask ourselves whether this legislation will provide for adequate protection, care and support services for children in South Africa, given the fact that we are still several years away from realising the full impact of the pandemic on our most vulnerable citizens.

NOTE: Where specific clauses in the Bill are commented upon, deletions are indicated with ~~strikethrough~~ and additions are <u>underlined.</u> We have also incorporated brief motivations for our suggested re-drafts. These motivations are based on extensive research and consultation with a broad range of stakeholders, including children, caregivers, a range of service providers, academics and government officials.

2 General comments

The initial intention of reviewing the Child Care Act of 1983 was to create a single comprehensive statute for South African's children that is in line with the constitutional protection accorded child rights in the South Africa Constitution and South Africa's international obligations in terms of the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the

[1] Bradshaw, D., Johnson, L., Schneider, H., Bourne, D., & Dorrington, R. (2002). *Orphans of the HIV/AIDS Epidemic: The time is to act now*: Medical Research Council Policy Brief, No 2.

[2] Dorrington, R., Bradshaw, D., & Budlender, D. (2002). *HIV/AIDS Profile In The Provinces Of South Africa: Indicators For 2002.* Cape Town: Centre for Actuarial Research, University of Cape Town.

Child[3]. It is disappointing to note therefore that the latest draft of the Children's Bill appears to have moved away from the notion of a comprehensive statute, and many of the fundamental provisions recommended by the South African Law Reform Commission (previously the South African Law Commission) have been removed.

In particular, we strongly recommend that the following two key provisions, removed from the latest draft of the Bill, be reinstated:

1. The principles and eligibility criteria for a coherent social security system for children.

A coherent social security system for children should include, but not be limited to, a universal (non means tested) child support grant for all children.

In the alternative, we recommend that the child support grant be extended to children under 18 years and that the current means test be simplified and adapted (as the first step towards the abolishment of the means test) to ensure that the grant accommodates those children who need it most.

2. The provisions for an intersectoral National Policy Framework (or equivalent)

Rationale for this recommendation and relevance to HIV/AIDS

1. 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. Groups of children currently excluded from any form of financial support include:

- *Children over the age of 9 years who live with their biological parents.* In the context of HIV/AIDS, where many biological parents are sick or dying, where household income typically decreases, and where expenditure on health care, transport and burials increase, there is an urgent need for financial support for families.
- *Children over the age of 9 years who are cared for "informally" by adults who are not their biological parents* i.e. caregivers of children who have not been placed in their care through a children's court. It is important to note that the vast majority of children who have been orphaned live with relatives who have not formally fostered the children, and that most of these caregivers do not have access to the services (social and justice) required to process formal (foster or kinship care) placements. Nor, we argue would it be appropriate for these children to have to go through a children's court process simply in order to access financial support.

We feel that the most equitable, appropriate and administratively feasible option for addressing the poverty related needs of children in the context of HIV/AIDS is the full extension of the child support grant to all children, as one component of a comprehensive package of services and support.

2. The scale of the HIV/AIDS pandemic and its multifaceted impact on children, families, communities and service providers demands an integrated and collaborative response from all sectors. Responsibility for the care and support of the millions of children who are at risk of being orphaned, who have been orphaned or who are otherwise made vulnerable by HIV/AIDS cannot be borne by one Department. It is

[3] South African Law Commission (2002). Project 110: Review of the Child Care Act Report. SALC, Pretoria.

therefore essential that the provisions for an intersectoral National Policy Framework (or equivalent) be reinstated, to guide the implementation, enforcement and administration of the Act and to ensure that responsibility for the wellbeing of children is shared across relevant Departments.

3 Comments on specific provisions

Chapter 1: Definitions

Provisions of the Bill

An **orphan** is defined in the Bill as a child who has no surviving parent caring for him or her.

Comments

In the previous draft, an orphan was defined as 'a child who has no surviving parent caring for him/her *after one of his or her parents has died'*. This definition allowed for a child to be defined as an orphan even if only one parent had died and the other had abandoned the child. This may also be implied in the new definition although it is less explicit.

