

# Developing social policy for children in the context of HIV/AIDS:

A South African case study



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December 2008



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Debbie Budlender, Paula Proudlock & Lucy Jamieson  
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and the Community Agency for Social Enquiry

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## Abbreviations & acronyms

ACCESS	Alliance for Children’s Access to Social Security
ANC	African National Congress
ASSA	Actuarial Society of South Africa
CSG	Child Support Grant
ECD	Early Childhood Development
FC	Full Cost
FCG	Foster Child Grant
GEAR	Growth, Employment and Redistribution
IDASA	Institute for Democracy in South Africa
IP	Implementation Plan
JLICA	Joint Learning Initiative on Children and HIV/AIDS
MEC	Member of the Executive Council
MP	Member of Parliament
MTEF	Medium-Term Expenditure Framework
NCOP	National Council of Provinces
NEC	National Executive Council
NGO	Non-Governmental Organisation
NWSSDF	National Welfare, Social Service and Development Forum
SALRC	South African Law Reform Commission
SMG	State Maintenance Grant
UNCRC	United Nations Convention on the Rights of the Child
UWC	University of the Western Cape

# Background

The HIV-prevalence rate in South Africa is among the highest in the world. The country also outranks others in the absolute number of infected people within its borders. HIV/AIDS is one of the major problems facing the country, but certainly not the only major socio-economic challenge. Although South Africa is a middle-income country, it has high levels of poverty due to a highly unequal distribution of income and resources. A further challenge is the high level of violence, including against children.

Given this situation, this study examines how three policies related to financial and other care for children have been formulated since the mid-1990s. The paper is concerned, in particular, with whether and how children affected by HIV/AIDS should be targeted in public policy. For the purposes of the paper, the term '*policy*' is understood in a broad sense that extends to laws and regulations. The paper focuses on issues relating to both the content of the policies, and the process through which they were developed, as well as how process and content influenced each other. The paper examines, among others, the extent to which policies are targeted at children with particular needs, or instead provide for a specified minimum level of care for all. The overall aim of the paper is to contribute to the debate on how best to meet the needs of children in the context of an HIV/AIDS pandemic, and how the particular context of policy-making influences what can be and is done.

The study was conducted under the auspices of the Joint Learning Initiative on Children and HIV/AIDS (JLICA). This international initiative aims to engage practitioners, policy-makers and scholars in collaborative problem-solving, research and analysis to address the needs of children living in the context of HIV/AIDS. In particular, it hopes to expand the scientific evidence base to produce recommendations for policy and practice.

JLICA's work is organised in terms of learning groups, and this study was commissioned by learning group 4 on social and economic policies. One of the aims of this group is to explore how universal access to AIDS treatment can be combined with health and welfare programmes to address other dimensions of children's well-being. The group also aims to document the socio-political determinants of effective policy-making in different contexts.

The South African study focuses on three policies: the child support grant (CSG), the Children's Act, and the foster child grant (FCG). The three policies differ widely in terms of the stage of the policy process covered in this paper, as well as the way in which policy has been, or is being, developed. What is common across the three policies is that they are large-scale interventions involving significant amounts of money. Another common feature is that these policies were not designed specifically to address HIV/AIDS-related issues. The paper could, for example, have focused on prevention of mother-to-child transmission of HIV, or the policy in respect of orphans and vulnerable children. Instead, it examines the extent to which mainstream policies related to poverty relief and basic services address the needs of children affected by HIV/AIDS.

A further factor influencing the choice of policies described was the extent to which the authors were involved in the policy processes, thus having in-depth knowledge of aspects

that might not be available to those not so involved. Debbie Budlender was a member of the committee that developed the CSG, and has also worked with the Children's Institute at the University of Cape Town and others on research related to children's issues. Paula Proudlock and Lucy Jamieson led the Children's Institute's work on the Children's Bill/Act and co-ordinated the civil society alliance called the Children's Bill Working Group, which made input on the Bill throughout its eight-year drafting and finalisation process. Paula is also a founding member of the Alliance for Children's Entitlement to Social Security (ACCESS) and played a leadership role in the Children's Institute and ACCESS' civil society campaign in the early 2000s, which contributed to the extension of the age threshold for the CSG from 7 to 14 years. Given the authors' insider knowledge about these processes, they expanded the scope of the paper to a fuller documentation of the various policy processes and influences rather than a narrower focus only on those aspects related to HIV/AIDS. The insider knowledge means that this paper has fewer references than it might otherwise have had, as many of the events are reported, and observations made, based on personal experience of the authors rather than from reading of the accounts, research or views of others.

The paper has three main sections. The first section describes characteristics of South Africa that are important when discussing and engaging in policy formulation and implementation in respect of children in an HIV/AIDS-ridden context. The second section describes the evolution of each of the three policies. The descriptions cover the process of development and implementation of each policy as well as their content. It reveals, in addition, how the processes and content have influenced each other over time. The third section discusses themes emerging across the three policies. It also draws together lessons in respect of targeting or general provision.

## Section 1: Characterising South Africa

None of the policies described in this paper were primarily designed to focus on HIV/AIDS. Nevertheless, the HIV/AIDS pandemic has affected the way in which each of these policies has been designed and implemented. Selected indicators derived from the Demographic and AIDS model of the Actuarial Society of South Africa (ASSA) illustrate the extent of the pandemic in the country. The indicators presented here are for 1994 and 2007, the outer years of the main period covered by this paper. Comparison of the estimates for the two years illustrates the extent to which the situation has worsened over this period in terms of numbers affected.

Between 1994 and 2007, the overall prevalence rate increased from 1.3% to 11.4%. Among women aged 20 – 64 years, the rate increased from 2.6% to 20.8%. Among women aged 15 – 49 years, those most likely to bear and have young children, the rate increased from 2.9% to 21.6%. The estimated number of annual deaths caused by AIDS increased from just over 10,000 in 1994 to 367,000 in 2007. In the latter year, AIDS deaths accounted for 48% of all deaths in the country. By 2007, there were an estimated 1,708,032 maternal orphans in the country, of whom 1,201,675 were orphaned as a result of AIDS. In the same year, an estimated 38,592 babies would have been infected at birth, with a further 25,786 infected by their mothers' milk.

The South African government's ambivalent stance on HIV/AIDS during the period that this paper covers is well-known, but has varied across sectors and affected the policies examined in this paper less than it has affected policy and practice directly targeting HIV/AIDS. The strongest denialism came from the Minister and Department of Health, and the Presidency. In contrast, the Minister and Department of Social Development, who are the lead actors for the three policies covered in this paper, have been among those most open in acknowledging the pandemic and discussing how to address it. The National Treasury, which will be shown as a key role player in policy-making, has also been more open than many others, although not always taking a public stand.

The paper focuses on the period 1996 to 2007. The change-over in 1994 from the apartheid regime brought major and relatively sudden changes in the political and social life of the country. These changes opened up new spaces and thrust people and institutions into situations they had not experienced before. All three policy processes must thus be understood as reflecting the tensions that developed as the various actors – the executive, legislature, judiciary and civil society – experimented with their roles in South Africa's new constitutional democracy.

Unlike many other developing countries, South Africa does not have an overarching national poverty or development policy. Social grants are seen by many as the government's most effective poverty alleviation programme. Two of the policies studied here – the CSG and FCG – are part of the grants system, although the FCG was not initially designed as a poverty alleviation grant.



In South Africa, the issue of race remains as salient, if not more so, than poverty in policy discussions. The race question is closely tied to that of class in that poor people remain almost exclusively black, although there are increasing numbers of black people among the wealthy. The high level of inequality in the country increases the salience of the issue. The concern over race and class can at times discourage universalism, as there is antagonism to the idea of wealthy people benefiting from government services that they could pay for themselves.

The differing influence of sectors of government such as Treasury, Education and Social Development, and the importance accorded to these and other sectors, have also influenced the progress of policy-making. The Department of Social Development bears the main responsibility for all three of the policies covered in this paper. The department is weaker than many other departments in terms of status and capacity. Furthermore, social welfare policy is considered of lesser importance than say justice or education policy, and the Department of Social Development also has less influence with National Treasury than departments responsible for these other sectors. Internationally, too, policy related to social welfare is seen as less important than economic or security issues. Ironically, the low importance accorded to this area of work by many of the key decision-makers other than those in Social Development might have allowed more space for the development of innovative policy.

In the mid-1990s, soon after the formal transition from apartheid to a democratic government, the White Paper for Social Welfare introduced the notion of 'developmental social welfare'. The former approach to social welfare was seen as 'residual' to the extent that it only addressed individual problems after they arose, rather than trying to prevent the problems happening in the first place.

The new policy approach of developmental social welfare is relevant for all three of the policies studied. In respect of the Children's Act, the new approach supported the emphasis on prevention and early intervention rather than simply on helping those already in trouble. In respect of the two grants, the new approach was interpreted by some as implying that grants were an inferior form of assistance. Grants were (incorrectly) seen by many as 'handouts' or 'band-aid', rather than providing people with the means to help themselves. Since the introduction of the grants, there has been a massive increase in the number of grant beneficiaries, including of the CSG and the FCG. Researchers and others (see, for example, Posel et al, 2004; Samson et al, 2004) have argued that grants do not necessarily promote dependency but instead can promote economic engagement.

The FCG already existed during the apartheid years. The other two policies were developed against the background of a new Constitution which provides justiciable socio-economic rights, with especially strong rights for children. The progress in respect of two of the policies – the CSG and the Children's Act – described in this paper is at least partly related to the foundation provided by these strong constitutional rights, the impetus created by dialogue on the development of some of these rights during the process of drafting the Bill of Rights in the 1990s, and the use of the rights foundation by government and civil society organisations to argue for progressive realisation.

Progress in respect of the CSG and the Children's Act might also be related to the fact that children (and pension-age people) are more likely to be regarded by policy-makers and the general public as the 'deserving poor', where equally needy working-age adults might not be regarded as such. This does not, however, mean that there is no opposition to expanding rights and services, or that there is no questioning of the extent to which these groups, or those who care for them, are 'deserving'. The CSG has, for example, sparked debate as to whether it generates perverse incentives, such as encouraging teenagers to become pregnant to access the grant. Research commissioned by the Department of Social Development to investigate this possibility suggested that it is not the case (Kesho Consulting & Business Solutions, 2006).

The strong constitutional rights have increased the possibility of using public interest litigation through the courts as a way of influencing policy. Court cases have won victories in terms of access to grants. They have also spelled out government responsibilities in terms of progressive realisation of other policies, such as access to prevention of mother-to-child transmission of HIV. Today the threat of court action is in the minds of both the executive and the legislature when developing policies and implementing them. For example, a litigation risk analysis was done as part of the costing process for the Children's Bill to inform decisions about where resources should be focused.

Also of interest is the way in which the government has sought to balance the push towards rights-based public policies and its desire for 'fiscal prudence'. The CSG was developed at more or less the time the Growth, Employment and Redistribution (GEAR) policy was introduced. Despite its name, this policy was labelled by many as a structural adjustment programme. The structural adjustment programmes were imposed on developing countries by the World Bank and the International Monetary Fund together with a range of conditions in terms of financial controls, movement towards a free market economy, and limits on the extent of public sector employment and provision of social services. GEAR's main emphasis was on deficit reduction, with growth and unemployment reduction as the hoped-for results. By 2007, the deficit turned into a small surplus, but unemployment and poverty rates changed very little.

Grants are of special interest in a discussion on finances as, once the right to a grant has been established in a national law, government has an ongoing obligation to provide the necessary funds and any non-provision can be challenged as unconstitutional. There is not, as yet, as strong a legislative obligation in respect of social services for everyone, although the Children's Act does introduce legislative obligations on provincial ministers – Members of Provincial Councils (MECs) – to provide social services to children such as prevention and early intervention services, protection services and child and youth care centres. In the debates on the CSG and the Children's Act, in particular, many of the arguments against extending provision have been based on whether the state is constitutionally obliged to deliver the relevant service, the cost involved and the risk of litigation if resource and capacity constraints prevent the state from being able to deliver on the promised benefit or service.