Either way, this definition is a vast improvement on definitions widely in use internationally, where an 'orphan' is typically defined as a child under 15 years of age and, prior to 2002, it was common for the loss of a father to be discounted in definitions used by prominent international agencies (see, for example, UNICEF and USAID publications) (Giese et al, 2003).

Chapter 8: The protection of children

Provisions of the Bill (Sections 130 to 135)

Section 130 outlines the conditions under which a child may be tested for HIV and the procedure for obtaining informed consent from a child. If the child is over the age of 12 years or under the age of 12 years but of sufficient maturity, the child may consent for HIV testing. In the alternative, consent may be given by the child's caregiver, a designated child protection organisation arranging the placement of the child, the superintendent or person in charge of a hospital, or (under certain conditions) a children's court

Section 132 stipulates that a child may only be tested if proper pre and post test counselling is provided by an appropriately trained person.

Section 133 outlines the conditions under which a child's HIV status may be disclosed. Informed consent for disclosure is based on the same principles as consent for testing.

Section 134 provides for access to contraceptives for children over the age of 12 years, on request and access to other forms of contraceptives without the consent of the parent or caregivers provided the child is at least 12 years of age, has received the necessary medical advise and has undergone any necessary medical examinations.

Comments

We support these important provisions but emphasise that they have obvious direct implications for health workers. It is therefore essential that these provisions are mirrored / cross-referenced in relevant health policy and legislation.

Health workers need adequate training and support in order to provide age appropriate counselling and in order to determine a child's capacity to consent for HIV testing. Our experience is that few health workers feel that they have the skills (or the time) to counsel children around HIV. Consider for example, the following quote from a VCT counsellor, which highlights the need to have in place effective referral systems between health workers and other service providers:

> *"We are not trained at all to counsel children and would find it very difficult. We are really not sure how to do it. We are also so concerned that if we counsel an 11 year old, for example, there would be no support for that young person when they go home"*

Our research suggests further that many health workers are unwilling to treat children who arrive at clinics unaccompanied[4]. In the context of the illness and death that characterize the AIDS pandemic, this situation is likely to arise more frequently. As such, health workers need clear policy guidelines on when and how to treat unaccompanied minors.

The need for intersectoral collaboration around issues pertaining to children is evident throughout the Bill. **It is thus imperative that the provisions for an integrated National Policy Framework (or equivalent) be reinstated**.

Provisions of the Bill (Section 136)

Section 136 looks at the issue of **child headed households**.

Comments

The recognition of child headed households as a family form in South Africa is an important step which we support.

The current provisions within section 136 raise several questions however which we need to consider.

- It is unclear whether the provisions for CHH are only applicable for those households *recognised* as such by 'a provincial head of social development'. The procedures for 'recognising' a household as child-headed would need to be clearly spelled out so as to ensure that this provision does not create an additional barrier to children attempting to access support.
- The SALRC recommended in the draft Bill they submitted to the National DSD that a CHH must function under the general supervision of an adult designated by a child and family court OR an organ of state or NGO. The latest draft has removed the option of a CHH functioning under the supervision of an adult designated by a child and family court. The implications of this are unclear but potentially harmful in instances where a registered NGO is not available and where services to children are being rendered by community based organisations and volunteers (as is so often the case). In effect, the current provision in the draft Bill would exclude these individuals from functioning as mentors for children living without adult caregivers.
- The provisions for child headed households are limited to facilitating access to social assistance grants with no mention of other forms of support which may be necessary, particularly in instances where a child has assumed primary responsibility for managing a household and caring for a sick adult. Provisions

[4] Giese S., Meintjes H., Croke R., Chamberlain R. (2003) *Health and Social Services to address the needs of orphans and other vulnerable children in the context of HIV/AIDS – research report and recommendations*. Children's Institute and National Department of Health, Pretoria.

need to be made to ensure adequate support to the hundreds of thousands of children living with and caring for AIDS sick parents in de facto “child headed households”.

We therefore suggest the following amendments to the current provisions in Section 136.

Suggested redrafts and additional provisions

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;

(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 organisation~~ –

(a) An organ of state or non-governmental organisation 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~~ adult person 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 ~~organ of state or non-governmental organisation~~ adult 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.