The constitutional obligations and other factors favouring success in promoting favourable policy for children need to be balanced against the fact that children can be expected to have much less 'voice' than adults to influence policy. This status can be explained, among others, by the fact that they do not vote and lack the means to organise campaigns or go to court on their own, and therefore cannot exert pressure on the political system. In turn, it raises questions on who speaks on behalf of children, and the role played by child rights activists within government and non-governmental organisations in shaping policy.

The Children's Act is an example of concerted action by civil society and child rights champions within government to influence policy-making. With the CSG, many of the members of the Lund Committee which developed the proposal for the grant were civil society activists or practitioners. There was, however, limited civil society engagement in the first formulation of the policy. Subsequently, civil society prompted and participated in public hearings on the proposed policy before the Portfolio Committee on Social Development in Parliament. They also participated as members of a task team who drafted the regulations for the CSG. Subsequently, concerted civil society action had a definite influence on implementation and expansion of the policy. The three case studies thus provide interesting contrasts in terms of both the depth of consultation and public participation, as well as the stage at which it occurred. There are also differences as to who were involved in terms of civil society and the legislatures.

The last decade has seen promotion internationally, at least in rhetoric, of 'evidence-based' policy-making. This is particularly relevant for the policies being considered here – both because the Department of Social Development places more emphasis on research than many other departments and because non-governmental organisations in the children's sector have used evidence to influence policy-making and implementation. It is especially true of the Children's Institute, which is based at a university, and which has played a lead role in much of the advocacy on all three policies in the 2000s. The Community Law Centre, based at the University of the Western Cape, played a lead role in the advocacy on the Children's Bill and the CSG in the 1990s and continued to contribute into the 2000s. The development of the CSG was also a heavily evidence-driven process, led by an academic, Frances Lund.

There is also a range of issues related to the institutional set-up in South Africa post-1994 that influenced the process and content of policy-making. Constitutionally, national government bears the main responsibility for social policy, while provinces bear the main responsibility for implementation. To complicate matters, provinces are given some policy-making powers and have formal channels to influence national policy that affects them. The allocation of functions affects implementation and equity as the nine provinces differ considerably in respect of capacity and resources, amongst others. These differences, in turn, are largely a legacy of apartheid. Stated crudely, the areas which previously incorporated homelands continue to be under-served, less wealthy and have less efficient administration.

The way in which budgets are formulated in South Africa also affects implementation, or 'policy-in-practice'. South Africa is a semi-federal state. Provinces in theory have large

discretion over how they spend their budgets in relation to the areas over which national and provincial government share competency, which mainly relate to social services. Provinces are, however able to raise revenue that covers only about 5% of their expenditure, and are therefore dependent on the national government for about 95% of their funds. The way in which funds are channelled from national to provincial, and the relative power of decision-making of national and provincial governments over how this money is spent, is therefore a consideration, as is the influence of historical expenditure patterns. The problems caused by this complicated system in relation to grants resulted in national government taking back all responsibility for social security in 2004 in an effort to ensure adequate funding, reduce corruption, improve service delivery, reduce litigation and promote equality. The responsibility for social welfare services, in contrast, remains shared between national and provincial government.

As in other countries, there is often poor co-ordination of policy-making across different parts of government, or even within the same part of government. Both early childhood development (ECD) (within the Children's Bill) and the FCG illustrate the difficulties encountered by advocates, as well as policy-makers and implementers, when policy straddles different agencies.

## Section 2: The three policies

### Child support grant<sup>1</sup>

#### Introduction

The child support grant (CSG) is a relatively new grant, introduced during the late 1990s. It replaced the previous state maintenance grant (SMG). The SMG was intended to provide financial assistance to mothers (and later fathers) and their children where the spouse was no longer present due to death, imprisonment, or a number of other specified reasons. The SMG included amounts for each child, plus an amount for the caregiver. There are no accurate estimates of the number of children and parents who received the grant, as it was recorded inconsistently across the different administrations. However, Lund (2008; personal communication) suggests that in the early 1990s it was probably about 200,000 children and 200,000 mothers.

Access to this grant was severely skewed racially. In 1990, about 8 out of every 1,000 children aged 0 – 17 years benefited from the grant. However, the rate was 48 per 1,000 for coloured children, 40 per 1,000 for the small Indian population group, but only 2 per 1,000 for African children. The rate for white children was 15 per 1,000, but this relatively low rate was largely attributable to potential recipients having incomes above the means test rather than them being denied access. The low rate among Africans was the result of a range of different reasons. In some 'homelands' the grant was simply not available. In other 'homelands' it was available, but had stricter rules than those used for people living outside 'homeland' areas. For example, in some administrative areas there was no caregiver portion. In some areas where the grant was available, lack of awareness contributed to low take-up rates. Ignorance about the grant also prevailed among many of the new leaders in the period immediately following the end of apartheid. It was especially the case among those from the poorest provinces, as these were the areas in which the grant was least common. While there was thus widespread recognition of the role of the old age grant in addressing poverty, there was very little recognition of the role played by the SMG.

In the mid-1990s, approximately R1.2 billion was allocated for the SMG in the government budget. It was obvious to the new government that, if access were extended equitably to the full population, take-up among Africans would increase beyond the coloured rate, given the higher poverty rates as well as more fractured family conditions among Africans. It was estimated that extension of the grant under the existing rules would have cost around R12 billion per year. This was equivalent to the amount spent on all other pensions and grants combined at that point. It was also equivalent to the annual health budget. The latter comparison was especially pertinent because in many of the provinces health and social welfare were at that time combined in one department. In addition, six of the nine

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<sup>1</sup> The *Introduction* and *The Lund Committee* sub-sections draw heavily on Lund (2008). Information on the executive and parliamentary decision-making phase also draws on Haarmann (1998), and personal communication with Alison Tilley (2007), one of the active civil society advocates at the time.

provincial ministers were medical doctors. They therefore knew little about the welfare field. Perhaps also important, is the fact that eight of the nine were men.

The White Paper for Social Welfare of 1997, which was drawn up through an extensive consultative process, suggests that ambivalence towards the SMG extended beyond the provincial ministers. The White Paper openly acknowledges the role of the old age pension and disability grants in alleviating poverty, especially for African people, and women and rural people in particular. In respect of child and family benefits, it notes severe racial inequalities, and estimates that as many as 2.8 million women would qualify for the SMG under its rules at that time. However, it states that "sustainable and affordable options of social security provision for families and children will be developed", highlighting a concern with finances. This concern is further elaborated in the section on finances, which hopes that the design of a more "efficient" system combined with initiatives for employment will result in decreased "dependence" on state social assistance and "increased self-reliance on the part of the poor and the vulnerable".

### **The Lund Committee**

In mid-1995, a meeting of MinMEC, which brings together the national Minister and the provincial ministers (MECs) of Welfare, agreed that the SMG should either be abolished, or the amount drastically reduced. Although this body did not have the final decision on the matter as it would have required an amendment of the Social Assistance Act by Parliament, its views would have been influential in shaping the final decision. Frances Lund was attending the meeting for another item on the agenda. Lund was trained and worked as a social worker and subsequently, as an academic, did path-breaking research on the operation of the welfare system across all the various administrations, including those of 'homelands'. She thus had a good understanding of what abolition of the grant would mean for poor women and children.

As a result of Lund's intervention at the meeting, the MinMEC agreed that the grant should not be immediately abolished. Instead, Lund was asked to chair the Lund Committee on Child and Family Support. The committee was made up of people identified by the provincial ministers, people nominated by organisations identified by the ministers, several co-opted members, and representatives of the national Department of Welfare (later re-named "Department of Social Development").<sup>2</sup> While there were some differences in the ideological positions of committee members, all were supportive of the new government, and all favoured redistribution. The committee also drew on the advice of some international experts. These experts were carefully selected by the committee, both for the approach they could be expected to adopt as well as the 'gravitas' they might give to the committee's recommendations. Getting international endorsement was seen as especially important given that the committee was operating in an international environment where it was more common to restrict grant systems than to expand them.

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<sup>2</sup> The name change to "Department of Social Development" took place during the period under discussion here. Hence, the authors interchangeably refer to the department as the "Department of Welfare" and the "Department of Social Development", and to the Minister as the "Minister of Welfare" and the "Minister of Social Development".

The committee's terms of reference were to assess the existing system of support to children and families across all government departments, investigate ways of increasing parental financial support through the private maintenance system (payments by separated parents to the parent living with the child), explore alternative options for social security, and develop approaches for effective targeting of programmes for children and families.

The committee was named a 'technical committee', underlining the fact that it could not engage in a full consultation process given the timeline of six months. The committee did, however, commission several pieces of research to inform its discussions. It also visited provincial departments and non-governmental organisations, as well as national agencies, to inform them about the committee's work, gather information from them, and inform those in the provinces of their right to demand public hearings. The emphasis on research and information-gathering reflected the location of the chairperson and some of the members, as well as the international trend towards evidence-based policy-making. In her recent writing on the experience, Lund (2008) notes that this evidence-based work "had to travel a political road".

The first meeting of the committee was held in February 1996, and the final report was submitted to government six months later, in August. The committee proposed that the SMG should be phased out and the new CSG introduced at R70 per child per month. An age bracket of 0 – 9 years was proposed as the preferred option, with 0 – 4 years being a second option.

### **The executive and parliamentary decision-making process**

The committee's proposal was brought before Cabinet in March 1997 by the then Minister of Social Development, Geraldine Fraser-Moleketi, after it was accepted by her and her provincial counterparts in February 1997. Cabinet accepted most of the proposals, including the phasing out of the SMG and the introduction of the CSG. With regards to the value of the grant and the age, they decided on R75 per child per month, and the seventh birthday (i.e. 0 – 6 years).

At this stage of the process the Black Sash and the Community Law Centre at the University of the Western Cape (UWC) convened a meeting of civil society actors to discuss the policy proposals. The group was concerned about the small amount being proposed for the grant and the age cut-off. They organised a meeting with the parliamentary study group of the African National Congress (ANC), the ruling party. They also lobbied for public hearings to allow them a public space to voice their concerns.

In April 1997 the Portfolio Committee on Welfare held public hearings, attended by the Minister of Welfare, where several organisations from civil society made submissions. The New Women's Movement and the Gender Advocacy Programme organised a march of around 300 – 500 women on the first day of the public hearings to demonstrate their unhappiness with the proposed policy, in particular the amount and the age limit. Civil society's common call was for a grant of value of R135 per child per month for all poor children under the age of 12 years.

A task team was established within the Department of Social Development to work out the details of the new system. The department developed the Welfare Laws Amendment Bill which was passed in Parliament by July 1997. The age limit was set at children under 7 years (i.e. 0 – 6 years) “or such higher age as the Minister may determine by notice in the [Government] Gazette”. While setting the cut-off at the seventh birthday, the wording was clearly designed to allow for progressive expansion of the age threshold as resources became available. The Act left the decision on the monetary amount of the grant to the discretion of the Minister of Social Development in concurrence with the Minister of Finance. All other conditions for eligibility were to be set in regulations issued by the Minister. These included the eligibility means test that was to be applied and that would, in effect, determine the size of the target population and the budget.

In respect of the amount of the grant, a discussion document prepared for the July 1997 ANC Policy Conference proposed R100 per child per month, substantially higher than the Lund Committee's proposal of R70. And in July 1997 the National Executive Council (NEC) of the African National Congress took a formal decision that the amount should be R100. Civil society pressure almost certainly was a key factor in this decision. Once the regulations were drafted, the child support grant was introduced in 1998 as amendments to the Social Assistance Act of 1992 and its regulations.

The policy development process was very different in length, as well as in many other aspects, from the Children's Act process described later in this paper. The fact that people had already started applying for the SMG across all provinces increased the need for a speedy process. Nevertheless, the speed with which a fairly major reform of social policy was developed and implemented – from the time the committee was established (1996) to the time the first application occurred (1998) – is unusual.

The non-consultative nature of the Lund Committee inevitably resulted in its recommendations being questioned by civil society actors. The extent of the questioning was heightened by the contrast with the extremely consultative process during the drawing up of the White Paper for Social Welfare. The latter went through a series of drafts, each involving broad public consultation. In respect of child and family welfare, the White Paper (paragraphs 47-8) suggested that a “... short-term, immediate and urgent step will be to start the process of reaching national consensus about the issue of family support. An intersectoral commission will be established and the process of public debate begun”. The White Paper also recommended an investigation into the possibility of increasing parental support through the private maintenance system (included as part of the Lund Committee brief) and an educational process for policy-makers and the public on the need for family support as well as “realistic trade-offs”. By the time the paper was published, the Lund Committee already presented its report to government.

The cautious nature of the committee's recommendations (see below), and the fact that it took the fiscal constraints specified by the Ministry of Finance seriously, added to suspicion. Civil society's reaction was thus initially quite hostile. On the more formal political side, however, some of the older ANC leaders were opposed to the grant on the basis that it



would contribute to teenage pregnancy and high fertility rates, and reduce voluntary activity.

Despite civil society being generally dissatisfied with the proposal, some leading civil organisations engaged directly with the Lund Committee and the Department of Social Development in the interests of improving the proposal. For example, the Law, Race and Gender Unit at the University of Cape Town assisted while the committee was still functioning with activities related to the investigation into private maintenance. Once Cabinet accepted the general proposal for a new grant, the Community Law Centre at UWC, in collaboration with the Department of Social Development, organised a workshop aimed at defining more clearly the meaning of a *'primary caregiver'*, which contributed to an amendment of the definition of *'primary caregiver'* by the Portfolio Committee on Welfare. Apart from this change, the Bill that was finally passed by Parliament in 1997 did not differ substantially from the Bill that was tabled by the executive.

Initial take-up of the grant was very slow. By January 1999, after nine months, only 18,200 grants were awarded. By March 2007, however, the number has increased to 7 million. In 2007, the Department of Social Development estimated that the grant was reaching close on 90% of those who are eligible (Department of Social Development, 2007: 12).

## **Key debates during the development of the policy**

### *The concept of the primary caregiver*

The CSG involved a major re-conceptualisation of many aspects of the SMG. Perhaps most important, the CSG is not targeted only at mothers (and fathers), or only at those who have lost spouses. Instead it is intended to 'follow the child' and be available to whoever is the primary caregiver for any child living in poverty.

The SMG was intended for a society in which children were born into a family consisting of an employed father, a non-employed mother responsible for the care of the children, and one or two children. With this family profile, a grant was seen to be necessary when the father was unavailable and income thus depleted. The reconceptualised grant is more appropriate for a society such as South Africa, with a family structure that is very diverse and fractured (among others, as a result of apartheid), than a grant that assumes a nuclear family as the norm. In particular, it caters better for a situation where large numbers of women bear children outside marriage and permanent partnerships, where many men neglect their responsibilities towards the children they have fathered, and where care by extended family members is common. It thus does not discriminate against children on the basis of the family form in which they live. The 'follow the child' aspect is also appropriate for a society with high HIV prevalence, in which there will also be large numbers of orphans.

The implications of the pandemic were, indeed, explicitly discussed in the committee and in its report. Nevertheless, some aspects of the way in which the grant is administered – such as the fact that it is not automatically transferred to the new caregiver when the current caregiver dies, and the strict requirements for birth certificates and identity documents –

which are often not easily accessible to non-parental caregivers – are not sensitive to the HIV/AIDS context.

### *The age group to be targeted*

While most might agree that the 'follow the child' approach was positive, other aspects of the proposed grant were criticised, in particular the low monetary amount proposed (R70) and the restricted age group targeted (0 – 6 years). However, in arriving at its recommendations, the committee was conscious that, if it suggested a grant that cost significantly more in total than the cost of the SMG, there was a real danger of policy-makers deciding to abolish the grant completely. The committee thus erred on the side of caution and tried to come up with a solution that cost more or less the same in total as the SMG, but which ensured more equitable distribution. The proposed solution was also designed in a way that could be easily expanded if and when more money became available and/or attitudes towards social welfare changed.

The cautious approach meant a severe reduction in the age group covered. The situation was aggravated by the fact that the Demographic Information Bureau population estimates considered by experts as the 'best guess' of the country's population were significantly higher than the actual population estimates announced in 1998 in respect of Census 1996. The committee's report proposed 0 – 9 years as the preferred option, and stated that 0 – 4 would be the absolute minimum that could be considered. One of the motivations for special focus on the younger age group is that they could not easily be reached through other means, such as schools, and that malnutrition during these early years of childhood has a lasting impact on a person's well-being that is not as likely if there is malnutrition at an older age. The committee's calculations also suggested that 0 – 4-year-olds could be covered using the same amount then allocated for the SMG. The committee advised that, if the minimum were chosen, "it should be loudly declared as the minimum, and the age increased as fiscal circumstances permit" (Lund Committee, 2006: 95).

Cabinet finally decided that children under seven years of age would be covered and tabled a Bill in Parliament specifying seven as the cut-off age but allowing for the Minister to expand the age group in the future by gazetting a higher age limit.

At the April 1997 parliamentary hearings on the proposals, civil society organisations led by the Black Sash and Community Law Centre, UWC, called for children 0 – 12 years to be covered. However, the final Amendment Bill was passed without Parliament making any changes to Cabinet's proposed age threshold.

### *The monetary value of the grant*

The proposed amount of the grant was much less than that for the SMG. In addition, the CSG was to be paid only in respect of the child – the parent portion fell away. The committee suggested two options in terms of the child amount. The first option, R70 per month, represented the amount calculated to cover food for a young child in a low-income household in terms of the Household Subsistence Level determined by the

University of Port Elizabeth. The second option, R125 per month, was at the level of the child allowance part of the SMG. The motivation for suggesting the first measure was that, although it was very low, it was based on real (but limited) costs and would automatically increase in line with inflation.

First indications were that the government would opt for R70 or R75. Civil society organisations called for R135 and campaigned vigorously to convince the ANC to increase the amount. The organisations involved included the Community Law Centre at UWC, the Black Sash, the Congress of South African Trade Unions, the Institute for Democracy in South Africa (IDASA), the Cape Flats Development Association, the Gender Advocacy Programme, the New Women's Movement, and the South African Non-Governmental Organisation Coalition. One of their assertions was that the new grant represented a regressive trend that was not based on a human rights approach because it was driven by an argument about fiscal constraints rather than by the rights and needs of the children affected. The ANC-led government's decision to set the amount to R100 was almost certainly the result of strong advocacy from these organisations.

The fact that both the age group and the amount were eventually set at levels that would mean that the CSG could cost government more than the SMG suggests – as indicated elsewhere in this paper – that the specified budget limits were not set in stone and were subject to change through the political decision-making process. Nonetheless, it is probably also true that, if the committee came up with a proposal that cost significantly more than the SMG, there would have been a real danger that a child and family grant could have fallen away completely.

#### *The means test*

Many members of the Lund Committee favoured a universal grant that would go to all children in the chosen age group. One of the arguments against this related to equity. Stated crudely, it did not seem justifiable for children of wealthy white households to receive any benefit given the very high levels of inequality in the country and the previous race-based privileges that they enjoyed. The second argument related to affordability – that by targeting through a means test, the number of children to be covered would be less, which would allow for a larger age group to be covered and/or a larger amount to be paid. The committee eventually bowed to the strong arguments for equity and proposed that a very simple means test be devised.

The means test and targeting more generally were not discussed much within the Lund Committee. The detailed work on these aspects instead took place in the task team that was set up by the Department of Welfare once Cabinet decided to go ahead with the new grant.

An evidence-based approach was utilised to the extent that different income cut-offs and approaches were tested on large household datasets from Statistics South Africa surveys. These tests were designed, among others, to compare different approaches in terms of the numbers reached, profile of beneficiaries, and overall cost. The final recommendation was

for a means test that distinguished between rural dwellers and those living in urban informal dwellings on the one hand, and formal urban dwellers on the other. The means test had a higher income cut-off for the first grouping (R1,100 versus R800 per month). The logic behind this differential cut-off was that those living in rural and urban informal areas would be disadvantaged in terms of access to a range of services and opportunities (such as schooling, health services and employment) and would thus be 'poorer' than those with equivalent incomes in formal urban areas.

What is interesting here is the extent to which the political process ignored the financial constraints implied by the testing against data. Thus the Minister of Welfare, without consulting the task team, announced a means test that would render about 50% of children under seven years eligible, an estimated 3 million children. This would cost significantly more than the outer budget limit which the committee and task team were led to believe was sacrosanct.

### **Development of the policy since its inception**

The CSG has undergone important changes since its introduction in the late 1990s. These include the removal of some conditions, changes to the means test, increases in the grant amount and extension of the age group covered. Many of the changes were, in part, the result of advocacy by civil society organisations. In the early years the changes – all of which made the grant more accessible – were also motivated by the initial slow take-up. The government was thus open to introducing changes that could increase take-up and allay some of the criticisms.

Since the establishment of the grant, civil society organisations have maintained an interesting balance between assisting the government in some tasks associated with the grant and adopting strong advocacy positions against the government on other aspects. Over time, the CSG has become widely accepted by civil society organisations, to the extent that many service providers see one of their service delivery tasks as helping people to access the grant. Nevertheless, the grant is still not seen as optimal. So, while helping people to get the grant, many civil society organisations at the same time are advocating for it to be improved. This dual role is part of a deliberate advocacy strategy. By increasing take-up, the organisations strengthen the effectiveness of the programme, strengthen the case for continual improvement and expansion, and also increase public demand.

The opportunity for policy dialogue and influence created by the Committee of Inquiry for a Comprehensive Social Security System in South Africa (more commonly referred to as the Taylor Committee, after the chairperson, Vivienne Taylor) in 2000 almost certainly assisted in the achievement of improvements to the CSG. The Child Health Policy Unit at the University of Cape Town (later to become the Children's Institute) and the Black Sash prepared an 'Issue Paper on Social Security for Children in South Africa' for the Committee very soon after its establishment. The paper (Guthrie et al, 2000) described the three child grants – the care dependency grant, foster child grant, and child support grant – in some detail, outlining the rules that applied, the numbers of children benefiting, and the practical and other problems experienced by those for whom it was intended.

Much of the advocacy related to the CSG has centred on the explicit and implicit conditions related to accessing the grant, the means test, the amount, and the age group covered.

### *Conditions*

In terms of conditions, the 1998 regulations in respect of the CSG initially required that applicants provide evidence that they had not refused to accept employment or to participate in a development project, that they had made an effort to secure maintenance for the child from the child's other parent, and that the child has been immunised. These three conditionalities were removed through an amendment to the regulations in 1999. The first one was removed on the basis that employment and development projects existed in too few areas to make this a reasonable condition. The second one was removed because of the many acknowledged weaknesses in the private maintenance system. The third one was removed because failure to immunise a child could be a result of lack of access to health services, rather than the fault of the caregiver, and the child should not be doubly penalised because of this lack of access. In addition, immunisation rates were already fairly high, suggesting that there was little need to incentivise through attaching such a condition to the grant.

### *The means test*

A change to the means test was introduced in 1999, relatively early in the life of the grant, and resulted in the test being applied to the personal income of the caregiver (and spouse, if applicable) rather than the household income. This change acknowledged the fact that household income is not necessarily equitably distributed among household members. In particular, as women are less likely than men to earn money, or earn less when they have paying jobs, women (and the children they care for) might not get their fair share of general household income.

The cut-off points for the means test (R800 or R1,100 depending on location and dwelling type) have remained constant, whereas they are automatically adjusted for the old age and disability grants in line with increases in the grant amounts. In effect, the lack of adjustment in the CSG means test means that many caregivers who might previously have qualified would no longer do so as the nominal amount of their income increased with inflation, while the real value remained the same. Not increasing the threshold annually in line with inflation also ignores the compounding effects of the HIV/AIDS pandemic on households living in poverty.

In 2004 the Children's Institute engaged in detailed research that calculated the cost of implementing the means test to both government and applicants, arguing on simple financial grounds that the test should be abolished (Budlender et al, 2005). The Institute's subsequent larger-scale Means to Live project, which used a household survey to research problems in accessing grants and other poverty alleviation programmes, provided further evidence of barriers to accessing the CSG as a result of the means test (Hall & Monson, 2006).

Officials have added to the inevitable problems of the means test by sometimes implementing it in harsh ways. The first application forms, in particular, asked questions that contradicted the simplicity proposed by the committee. For example, officials insisted that the form included questions about marital status, whereas such information was irrelevant given the original design of the grant. Field research (Budlender et al, 2005) later confirmed that some officials were requiring documents and other evidence far beyond what the law dictated, which amounted to asking applicants to "jump through hoops".