(7) The Minister must include in the national policy framework [or equivalent], a comprehensive and intersectoral strategy aimed at identifying, assisting and promoting the best interests of children living in child headed households.

Chapter 9: Prevention and early intervention services

Provisions of the Bill

The emphasis of this chapter is on strengthening families in order to prevent circumstances that may be harmful to the child and / or lead to the removal of the child from his/her home.

Comments

The provisions of this chapter need to include those which will facilitate early identification and adequate support for children who are at risk of being orphaned i.e. children living with terminally ill caregivers, and for children who have been orphaned. Once again, this calls for intersectoral collaboration and emphasises the need for a national policy framework which functions across departments.

In particular, health workers are ideally placed to be identifying vulnerable children through the services they provide to sick adults; and schools are ideally placed to be identifying children who display any of a range of signs of potential vulnerabilities, including repeated or prolonged absenteeism, inability to pay school fees, signs of hunger and exhaustion, lack of uniform etc.

In their earlier draft of the Bill, the SALRC included a section (Chapter 16, Section 236) which outlined the role of schools in identifying children in especially difficult circumstances. In the latest draft of the Bill this section has been deleted, presumably because responsibility for implementing this provision would fall with the Department of Education. However, we would argue for the reinstatement of this section, particularly given the fact that health related issues are included in Chapter 8. The more comprehensive the provisions of the Bill, the greater the chances are of ensuring intersectoral collaboration and ultimately, that children do not fall through gaps in the service "net".

Suggested redrafts and additional provisions

146. The Minister must include in the national policy framework [or equivalent] ~~departmental strategy~~ a comprehensive national strategy aimed at securing the

provision of prevention and early intervention services to families, parents, care-givers and children across the country.

We suggest further that the following clause be included in Chapter 9:

The principal of a public or private school must on a confidential basis -

(a) Identify children who are frequently absent from school and/or who exhibit other signs of vulnerability; and

(i) Take reasonable steps to assist them in returning to school or to discourage them from leaving school;

(ii) Take reasonable steps to refer these children to appropriate support services;

(iii) Where appropriate, as prescribed, submit the names and addresses of these children to the provincial head of social development.

Additional provisions could also be made – either in the legislation, the regulations or the national policy framework (or equivalent) – for the identification of potentially vulnerable children through health facilities and through home based care services, and for social workers or equivalents to be allocated to school clusters in order to facilitate referral mechanisms and to address the needs of children who are identified as vulnerable.

Chapter 10: Child in need of care and protection & Chapter 12: Children in alternative care

Provisions of the Bill

Chapters 10 and 12 include as a category of children in need of care and protection, children who have been orphaned. Following a court process, the options for placement of children in need of care and protection include court ordered kinship care, foster care, care in a child and youth care centre and temporary safe care.

Comments

With an emphasis on court ordered care to meet the needs of children who have been orphaned, the provisions of the Bill fail to fully recognise and support informal care arrangements which by far accommodate the vast majority of orphans. As the Bill stands at the moment, relatives and neighbours who take on responsibility for the care of orphans and other vulnerable children can only access support from the State (other than the child support grant for children under the age of 9 years) if the child is declared “in need of care and protection” and the case is processed by a social worker and heard by a children’s court.

Failing the full extension of the child support grant to all children, it is likely therefore that the provisions within the Bill will lead to massive pressure on the courts and social workers to process court ordered kinship or foster care, the majority of applicants applying simply to access some form of poverty relief. Consider the following:

- The processing of foster care / kinship care placements will **consume an inordinate amount of social workers' time**, allowing them to reach far fewer children than they otherwise might and significantly impacting on their ability to deliver other much-needed services.
- The focus on processing foster care / kinship care placements (which are not an option for biological parents) means that there is **little / no support for children in the care of their (sick) biological parents.**
- The focus on court ordered care for orphans will **create further bottlenecks** in an already overburdened system and reduce the effectiveness of the foster care system to meet the needs of children who require the state to intervene in their care arrangements, eg. children who have been abused, neglected or who require temporary removal from their families while family re-unification services are delivered.
- If courts remain the gatekeepers to state support, then we will continue to **discriminate against children and caregivers in rural and poorly resourced areas** where children's courts are often inaccessible.