#### *The amount*

The amount of the CSG remained static for the first few years at R100 per month, even while the amount of other grants increased in line with inflation. The reason for this was never explained by the government. In 2000, the Children's Institute and ACESS asked IDASA to investigate the extent to which the value of the grant decreased in real terms. These calculations showed that, by March 2000 already, the real value of the grant fell to R90.50 if measured in 1998 rands (Cassiem & Streak, 2001: 94).

These calculations were used by the Children's Institute, the Black Sash and ACESS to motivate for an increase in the CSG amount in several submissions in 2000 and 2001 to the Department of Social Development and the Taylor Committee. The first increase – to R110 per month – came into effect in July 2001. Since then, the amount has been increased each year to cover inflation, and sometimes a bit more.

#### *Age group*

The first change in age group was introduced in 2003, when the government announced that an extension would be phased in. The grant was to be extended to children under nine years in the first year, to children under 11 years in the second, and children under 14 years in the third. The fact that the grant was clearly effective, popular and not too 'expensive', almost certainly played a role in this decision. Civil society action, led by ACESS, was also important in creating pressure for change.

ACESS was established in March 2001 after a workshop convened by the Children's Institute, the Children's Rights Centre and Soul City. The workshop brought together representatives of about 70 children's sector organisations. By mid-2007, ACESS had a membership of approximately 1,500 children's sector organisations from all nine provinces in the country. The overall objective of the alliance is to develop recommendations and advocate for improvements in the social security system to provide better for children. To date, extension of the CSG has been a major focus.

While ACESS made submissions and did advocacy in its own name, the real strength of the alliance lies in its many members also making their own submissions and conducting advocacy in their own names. Successes achieved by ACESS are therefore more correctly described as successes achieved by all the members acting individually and in concert. Key members working on the policy reform aspects of ACESS's agenda at the time included the

Children's Institute, Soul City, the Children's Rights Centre, the Black Sash, the Community Law Centre (UWC), and the New Women's Movement.

The alliance was established at a time when the Taylor Committee was deliberating, and ACCESS's submission to, interaction with and advocacy on the committee's work already raised the issue of extension of the eligible age. ACCESS's engagement was strengthened by the fact that their members had on-the-ground experience of delivery of grants through the services they provided to communities, as well as the research they conducted. They were therefore able to point to issues that those who worked at a 'higher' policy level might not have recognised adequately.

Among these issues were the difficulties applicants experienced in getting identity documents, and the importance of nutrition programmes as a complement to grants and other social services. Once the Taylor Committee published its report, ACCESS produced a simple summary which it distributed to members so that they could understand the proposals and advocate for them. One of the committee's recommendations was that the CSG was extended to all children under the age of 18 in the period 2002 – 2004. The committee also recommended abolishing the CSG means test.

During the Taylor Committee process in 2001, the Department of Social Development invited comments on suggested amendments to the regulations of the Social Assistance Act. These regulations set the eligibility criteria such as the age and the means test and also determined the administrative procedures for applications. The regulations therefore had an important impact on eligibility criteria and the ease with which applicants access grants. ACCESS grabbed this opportunity, too, for putting forward suggestions on the three child grants. Among other issues, ACCESS raised the age threshold of seven as a barrier and called for an extension to 18. The new regulations were, however, finalised without incorporating any of ACCESS's recommendations.

In July 2002 a government communiqué reported that a Cabinet *lekgotla* (strategy meeting) had examined the Taylor Committee report (Government Communication and Information System, 2002). The communiqué noted that work was in progress "to examine the efficacy of increasing the age of child grant beneficiaries as well as massive expansion and improvement in the efficiency of the school nutrition programme". It noted that these issues would be dealt with in January 2003, but that in the interim there would be an intensified campaign to reach all those eligible for the grants. Cabinet discussion of the committee's report was, however, subsequently again delayed, this time to July 2003.

Meanwhile, in September 2002, the ANC Policy Conference adopted a draft resolution that the cut-off age for the CSG should be extended from seven to 14 years. To ensure that the resolution was passed at the ANC National Conference in December 2002, ACCESS members in campaign T-shirts (mainly women and young children) gathered at the conference venue in Stellenbosch on the first day to distribute pamphlets to delegates, advocating for an extension of the CSG to age 18. They also requested the ANC leadership to accept a memorandum and petition. After the conference, ACCESS representatives met the Minister of Social Development to discuss their calls. The advocacy paid off partly: The ANC took a

final resolution to extend the CSG to age 14, and it was subsequently announced as government policy in March 2003.

Despite Cabinet not having formally considered the Taylor Committee report yet, the Department of Social Development began drafting a new Social Assistance Bill which was circulated for comment in January 2003. The draft Bill was not aimed at extensive social security policy changes despite the fact that the Committee of Inquiry's recommendations were awaiting consideration. The Black Sash, the Children's Institute, ACCESS and the Community Law Centre, UWC, made a joint submission to the department and later to Parliament, calling for the same amendments they have called for in the submissions to the Committee of Inquiry and to the department (on the regulations). They also called for a clause in the Bill to ensure that the regulations would be tabled in Parliament for debate in the hope that it would make the decision-making process on the regulations more transparent and participatory. It was particularly important as the CSG eligibility criteria (and thus barriers to the grant) are set through the regulations, which are drafted by the executive without an open public participatory process where civil society could influence decision-making.

Once the decision to extend the age to 14 was taken by the government, the Children's Institute in collaboration with ACCESS started to monitor the extension. The project set up a hotline which caregivers could phone to report administrative problems with the extension. ACCESS members also collected and submitted information on relevant cases. The information gathered was compiled into monthly 'Case Alerts' that were sent to decision-makers, service providers, civil society and the media.

By early 2004, ACCESS and its members claimed a range of victories, including extension of the grant to age 14; a call, supported by major churches and unions, for the CSG to be extended to 18 as a first phase of a basic income grant; and incorporation of recommendations for reform into the Committee of Inquiry report, the draft Social Assistance Bill and the draft Children's Bill. They further claimed that there was widespread acceptance by the public and the government that the social assistance programme was the country's most successful poverty alleviation programme, and that it needed to be consolidated. An ACCESS report of early 2004 suggested that the main opposition to extending the CSG came from the leadership elite and over-burdened service providers.

There is currently a court case pending, initiated by a mother in the North West province, Mrs Mahlangu, aimed at extending the grant from children under 14 years to children under 18 years. Mrs Mahlangu is being supported by the Legal Resources Centre, the Children's Institute, ACCESS and the Black Sash. The affidavits for the court case draw, among others, on research findings of the Children's Institute's Means to Live project, which highlighted how the CSG was a gateway to other poverty alleviation programmes and that restriction to children under 14 discriminated against older children not only in relation to grants but also in relation to education and health care services (Hall, 2007).

There is strong support for an extension to 18 years within some parts of government. Indeed, during 2006, the Department of Social Development commissioned the Children's



Institute to draft a paper on the proposed extension of the CSG as the basis of a memorandum which the department planned to submit to Cabinet. Former President Thabo Mbeki's opening-of-Parliament speech in February 2007 noted the need to look at policies to support older children, and the Cabinet *lekgotla* in July 2007 reportedly discussed how to provide better for 14 – 18-year-olds. The ANC Policy Conference in July 2007 and final conference in December 2007 also came out in support of extension to 18, with strong backing from the ANC Women's League. In its own papers for the court case on the extension, the government acknowledged that the grant should be extended, contesting only at what point this should happen (Department of Social Development, 2007).

In the meantime, in February 2008, the Minister of Finance announced that the CSG would be extended to age 15 from January 2009.

### **Assessing the success of the CSG**

Overall, the grant is acknowledged by all role-players as being successful – in fact, as the most successful of the government's poverty alleviation programmes. The department estimated that take-up among eligible children aged 0 – 13 years stood at 88.6% in October 2006 (7,629,128 of 8,606,030 eligible children) (Department of Social Development, 2007: 12). Advantages of the grant over many alternative poverty alleviation measures are the small overhead costs and limited administration involved. On the first point, there are few, if any, other government activities where such a large proportion of the expenditure reaches the final beneficiaries. On the second point, administration of the grant is simple, especially once the application process is complete. Even the application process requires limited staff time.

There is also a growing body of research evidence available on the impact of the CSG (Kola et al, 2000; Samson et al, 2005; Budlender & Woolard, 2006; Agüero et al, 2005; Case et al, 2005). Among the findings are that the grant improves the ability of caregivers to care for the child and buy necessities for them; that it results in increases of height-for-age, an important proxy for child well-being; and that it increases the already high level of school enrolment both for the immediate child beneficiary and other children in the household. Some of the research (Kola et al, 2000; Samson et al, 2005) was commissioned by the government.

In recent years there has been some discussion, prompted by international 'fashions', as to whether conditionality should be introduced in respect of the CSG. The logic behind this is questionable given that, without conditionality, the grant has proved to be effective in terms of promoting health and education. An education-related conditionality would also make little sense given the already-high enrolment rates in the country and research evidence that grant receipt is associated with an increase in the already high rate (Budlender & Woolard, 2006). The danger of introducing conditionality is that it might well prevent those who are most in need from accessing the grant because their disadvantage prevents them and their caregivers from fulfilling the conditions.

## Children's Act<sup>3</sup>

### Introduction

The purpose of the Children's Act is to give effect to the constitutional rights of children to:

- family care, parental care or appropriate alternative care;
- social services; and
- protection from abuse, neglect, maltreatment and degradation.

The realisation of these constitutional rights has particular salience in the context of an HIV/AIDS pandemic. For example, there are approximately 1.2 million children in South Africa who have lost their mothers as a result of AIDS (Actuarial Society of South Africa, 2006) and social services play a critical role in providing care and protection for these children. The Act also emphasises the core international and constitutional principle that, in every matter affecting a child, the child's best interests should be of paramount importance. This is an important development because the apartheid-era 1983 Child Care Act does not reflect a child rights perspective and does not take into account equality for all children in social welfare service provision. Consequently, there are great disparities in respect of social services to children. Higher levels of service delivery are concentrated in areas with low HIV-prevalence rates and lower levels of poverty, such as the Western Cape, whereas areas dominated by the former 'homelands' where HIV prevalence, the poverty rate, and the number of vulnerable children are higher, such as Limpopo, Mpumalanga and the Eastern Cape, have lower levels of service delivery.

The Children's Act defines the legal relationship between children, their parents, guardians and caregivers and it sets out who has what decision-making rights, and under which circumstances. It recognises that many children are living with extended families and makes provision for such caregivers to have the necessary decision-making powers, such as consent to medical treatment and HIV testing, to enable them to provide the necessary care for children living with them. This provision is particularly important in a context of HIV/AIDS where many children are being cared for by relatives who did not have formal parental rights and responsibilities bestowed upon them by the parents of the child through a will or by the court.

The Act also provides for and regulates the following social services for children and their families:

- Partial care (crèches);
- Early childhood development (ECD) centres and programmes;
- Prevention and early intervention programmes (to assist families to prevent abuse and neglect);
- Protection services for children who have been abused and neglected;
- A mentorship scheme for child-headed households;
- Foster care;

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<sup>3</sup> This section draws, among others, on Proudlock (2007); Skelton & Proudlock (2007); and Jamieson & Proudlock (in press).

- Child and youth care centres (children's homes, places of safety, secure care facilities, schools of industry, reform schools, and shelters for street children); and
- Drop-in centres for vulnerable children.

These services are currently provided by both government and non-profit organisations. The level of service delivery is way below the needs and massive up-scaling will be needed over the next few years. The Children's Act provides a solid foundation for this up-scaling to occur. However, as with the CSG, continued civil society participation and engagement will be needed to keep up the pressure for the implementation of the Act as a priority amidst the many key challenges facing government.

## History

Skelton & Proudlock (2007) detail the history of general legislation in respect of child care and protection in South Africa. The Care of Neglected Children Act of 1895 was the first comprehensive legislation providing for care and protection of children in the country. This was followed by the Child Protection Act of 1901 in (the then province of) Natal; the Protection of Child Life Act of 1907; the Children's Care and Protection Act of 1913; the Child Care Act of 1937; the Children's Act of 1960 and, finally, the Child Care Act of 1983. Of relevance for our purposes is the fact that the 1960 Act was the first South African statute to use the term 'foster care'. The 1983 Act currently remains in force but will soon be replaced by the Children's Act of 2005, which is the focus of this section.

In 1996, after the transition to democracy, South Africa adopted a new constitution with a strong rights-based approach. The Constitution guarantees children rights which are stronger than those guaranteed for adults. In particular, while various socio-economic rights for adults are subject to progressive realisation based on the availability of resources, children rights to basic health care services, nutrition, shelter and social services do not have the same expressed internal limitation. Children are also given some rights that adults do not have, including the rights to social services; family care, parental care or appropriate alternative care; and protection from abuse and neglect. Section 28(2) of the Constitution states further that a child's best interests are paramount in every matter concerning the child.

Also in the mid-1990s, the South African government ratified international instruments such as the United Nations Convention on the Rights of the Child (UNCRC). The UNCRC, in particular, was used by children's advocates and others, as well as by the technical drafters, in the process of drafting the Bill of Rights of the Constitution.

More generally, the second half of the 1990s saw comprehensive overhauls of policies in all sectors in a determined endeavour to move away from the apartheid past. It was in this context that moves towards the development of a new, comprehensive and rights-based piece of legislation in respect of child care and protection began.

The development of the Children's Act was also informed by a shift in approach signalled by the White Paper for Social Welfare of 1997. Previously, South Africa took a residual

approach to welfare. The White Paper promoted the idea of a developmental approach, which aimed to build the capacity of people to provide for themselves and their families rather than simply providing a safety net for those in dire circumstances. This represented a marked shift from the earlier approach to social welfare. During the apartheid years, the government provided very few social welfare services. Instead, it subsidised a proportion of the costs of civil society and religious organisations providing social welfare services. Few of these organisations served African people, and most of the services were curative and clinical rather than preventive.

The Children's Act has taken a very long time to develop, in marked contrast to the CSG discussed earlier. There are a range of reasons for the lengthy process. Factors include the length and scope of the Act, four changes in leadership of the executive drafting team, the fact that the Act prescribes activities for a range of different government departments and spheres (levels) of government, the inclusive consultative and participatory process that was followed, and the splitting of the legislation into two Bills (discussed below). While the participatory nature of the process may have added to the length of the process, the high levels of participation, and the public pressure that it has generated, also ensured that the process was not neglected or subject to long periods of inactivity.

The section below tells the story of the Children's Act development, including the involvement of civil society actors.

## **The policy development process**

### *The South African Law Reform Commission*

In 1997, the then Minister of Welfare requested the Minister of Justice to include a review of the Child Care Act in the law-reform programme of the South African Law Reform Commission (SALRC). The SALRC project committee which was established for this purpose decided to use the opportunity to develop a new, comprehensive statute related to children's rights to care and protection. The SALRC's process of research, consultation and development of the first draft of the Bill spanned six years, up until 2002. The project committee included representatives of various government departments, academics, and other civil society representatives with expertise in respect of children. The process produced a range of documents, including an issue paper, several research papers, a discussion paper, a report and a draft Bill. The public was provided an opportunity to comment on each of these documents and several consultative workshops were organised by the SALRC.

In line with the new approach of developmental social welfare, the SALRC draft Bill set out a range of preventive measures. The Bill had 26 chapters and dealt with a range of matters of critical importance for children. These include inter-sectoral planning and co-ordination, children's rights, parental rights and responsibilities, primary prevention of abuse and neglect, protection from abuse and neglect, children's courts, early childhood development centres and programmes, child and youth care centres (children's homes and places of safety), street child shelters, foster care, adoption, trafficking, and social security grants.

In contrast to the Child Care Act, which seeks to provide protection services after abuse has occurred, the main focus of the SALRC's draft Children's Bill was to prevent abuse and neglect. It set up a three-tier system. The first is prevention services to strengthen families and communities. Where these services fail, various early intervention mechanisms were designed to come into operation. These included family counselling, parenting classes, and drug rehabilitation programmes. If the second level also failed, a protective system was provided to safeguard children from further harm and, where necessary, to ensure alternative care, healing and reintegration into the community. Special attention was also paid to children marginalised on account of disabilities, chronic illnesses (including HIV/AIDS), being on the streets, being foreign and living in child-headed households.

A new concept of kinship care was also written into the law. This had two streams: court-ordered kinship care, which was essentially foster care by relatives, and informal kinship care which was to be supported by a grant that could be processed administratively without the need for court intervention. Consultation on these suggestions occurred through written submissions and workshops throughout the process. Overall, civil society representatives were very pleased with what was proposed by the SALRC as well as with the process through which the Bill was developed.

#### *Civil society advocacy campaign*

Already in late 2002, after the SALRC released its draft Bill, a group of children's sector representatives started talking about the need to get together to plan a campaign on the Children's Bill. The representatives were worried that the cost implications of the comprehensive Bill would result in major dilution as it made its way through the legislative process. There were also concerns that the Bill did not adequately address the needs of particular groupings of marginalised children such as those affected by HIV/AIDS, foreign children, and children with disabilities.

The organisations realised that they needed to participate in and influence the process. Most, however, did not have the time, energy, resources or skills necessary to engage in successful law-reform advocacy on their own. In addition, the SALRC draft Children's Bill had 26 chapters dealing with different issues and there was no single organisation with the diverse expertise needed to spearhead the campaign. The organisations nevertheless recognised that having a unified voice rather than multiple voices on multiple issues would increase the chances of winning concessions. The Children's Institute applied for, and was awarded, funding to co-ordinate a campaign and, in March 2003, the Institute and Resources Aimed at the Prevention of Child Abuse and Neglect (RAPCAN) brought together 100 children's sector representatives at a workshop in Cape Town. A number of organisations thereafter established the Children's Bill Working Group.

A total of 35 organisations signed up for the campaign at the workshop and joined the Working Group. Most were representatives of national umbrella organisations. The Working Group was later expanded by the recruitment of 10 new members from the umbrella organisations to broaden representation. Many of the new members were people who have not previously been involved in a similar initiative and would thus benefit from

the training and exposure, as well as bring new approaches and knowledge into the Working Group methodology.

The aims of the Working Group included, among others, to promote the use of evidence in the decision-making process. The group built on the model of advocacy used by the Gun Control Alliance during the passage of the Firearms Control Bill, as well as the experience of ACCESS with the CSG.

One aspect of the Working Group model involved supporting child care and protection service providers to speak for themselves, rather than have lawyers and parliamentary lobbyists engaging on their behalf. More generally, the methodology was built around research, consultation, and dialogue with organisations on the ground. The research ranged from quantitative, survey research to the use of case studies and experiential knowledge of practitioners in the field, and children themselves. The details of the advocacy methodology were continuously adapted as new challenges emerged and the political landscape shifted. While the importance of a unified voice was promoted, the Working Group was divided into sub-groups so that everyone could contribute in the area in which they had appropriate experience, knowledge and interest. Regular workshops were held to share evidence, to allow for debate and reach common understandings about the best way forward.

#### *The department and Cabinet phases*

After receiving the draft Bill from the SALRC in late 2002 and negotiating with other departments, the lead department, Social Development, produced a new version of the draft Bill. These negotiations happened in a pre-election year which greatly influenced the different departments' ability to engage in constructive discussions. Furthermore, the relatively weak position of the Department of Social Development in relation to other departments resulted in blunt excisions rather than negotiated compromises. The department deleted several chapters of the SALRC version and weakened others. The new version was submitted to Cabinet, which requested further deletions and weakening.

The Cabinet-approved Bill lost four chapters and many important clauses, including the chapters on a National Policy Framework and a Children's Protector. Another excision was the chapter on children in especially difficult circumstances, which covered children affected by HIV/AIDS. This chapter would have placed an obligation on government to devise a strategy to ensure that these children and their families received comprehensive support. The chapter on funding, grants and subsidies was also removed. The latter area was particularly serious in terms of care for children affected by HIV/AIDS, as discussed later in this paper in the section on the FCG. In addition, sections giving provincial ministers a discretion as to whether to provide and fund the various social services were inserted.

The revised Bill was published for comment in August 2003. While civil society was generally pleased with the SALRC version, it was not the case with the new version. Many child advocates therefore made submissions to the Department of Social Development, asking for the changes to the SALRC version to be reversed. However, before these submissions could be taken into account, the revised draft was sent to the state law

advisors for certification, and by October 2003 it was ready for tabling in Parliament. The fact that the executive did not engage with civil society's concerns lengthened the parliamentary process as Parliament was left with the task of dealing with all the complex debates that arose from the evidence presented by civil society.

### *The parliamentary phase*

The state law advisers split the Bill into two. The first Bill covered those functions for which national government is solely responsible. The second Bill covered those functions for which provincial and national government share responsibility. This split was necessitated by the fact that a Bill covering provincial competences follows a different path through Parliament. Not only do the National Assembly and the National Council of Provinces (NCOP) consider the Bill, but each of the provincial legislatures has the right to consider national legislation that must be implemented by provincial governments.

The first Bill was initially tabled in Parliament in October 2003. However, with national elections planned for April 2004, debating the first Bill immediately would have meant that the Bill as a whole was split across two different parliaments. While the Minister of Social Development was putting pressure on Parliament to fast track the first Bill through Parliament, the Working Group actively lobbied for the debate to be delayed to ensure proper consideration. Parliament finally began deliberating on the first Bill only after the 2004 elections.

In July 2004 Parliament called for written public submissions on the first Bill. In August about 30 civil society organisations and individuals, including two groups of children, made oral submissions over three days of public hearings. Between July 2004 and January 2005, the parliamentary Portfolio Committee on Social Development undertook a study tour in the provinces and consulted with a range of government departments.

The public hearings, study tour and the first round of departmental briefings showed that there were many gaps in service delivery and co-ordination and that the different government departments did not yet have one position on a number of policy areas where inter-sectoral co-operation was needed. These areas included ECD, social security, and foster care. The lack of synergy between the departments (and even between directorates within departments) was partly a result of the rushed inter-departmental negotiations during 2003 and partly because some of the other departments did not participate in the inter-departmental meetings. Parliament therefore instructed the departments to have an inter-departmental meeting to discuss these areas where consensus was still needed and to take collective policy decisions. In January 2005, the Department of Social Development presented Parliament with a matrix that clearly allocated roles and responsibilities and indicated which issues belonged in the Children's Bill and which belonged elsewhere, such as in the Schools Act or the Social Assistance Act.

In April 2005, Parliament held a workshop to discuss contentious issues. Academics, experts from civil society, the Justice department, traditional leaders and provincial departments were invited to attend in an advisory capacity. The areas discussed included child-headed

households, foster care, consent to medical treatment and testing, and strengthening the role of social workers, auxiliary social workers and child and youth care workers, among others.

The portfolio committee proposed a number of amendments after further deliberations between April to June 2005 and, on 22 June 2005, the National Assembly passed the amended Bill. All political parties supported the Bill except the small, minority African Christian Democratic Party. This party voted against the Bill because of the lowering of the age of access to contraception.

The next step was a further round of public hearings by the Select Committee on Social Services in the NCOP during October 2005. This event was unusual for a Bill that covered only national functions, but it seemed that prohibition of the cultural practice of virginity testing provoked the decision. After deliberations, the NCOP proposed amendments, which had to go through an approval process by the National Assembly because they related to a Bill covering national competences. After further deliberations and negotiations, the Bill was again passed by the National Assembly in December 2005, and became the Children's Act 38 of 2005.

The Children's Amendment Bill was thereafter tabled in July 2006 to deal with the second part of the original Bill. Provincial and national parliamentary hearings and deliberations took place on a scale similar, if not more participatory than for the first Bill. The Amendment Bill was finally passed in November 2007.

#### *The costing of the Bill*

In late 2004, the Department of Social Development commissioned Cornerstone Economic Research, a consultancy group led (at the time) by Conrad Barberton, to cost the Bill. Costing of legislation was at this point increasingly required in respect of legislation expected to have significant financial implications. A multi-disciplinary team led by an economist, and including lawyers and a social work professional, won the commission to undertake the costing. In July 2006 the team submitted its 122-page report.