It is essential therefore that we strengthen the supplementary provisions for children who are in the informal care of relatives (or others) and for children in the care of their own biological parents. The current provisions create perverse incentives for poor children to live with caregivers who are not their biological parents, and provide little if any support to biological parents to care for their own children. This completely contradicts the principles enshrined in the South African Constitution, the White Paper for Social Development and the draft Children's Bill, where family preservation is accorded highest priority. We argue that the best way of ensuring blanket provisions for all vulnerable children is the full and immediate extension of the Child Support Grant, with additional needs met through the provision of free basic services and special grants (such as the foster care system for children who require these services, and the care dependency grant for children who are ill).

Having said that however, we do also need to consider the one additional benefit of court ordered care, that of assigning parental rights and responsibilities (or, in some cases, guardianship). The extension of the CSG to all children, including children who have been orphaned, will improve accessibility to poverty relief but will not address the question of assigning parental rights and responsibilities to caregivers of children who are not their own biological offspring.

The Bill currently allows for parental rights and responsibilities to be assigned to parent substitutes in the following ways:

23. (1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce cases or the children's court for an order assigning to the applicant full or any specific parental responsibilities and rights in respect of the child.

26. (1) A parent who has parental responsibilities and rights in respect of a child may appoint a suitable person as a parent-substitute and assign to that person

that parent's parental responsibilities and rights in respect of the child in the event of the parent's death.

It may be necessary to put in place additional mechanisms whereby informal caregivers can be afforded parental rights and responsibilities for children in their care. There is a need for further discussion around the form that such mechanisms could take.

Chapter 13: Foster care and care by family members

Provisions of the Bill

Chapter 13 outlines in more detail the provisions, purpose and proceedings for foster care and court ordered kinship care.

Section 185 of the Bill makes provision for more than 6 children to be placed in foster care or court ordered kinship care with a single person or with 2 persons sharing a common household if the children are siblings or related, or the court considers this to be in the best interests of the child.

Section 186 allows for the duration of court ordered kinship care and foster care to be extended for more than two years at a time. It also makes provision for a children's court to order that no further social worker supervision or reports are required with respect to a child in court ordered kinship care or foster care, if this is in the best interests of the child.

Comments

There is a need for further clarity on exactly when a child would be eligible for court ordered kinship care and what support the caregiver would be entitled to. Would for example, a grandmother who has been caring for her 4 grandchildren for the last 3 years be eligible to apply for court ordered kinship care? The lack of clarity on the existing legislation governing the foster care system has resulted in several different interpretations of the provisions of the Child Care Act of 1983 and we would want, as far as possible, to avoid a repeat of this.

We support the provisions in Section 185 and 186 of Chapter 13. In particular, Section 186 will prevent social workers from having to write unnecessary reports and, in the context of HIV/AIDS, allow them to focus their attention on placements that do require ongoing supervision and monitoring and on other much needed services.

4 Conclusion

While in many respects the Children's Bill is an improvement on the existing Child Care Act, there are several key areas of concern which need to be addressed if we are to ensure that the Act will meet the needs of children in the context of HIV/AIDS.

We need to strengthen provisions in the Bill for **all** caregivers of children whose basic rights are not being met. Many children living in the care of their *biological parents* are rendered vulnerable through HIV/AIDS and poverty, as are children cared for *informally* by relatives or neighbours. Government policy repeatedly refers to the importance of the informal care networks that exist in communities and the virtues of volunteerism, yet the Bill remains relatively silent on how the state plans to support these initiatives. We need to strengthen and support informal networks of care and support so as to ensure their sustainability through and beyond the worst of the HIV/AIDS pandemic.

Furthermore, the scale of the pandemic and its impact on children demands a co-ordinated and collaborative response. Thus far, attempts at collaborative efforts on the part of government departments to address the impact of HIV/AIDS on children have largely failed. We therefore see it as critically important that the Children's Bill includes legislative provision for a National Policy Framework (or equivalent) that will serve to strengthen and enforce collaborative efforts and shared responsibility.

Please send comments and endorsements to sonja@rmh.uct.ac.za.