The costing team took each service or activity proposed in the Bill, and determined its cost by multiplying the quantity (e.g. number of children needing the services) by the input(s) (what is needed to produce the service for one child, e.g. the staff time) and the price (the cost of the input/s). To do this, the costing team first needed estimates of 'demand' (how many children need services) for each service. For example, in respect of foster care, child and youth care centres and adoptions, the demand would be the number of children who cannot be cared for by their close family.

The costing team produced cost estimates for four different scenarios, namely Implementation Plan (IP) low scenario, IP high scenario, Full Cost (FC) low scenario, and FC high scenario. For the IP scenarios, the costing team asked each department to describe current levels of delivery for each service and how they planned to increase delivery in line with the Bill. Thus these levels mainly measured current service delivery. For the FC



scenarios, the costing team estimated how many children actually need services. Within each of the IP and FC categories, the high scenario costed 'good practice' standards for all services, while the low scenario used 'good practice' standards for services classified by the costing team as important, but lower standards for services classified by the costing team as non-priority.

The costing report estimated the total cost of each of the four scenarios over the period 2005/06 to 2010/2011. The costs increase faster than inflation as increased levels of service are phased in, and as the number of orphans increase. The cost of the IP low scenario increases from R6 billion in 2005/06 to R15.2 billion in 2010/11. At the other end of the scale, the cost of the FC high scenario increases from R46.9 billion to R85.1 billion. In 2005/06 the IP low scenario (which reflects the government's actual and planned delivery) meets only about 30% of the total demand for services provided for in the Bill when using the most reliable estimates available of objective need. The report acknowledged that one reason for including 'low' norms and standards was the significant increase in the extent of need resulting from the HIV/AIDS pandemic.

The costing revealed that existing government budgets covered only 25% of the services set out in the Child Care Act, which the Children's Act would replace. This confirmed that the government was not meeting its legal obligations under the existing Act. Across provinces, the percentage of Child Care Act services covered ranged from 34% in Western Cape to 10% in Limpopo.

HIV/AIDS is one of the big drivers of the need for services for children. For example, HIV/AIDS hugely increases the need for foster care orders by the court as well as the need for places in children's homes. These are amongst the largest costs in the Children's Act. Overall, about two-thirds of the cost of the FC high scenario reflects services to children orphaned by HIV/AIDS. Some of these costs could be reduced if the government vigorously implemented its HIV/AIDS prevention and treatment strategy. For example, if more adults could access anti-retrovirals, there would be fewer children with ill parents who cannot earn enough to provide for them adequately, and fewer orphans needing placement in care.

### **The Children's Bill campaign**

The organisations that came together under the Working Group umbrella were very diverse. Some of the diversity arose as a result of the many issues covered by the Bill. Further diversity reflected the different types of organisations, and their histories.

The sheer number of organisations, and the variety of issues covered by the Bill, resulted in the decision to split into sub-groups for much of the detailed work. At the end of 2004, the group's theme areas were set as: primary prevention and early intervention; early childhood development; protection from abuse and neglect; courts; child and youth care centres; foster care and adoption; child rights chapter; national policy framework; children's protector; international issues; local government; corporal punishment; parenting rights and responsibilities; children affected by HIV/AIDS; street children; children

with disabilities and chronic illnesses; health and nutrition; social security; foreign children (unaccompanied foreign children and refugee children); child labour; and trafficking.

Increasing participation in the law-making process was seen as both an end in itself of the campaign, and a means to an end. Firstly, increased participation would fulfil the democratic rights of participation of ordinary people in legislative decision-making. Secondly, participation by service providers and service users would increase the chances that the Bill would adequately meet the needs of children. There were also a range of efforts to allow for children's participation in the debate. This again corresponded both to the objective of increasing democracy and to ensuring that the Bill met needs.

Successful advocacy has a cost. The campaign has involved central costs of more than R1 million per year. To this must be added the direct and indirect costs (such as time of staff) incurred by the 45 member organisations of the Working Group. The central funding was used to fund the salaries of a lawyer, political scientist and an administrator, and to bring people together to meetings, parliamentary hearings and other opportunities for dialogue with decision-makers. Funds were also used to source specialists to provide legal and economic expertise and to ensure a presence in national and provincial legislatures.

The Working Group met twice a year for strategic planning. There was, in addition, very regular contact between the Children's Institute and Working Group members, much of which was focused on keeping members up to date and discussing advocacy actions in response to shifts in the parliamentary debates. Among others, the campaign distributed approximately 1,000 copies of the various drafts of the Children's Bill to members of the Working Group and its broader network of stakeholders. Without this support, many campaign members may not have been able to access the information or afford associated costs.

Beyond providing access to government documents for its members, Parliament and others, the Working Group produced and disseminated briefings on all developments in national and provincial legislatures as well as on upcoming events, and invitations to comment on the Bill. General invitations for comment were usually disseminated by e-mail, but people or organisations who were deemed to have especially important knowledge or opinions were followed up through individual telephone calls or other means, and encouraged to respond. Telephone calls and SMSs were also used when responses were required urgently – for example, in the middle of a debate in Parliament.

Throughout the deliberations on the Children's Bill, the Working Group and its allies used a wide range of different advocacy initiatives, with variations across topics and groups as were considered appropriate. Initiatives included written submissions, presentations at public hearings, workshops, meeting with members of the provincial and national legislatures during constituency visits, study visits or in the legislature, and taking members of Parliament (MPs) on site visits to see service challenges first hand.

The alliances formed with the legislatures are particularly interesting given that the dominance of the ANC discourages questioning by the legislatures of proposals by the

executive. In building alliances, the Working Group formed strategic partnerships with individual decision-makers with a special interest in children's issues generally, or in particular aspects. In some cases such interest was the result of personal experience or situation, such as being disabled or having a child with disability, or being on the board of a children's home; with others it came from professional knowledge, such as a legal background.

The Department of Social Development had a continual presence throughout the parliamentary discussions. Other departments were mostly absent, even when chapters affecting them were being discussed. The presence of Social Development, which was mostly supportive of the Working Group recommendations, and the absence of other departments, facilitated greater manoeuvring by civil society in Parliament.

As in many other countries, the South African Parliament has sectoral (portfolio) committees. It is in these committees that most of the parliamentary work associated with law-making is done, after which committees' recommendations are discussed in plenary. The parliamentary committee process for the first Children's Bill involved several stages which spanned nearly a full year. First, the committee was briefed by the relevant departments. Second, they held public hearings. Third, they went on a study tour in four provinces during which they visited non-governmental organisations (NGOs) offering services to children. Fourth, they recalled the representatives of the government departments to answer questions raised during the information-gathering process. Fifth, they went through the Bill clause by clause, discussing possible amendments. As part of this process, they invited experts to address them at a closed policy workshop. This workshop was partially the result of a suggestion made by members of the Working Group in a meeting with the ANC committee whip. Finally, they voted on their amendments. The entire process in the National Assembly took just under a year.

For the first round of public hearings in August 2004, the Working Group held pre-hearing workshops with their members to check submissions and more generally support those who would attend. This facilitated having common messages coming from civil society. The Children's Institute also wrote to the committee clerk asking that members be permitted to present in panels on given dates. This meant that those who were more confident and experienced could support those who were nervous and less experienced, and that submissions on the same topic could be heard together.

Children's Institute staff subsequently attended every meeting of the parliamentary committee. Whenever possible, Institute staff were accompanied by other Working Group members from the Western Cape. The Children's Institute took detailed notes of all the proceedings, which were distributed to Working Group members and decision-makers soon after the meeting. These notes included details of all inputs by individual parliamentarians, thus facilitating an understanding of positions as well as possible lobbying opportunities.

Some Working Group sub-groups organised visits for decision-makers to places where they could observe the problems facing children. For example, a member of the disability sub-group took one of the leading MPs on a tour of the magistrate's court in Nigel (Gauteng

province) to demonstrate how the court was physically inaccessible to children with disabilities.

While Parliament was the main focus of the campaign, it was not the only one. Working Group members also met at key times with departmental representatives to hear their views, keep them informed of civil society initiatives, and to debate the various clauses. The legislatures rely heavily on the executive drafting team's legal and service delivery expertise when they are uncertain. Ensuring that the executive team was fully briefed on the Working Group's evidence and positions facilitated greater understanding and acceptance of recommendations by the executive. This, in turn, facilitated Parliament's understanding of key issues and the reasons for recommendations. The Working Group also provided technical assistance to the executive and Parliament at various points including providing legal arguments, advice on drafting and writing of speeches.

Open communication and sharing of information with all role-players was also crucial. Information dissemination – and simplification of the issues covered in diverse documents and presentations – has been one of the Working Group's most important roles. By providing information in a simple way, the group was able to explain the reasons for the positions it was promoting. The information was especially appreciated in the South African context, where many of the issues were new for members of legislatures, and members were not always skilled in scanning long, technical documents. The dissemination of simplified and summarised information was supplemented by other forms of support. During debates in Parliament, for example, Working Group members sometimes passed notes to those MPs with whom they built a relationship to remind them of evidence and arguments.

Where possible, the Working Group attempted to give a common message to the law-makers. Where this was not possible, alternative options were presented to members of Parliament so that they could understand these options and make the choice themselves.

The Working Group decided against a broad media campaign aimed at generating mass-based public support. It felt that such support was unlikely to be easily gained on the range of quite technical and specific issues that would be raised. The effort involved would not have been worth the potential gains. The group did, however, develop fact sheets and other material for the media to encourage accurate reporting. The advantage of this approach was that the fact sheets could also be used to inform more central players, such as the parliamentarians. The group followed the media reporting on the Bill and pointed out errors and misinterpretations. The media were also used at particular times to increase pressure on the parliamentarians on particular issues, such as access for disabled children to courts, and during the period before the 2004 elections, when it was feared that a 'diluted Bill' would be pushed through Parliament. Unfortunately the media tended to report on sensational aspects of the Bill such as virginity testing, children's access to contraception, and the proposed ban on corporal punishment.

## Measures that support children affected by HIV/AIDS

As mentioned before, the Children's Act changes the legal relationships between children and their parents, guardians and caregivers. Parental responsibilities and rights are clearly codified in the law and 'care' in relation to children is defined. Loopholes have been closed that affected children who lost parents, many of whom are cared for by relatives in informal care relationships. The definition of 'caregiver' was expanded to give responsibilities and rights to anyone who *de facto* cares for children, including relatives looking after children, and staff in residential facilities. Section 32 of the Children's Act defines some of those responsibilities and rights. Caregivers have a duty to look after the well-being of the child and can consent to medical treatment of children. The latter was a victory for the HIV sector, which campaigned vigorously for improved access to medical treatment.

The Act provides that *all* children, regardless of age, are entitled to information on health care including sexuality and reproduction. Recognising that children have evolving capacities, and that each child is unique, the Act changes the way children can consent to medical treatment, surgical operations, HIV testing and disclosure of results, and access to contraception. The Child Care Act sets 14 as the age at which a child can consent without parents' involvement. The Children's Act lowers the age to 12 but also promotes a more nuanced approach through the introduction of a maturity test.

To get an HIV test or consent to disclosure of the results, a child must either be 12 years old or, if below the age of 12, must demonstrate sufficient maturity to understand the implications of taking an HIV test. The maturity test is also applied to children older than 12 years when consent to medical treatment is required. The Act also grants access to contraceptives at 12 years old. This has been a highly controversial move, but one which parliamentarians have defended, recognising that some young children are at risk of contracting HIV due to early sexual activity and that promoting their access to condoms can help prevent some of them from getting infected.

Children in child-headed household were also added to the list of children who may be in need of care and protection. Section 150(2) requires that a social worker investigates the circumstances of such children but it does not automatically require a children's court inquiry. The Act also provides for a mentorship scheme to support child-headed households. Such schemes are already run by non-governmental organisations. The Isibindi model implemented by the National Association of Child and Youth Care Workers is an example and which could now be expanded with increased government funding to reach more children.

The definition of '*child-headed households*' includes children living alone because they have been orphaned or abandoned. It also includes households where the adult is terminally ill and a child aged 16 or older has taken on the responsibility of caring for the adult as well as the other children in the household. Parliament shared the public's concerns about children heading households and taking on responsibilities usually shouldered by adults. However, they agreed these households should be legally recognised and supported with services to

reduce this burden. Assistance to be provided where necessary includes a range of support services by an adult mentor, from collecting grants to helping with shopping and homework. Where the parent is terminally ill, child and youth care workers will assist the family with making plans for the long-term care of the children and ensure that they get psycho-social support to help them deal with the death of a parent. Children must be consulted about any decisions taken on their behalf and have recourse to a complaints mechanism if the relationship with the mentor breaks down.

Currently government-run children's homes are not required to register with the Department of Social Development, which means that they are not subjected to the same quality assurance process as non-governmental institutions. HIV-sector research showed that the number of HIV-positive children in alternative care (which includes children's homes) is increasing and that, especially in government-run institutions, they are often not receiving appropriate care. The Act now requires all social services run by government to be registered, meet the required norms and standards, and be monitored.

One of the most successful lobby groups was the disability task team (sub-group). This team secured a number of clauses in the Act which are especially relevant for children infected or affected by HIV/AIDS. Major victories include:

- the insertion of a clause on the rights of children with disability or chronic illnesses;
- section 6.2 of the General Principles which "protect the child from unfair discrimination on any ground, including on the grounds of the health status or disability of the child or a family member of the child"; and
- the requirement that a child's illness be taken into consideration when the standard of the best interests of the child is applied.

## **Resourcing the Bill<sup>4</sup>**

Finances and resourcing surfaced repeatedly as a topic in the discussions on the Children's Bill. The issue of sufficient funding and resources is both inevitable and sensible given the wide range of services prescribed by the Act. The costing of the Bill was discussed earlier. Other finance-related issues are discussed here.

From the start of the campaign in 2003, civil society identified the obligation to fund services as an important focus of advocacy. A first round of advocacy on funding obligations resulted in an amendment to section 4(2) of the first Bill which provided that: "recognizing that competing social and economic needs exist, the State must, in the implementation of this Act, take reasonable measures within its available resources to achieve the progressive realization of the objects of this Act." After submissions from the Children's Institute and South African Human Rights Commission, the word "progressive" was removed and the words "maximum extent" were inserted before "available resources". This means that the National Treasury and the provinces are obliged to prioritise the implementation of the Children's Act when making decisions about budgets and the allocation of resources.

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<sup>4</sup> This section draws heavily on Budlender & Proudlock (2008).

Before the NCOP made amendments on 29 May 2007, the second Bill did not state clearly that government is obliged to provide or fund the services. It also did not say which sphere of government (national, provincial or local) has this obligation. Submissions and consultations with the department and the NCOP resulted in the NCOP amending the Bill to ensure that the duty to provide is clearly placed on the provincial ministers. However, the words “may provide” instead of “must provide” remained in respect of partial care; ECD programmes; prevention and early intervention; and drop-in centres.

The Working Group’s advocacy focused on convincing parliamentarians to change mentions of “may provide” to “must provide” in respect of as wide a range of services as possible. By October 2007, advocacy resulted in extension of the obligation to prevention and early intervention, protection services and child and youth care centres services. Where the portfolio committee did not agree to “must provide”, it proposed that a clause was inserted to state that resources must be targeted at poor communities and children with disabilities. This provision is now found in the chapters on partial care, ECD and drop-in centres. The Committee’s hesitation in using “must” arose, among others, from concerns over limited available resources, the large backlog in service delivery and a fear that “must” would result in litigation against the department by wealthier organisations claiming state funding. The lack of an express reference to ECD as a right in the Bill of Rights and a lack of understanding that ECD can be read into a range of rights in the Bill of Rights also contributed to the hesitation.

In South Africa, the responsibility for legislating for and delivering welfare services is carried jointly by the national and provincial governments. Historically, national government has been responsible for policy- and law-making while actual service delivery is done by the provinces. The Children’s Act expressly obliges the provincial ministers (MECs) for Social Development to provide and fund certain services. However, provincial governments receive most of their money from the national sphere, and the obligation thus ultimately falls on national government to provide provinces with the necessary funding to deliver on their legislative mandates.

For the 2007/08 budget year and three-year medium-term expenditure framework (MTEF) cycle, Cabinet approved an addition to the allocation to provinces of R3.57 billion, R4.37 billion and R10.65 billion. Of the total R18.6 billion, 80% was intended for meeting nationally-agreed service priorities, while the remaining 20% was intended for meeting province-specific priorities. Social Development was notionally allocated 4% of the total, but provinces had the discretion to decide on the actual division between sectors. In the provincial allocation letter, the National Treasury strongly advised provinces to use the money for national priorities. In respect of social welfare, these were defined as substance abuse programmes, employment of social workers and auxiliary social workers professionals, the national youth service, re-grading salary levels of community development practitioners, and funding of children in children homes. Several of these are clearly Children’s Act services.

The National Treasury was generally disappointed at the provinces’ failure to use the money in the way they intended. Nevertheless, analysis of provincial budgets suggests that,

in 2007/08, provinces allocated social development R84 million more than was added to the equitable share specifically for social development priorities. In contrast, for 2008/09, the MTEF allocation is R14 million less than was added to the equitable share for social development priorities.

Unfortunately, the budget information that is tabled in Parliament and the provincial legislatures does not allow for a direct comparison of allocations with each item in the costing, as the categories used are different. South Africa's budget format does, however, provide more information than that of many other countries. There is also a degree of standardisation across provinces in how they present structure and present budget information.

All provincial Social Development departments include a Social Welfare programme, which accounts for the bulk of the social development spending across provinces. Within this programme, there is a sub-programme for Child Care and Protection Services, alongside eight or nine other sub-programmes. The Child Care and Protection Services sub-programme is almost always the biggest within the overall programme in monetary terms (if one excludes the Administration sub-programme) and it covers a large number of Children's Act activities, but not all. For example, within the same Social Welfare programme there is an HIV and AIDS sub-programme that is responsible for provision of community home-based care and mitigating the social and economic impact of HIV/AIDS, while the Care and Support Services to Families sub-programme will also have Children's Act responsibilities. The aspects specifically related to the Children's Act are, however, unfortunately less easy to separate out from these other sub-programmes.

The Child Care and Protection Services sub-programme must thus serve as an indicator of the extent to which provinces have begun to plan provision of resources for implementing the Children's Act. Across all provinces, the increase for this sub-programme for 2007/08 averages 13%, well above inflation. The annual average over the three years of the MTEF is even higher, at 18%. These averages hide the fact that, of the two provinces with the largest populations, Gauteng shows a decrease from 2006/07, while KwaZulu-Natal records an increase below the inflation rate. Both of these provinces have high HIV-prevalence rates. Analysis also reveals that, despite the increase, the sub-programme's share of the total programme decreases from 37% in 2005/06, to 34% in 2006/07 and 2009/10. This could reflect that fact that two other new pieces of legislation, the Older Persons Act and the Child Justice Act, have resulted in marked increases in other sub-programmes. The increased allocations could thus be more about increased recognition of the importance of social welfare services in general than of the particular needs in respect of the Children's Act.

All provinces also mention the Children's Bill or Act at least once in the narrative that accompanies the budget figures. Several comment explicitly on the fact that the Bill will require significant additional resources which will place strain on both budgets and human resources. Current allocations are, however, woefully inadequate. With the 'cheapest' IP low projection, the amount for provincial Social Development for 2005/06 is stated as R5.05 billion in the costing document (Barberson, 2006), whereas across provinces the total



for the Child Care and Protection Services sub-programme is only R1.21 billion for 2007/08 (National Treasury, 2007b). For the third year the costing gives figures of R7.69 billion on the cheapest estimates, while the combined provincial budgets for the relevant programme stand at only R1.76 billion. The shortfall increases by astronomical amounts when compared with the FC high estimates for the first and third years of R42.70 billion and R56.31 billion respectively.

Finances are not the only form of resources needed for successful implementation of the Children's Act. As important, if not more so, are the human resources to provide the services.

Social welfare services in South Africa have traditionally been considered to be provided primarily by social workers. In reality many are provided more by community-based organisations and NGOs through community workers and volunteers. A discussion paper by the National Welfare, Social Service and Development Forum (2007) points out that, in April 2005, there were only 11,372 social workers and 1,849 social auxiliary workers registered with the South African Council for Social Service Professions. These professionals need to provide services to all vulnerable groups, not only children. The numbers must be contrasted with those in the costing report (Barberton, 2006), which shows that the lowest level of service delivery requires 8,656 social workers and 7,682 social auxiliary workers in the first year of implementation. By the fifth year, the numbers needed would be 16,504 and 14,648 respectively. Meanwhile the country's training institutions currently produce only about 500 new social workers each year, and virtually no social auxiliary workers.

The national government has partly recognised the human resources problem in relation to social workers. The social worker recruitment and retention strategy includes bursaries and scholarships for social workers and larger-than-usual increases in salaries for government social workers. One problem with the increases is that they are not reflected in similar increases in subsidies for the NGOs that provide a wide range of services, including some statutory services which government would otherwise be obliged to provide itself. Even before the increases were announced, there were marked differences in salaries and benefits of social workers employed by government and those employed by NGOs. The result was large-scale movement of social workers from NGOs to government and serious problems for NGOs wanting to provide quality services.

In terms of bursaries, the National Estimates of Expenditure record an allocation of R365 million within the National Social Development budget over the MTEF period for scholarships to be administered through the National Student Financial Aid Scheme. Under recent outputs, the 2007/08 budget documents note that 190 social work students were awarded scholarships in 2006/07, and a draft recruitment and retention strategy refined in respect of social work professionals. The 190 students will, however, take several years to graduate, and some may drop out along the way, choose to work outside of child care services, or choose a completely different career path. Even if all persevere and subsequently work in the child care arena, at a rate of 190 per year, there is no chance of reaching the estimates recorded in the costing document.

Working Group members have argued strongly for wider use of a range of professionals and para-professionals rather than over-emphasising the use of social workers. Some such changes have already been effected in the Act, with the words "social service professional" replacing "social worker" in some service areas. A problem here is that the Children's Act defines a social service professional to include a probation officer, development worker, child and youth care worker, youth worker, social auxiliary worker and social security worker who are registered in terms of the Social Service Professions Act of 1978. Child and youth care workers cannot yet register with the Social Services Professional Council. Yet, there are currently approximately 6,000 child and youth care workers providing services to vulnerable children. The majority of these workers are found in child and youth care centres, with an increasing number also working in prevention and protection services such as Isibindi. These workers could significantly decrease the problem by covering the shortage of skilled staff while providing quality services.

## **Foster child grant**

### **Introduction**

The FCG has been in existence for many decades. Its original intention was to provide financial assistance to non-relatives who took on responsibility for the care of a child in need of alternative care as a result either of insufficient care (for example from neglect, abuse, abandonment or orphaning) or as a result of child behavioural difficulties. The FCG is supposed to be part of a package of services which social workers are legally required to provide, including oversight of the quality of care being offered. The guidelines of the Department of Welfare (1998) in respect of the Child Care Act make clear that placements were intended to be temporary, with the hope that the child would return, after the provision of "family reunification services", to the care of his or her biological parent(s). This is obviously not possible in the case of children who have been orphaned. The grant has, however, increasingly been used to provide long-term financial assistance to those – including relatives – who take on the care of children orphaned by AIDS, whereas previously it was not given to close relatives. In effect, the grant has increasingly been used as a poverty alleviation measure rather than as a child protection measure. The attraction – for applicants, social workers and others – of using the grant in this way is obvious given the gap between the amount of the FCG and that of the CSG – R620 vs R200 per child in 2007.

In order to qualify for a FCG in terms of the Social Assistance Act, the applicant and foster child must be resident in South Africa at the time of application, the income of the foster child cannot exceed twice the annual amount of a FCG, and the child must legally be placed in the care of the foster parent by the Children's Court in terms of the Child Care Act. The legal process of applying for a foster care placement is complicated, lengthy and time-consuming. Social workers play a central role in this process and the current severe shortage of this category of workers means that delays in the foster care process are even greater than would otherwise be the case. The pressure is increased by the fact that each foster care placement must be ordered by the court and then reviewed by a social worker on a bi-annual basis, with an associated court-based process for each review. This process again requires the involvement of social workers in both the review and court appearances.

## Different uses and conceptions of the grant

There has been no formal and explicit policy change in respect of the FCG in recent years, although the new Children's Act will usher in some critical changes in the future. The Lund Committee consciously decided not to include recommendations in respect of this grant as members recognised the importance of it and did not want to raise the possibility of the proposed, and much lower, CSG being seen as a replacement. Guthrie et al (2000), in their submission to the Taylor Committee, noted that very little research and literature was available on the topic. The Taylor Committee itself recommended that the FCG should remain available for children who are placed with foster parents because their parents were dead or not able to care for them. It suggested that the process of applying for the grant be simplified and shortened. (In reality, it is the process of applying for the placement that takes most time, rather than the application for the grant.) The Committee did not, however, say clearly whether extended family members caring for abandoned or orphaned children should be eligible for the grant. ACCESS, in responding to the Committee, supported the retention of the FCG in cases of temporary placement of children in need of care (ACCESS, 2002). For children cared for by relatives, ACCESS recommended the use of the CSG. But they noted that this would only be viable if the age group covered by the CSG was extended, the amount increased, and various practical barriers eliminated. ACCESS also recommended that members of the extended family should be able to approach the courts for an adoption subsidy if they formally adopted the child.

Despite no formal change in policy, the marked shift in how the FCG is used described above has contributed to a substantial increase in take-up, and resulting backlogs in processing applications. In terms of take-up, the number of beneficiaries increased from 49,843 in April 2000 to 381,125 in March 2007 – a 665% increase over a period of only seven years (Mükoma et al, 2007; National Treasury, 2007b: 55). As will be shown below, a large proportion of current foster care placements involve care by relatives of children orphaned by AIDS.

The use of the foster care system and grants for children orphaned by AIDS has been openly encouraged by government actors, including the Minister of Social Development. Meintjes et al (2003), for example, quote the Minister as follows in a keynote address to an HIV/AIDS conference of the national Department of Education in May 2002: “The Department of Social Development is encouraging relatives to take care of orphaned children under the foster care package.” On 6 November 2007, in the second reading debate on the Children’s Amendment Bill in the National Assembly, the Minister said that there were many relatives who were caring for orphans who were receiving the CSG and that these relatives should rather be receiving the FCG. He noted that it was a problem that magistrates were reluctant to place children in foster care with relatives. He named three areas where magistrates were setting a good example by placing orphaned children in the care of relatives and encouraged other magistrates to follow suit.

The Children’s Act now states clearly that children can be placed in foster care with relatives until the child turns 18 without the need for review by a court. This makes foster care a permanent placement, but without the full transfer of parental responsibilities and

rights that would accompany an adoption. The Department of Social Development wants to encourage more people to adopt children. The financial test in the Child Care Act, that prevented willing people from adopting children simply because they (the prospective adopters) lacked financial means, has therefore not been included in the Children's Act. Adoption offers children added security and gives the adoptive parents total control over the child who is no longer a ward of the state. However, the loss of the FCG effectively creates a financial penalty and is a strong deterrent to potential adoptive parents to taking on the additional responsibilities.

The profile of grant beneficiaries and children by De Koker et al (2006) illustrates the extent to which the foster child grant currently serves as a poverty alleviation measure rather than support for children in need of care as a result of neglect, abuse or abandonment.

Given western conceptions of what constitutes a 'family,' and the link between marriage and parenting, it is interesting to note that 24% of foster parents have never been married and that only 50% were married or co-habiting at the time of the study. In reality, and in contrast to western conceptions, the nuclear family is not the norm in South Africa, where large numbers of women are bringing up their children without their fathers, even when fathers are still alive. De Koker et al also found that nearly two-thirds of caregivers had received the FCG for less than four years, which in part reflects the rapidly increasing take-up. Over three-quarters (78%) said that grants were their only source of income, and more than half received other grants in addition to the FCG.

The survey on which the De Koker et al analysis was based showed high numbers of beneficiary children living with extended families. It showed that, nationally, nearly one in five (18%) foster children lived with their foster parents since birth. In over two-fifths (41%) of cases, the foster parent was the child's grandmother, while it was the aunt in 30% of cases. Only 9% of foster parents were not related to the child. The Western Cape was an exception in this respect, with 36% of foster parents unrelated to the child. This could reflect a combination of factors – stricter application of 'rules' in the Western Cape, a lower HIV incidence, a smaller African population (and thus less likelihood of extended family structures), and high levels of substance abuse and crime which could increase the need for foster care to protect children.

Linking the grant to the HIV/AIDS pandemic is more difficult, but there are some indications. The survey revealed that in 48% of cases, both parents of the foster child were deceased. Western Cape was again the exception as the only province in which the majority of children were not in foster care because of their parents' death. Instead, the most common reason was that the parents were not fit to look after their children, with neglect or abuse the result. A further 21% of Western Cape parents had abandoned their children. In contrast, in KwaZulu-Natal, 63% of foster children were reported to be double orphans (both mother and father deceased). Of equal importance given the limited role played by many fathers in South Africa, is that in 72% of cases nationally, the mother of the child was deceased. In more than four-fifths of cases, respondents said that loss of one or both parents was the reason that the child was in foster care. Where the father was alive, he often did not make contact or contribute to the child's care.

The large increase in the number of foster care applications has overwhelmed the provincial Departments of Social Development and, in particular, the social worker cadre. In January 2007, the national department reported to the Portfolio Committee on Social Development that about 60,000 children were awaiting foster care placement. Processing the placements – which must happen before the child and caregiver are eligible for the grant – is a particular onerous process. In 2003, turnover time for foster placements was said to vary even in the urban sites from roughly six months to 18 months (Meintjes et al, 2003). Subsequent processing of the grant was less onerous for staff, but would take several further months. Costing of the Children's Bill (Barberton, 2006) found that the cost of reviewing foster care and kinship care orders (see below) would be R531 million in 2005/06 under the Full Cost (FC) high scenario – 24% of the total cost of the Bill for the Department of Justice in 2005/06. The cost would almost double over the period 2005/06 to 2010/11.

The burden of processing increasing numbers of foster care applications has made the provision of meaningful professional services impossible. In effect, social workers perform a slow 'rubber-stamping' function that gets children onto the foster child grant payrolls, but which does not provide the services that are required during the process or thereafter.

### **Discussions arising during the Children's Bill process**

MPs struggled to find a solution to these challenges during their deliberations on the different parts of the Children's Bill. During the early debates foster care was seen as one aspect of 'alternative' care – the care that is needed when the parents cannot provide for the child adequately. It was only through repeated submissions, briefings and intense lobbying from civil society that Parliament became more aware of the scale of the problem. MPs recognised the need for major reform, but were reluctant to introduce changes that would necessitate amendments to the Social Assistance Act, as this law was not on the table for discussion at the time.

The original SALRC draft of the Children's Bill provided for a range of grants for children up to age 18, including:

- A universal child grant for all children in South Africa, which was essentially the CSG extended to age 18, and with the means test removed;
- An informal kinship care grant for children living with relatives, but not with their biological parents. This grant would not require court intervention and could be the same value as the child support grant.
- A foster child grant for children 'in need of care' in legal terms and who were placed by court order in the care of unrelated foster parents. The grant would have a value higher than the child grant or informal kinship grant.
- A court-ordered kinship care grant for children 'in need of care' in legal terms and who were placed by court order in the care of relatives.
- An adoption grant equal in value to the FCG.

The full range was proposed in recognition that definite policy choices on a social security system for children still had to be made. It was anticipated that the universal grant proposal

would be rejected and that the package of the informal and court-based kinship care grants would then be the next option.

The national Department of Social Development almost immediately removed the entire chapter dealing with social security, as well as provisions for the recognition of informal kinship care as a legal placement option. However, provisions for court-ordered kinship care were retained in the Bill, alongside those for foster care. Placements with relatives would not automatically require the two-yearly checks and extensions required for non-kin foster care placements.

In 2003 a detailed Children's Institute research report on the foster child grant (Meintjes et al, 2003) added evidence to the debate by drawing on three pieces of research – ethnographic research in four diverse communities affected by the HIV/AIDS pandemic, demographic projections of orphan numbers, and costing of four different scenarios of social security for children. The paper was intended to question the logic, ethics and cost-efficiency of the use of the FCG as a poverty alleviation mechanism for orphans. It also questioned, with the support of both quantitative and ethnographic data, the idea that care by adult relatives other than parents could be regarded as atypical or 'alternative'.

The research compared the relative estimated costs of four different possible cash grant scenarios up until 2017, the year at which orphan numbers were expected to peak. The four grants described in the scenarios included two existing grants as well as two proposed grants. The existing grants were the FCG and the CSG. The proposed grants were the court-ordered kinship care grant and a universal CSG.

The findings in terms of the costing were that the universal child support mechanism was more expensive than the more targeted approaches, but the difference in relative costs declined over time as the pandemic progressed. Targeted schemes for orphans were found not to be cost effective in supporting the largest possible number of poor children who require assistance. Introduction of new grants would also impose additional stress on a social security system already severely under strain.

Initially, there was very little consensus on the preferred solution among Working Group members, some of whom found the Institute's position too crude. Some members were uncomfortable with supporting a call for orphans to receive the CSG when the FCG amount was substantially higher, and because the CSG was restricted to children under 14. Those who supported the Children's Institute approach felt it was inequitable to provide higher amounts for orphans when many non-orphans lived in similar, or worse, conditions of poverty. They pointed, in particular, to the fact that it was young, single mothers of child-bearing age who were bearing the brunt of the HIV/AIDS pandemic, and that providing the FCG for non-parents would discriminate against and further disempower these young women. They also noted that inequities were aggravated by the varying practices of government in different parts of the country and by different magistrates and social workers as to whether related caregivers of orphans should automatically qualify for the foster child grant.

Through discussion, meetings and workshops the positions of Working Group members moved much closer to each other. The general consensus at the time of writing was that the Act should provide for some sort of informal kinship care that does not require a court-based process and that is distinct from the FCG. The FCG should be used for its original purpose, namely assistance to children legally 'in need of care and protection'. There is consensus that, for this system to be effective in serving the interests of orphans and other vulnerable children, the child grants need to be accompanied by a national roll-out of effective prevention and early intervention services targeted at the most vulnerable and poorest. There is agreement that the level of the CSG also needs to be increased compared to the FCG, and extended to age 18. Without the latter change, strong incentives will remain for both social workers and caregivers to choose the FCG. There are also suggestions that the level of the CSG could be higher for non-parent carers than for parents.

However, differences remain both within the Working Group and among parliamentarians as to whether related caregivers should be required to register and what duties should or can legally be placed on them. Some child rights advocates argue strongly for a system whereby related caregivers of orphans are registered in some way, that they have clear legal obligations, and are properly monitored. They argue that orphanhood in and of itself renders a child vulnerable and that it cannot be assumed that related caregivers will provide adequate care. However, it also cannot be assumed that biological parents will provide adequate care. The same argument for registration and monitoring could therefore be advanced for parents, which is clearly not reasonable.

The Children's Bill process provided the opportunity for more discussion of the FCG. Discussions, however, did not result in a thought-through decision. One hampering factor was that the issue involved two different Bills – the Social Assistance and Children's Bills – rather than only one. This fact also hampered the issue being properly addressed in 2000 when the Committee of Inquiry and the SALRC were dealing with different aspects.

Parliament eventually made significant changes to the Children's Amendment Bill, which broadened foster care way beyond the original concept. The Act now states clearly that relatives are eligible for the FCG. However section 150(1) of the Act requires that the child be orphaned or abandoned "and without visible means of support" in order to qualify as a child in need of care and protection. The Act does not state what "without visible means of support" means in practice and whether, for example, the relative will now be subject to a means test. The need for two-yearly court reviews of all foster care orders was also amended. Courts will now be able to order that the child remain in foster care until he or she is 18 without the need for further social work reports and court reviews. The Act distinguishes somewhat between relatives and non-relatives by allowing the court to make the foster care order permanent from the first court inquiry for relatives but only at the first two-yearly review for non-relatives.

The Act also introduces cluster foster care, which allows children to be fostered by schemes or organisations rather than by individuals and families. There is a danger that these schemes are essentially mini-children's homes which will not be subject to the protective

requirements imposed on children's homes by chapter 13 of the Act, which regulates child and youth care centres.

In essence, the Portfolio Committee on Social Development confirmed the Minister's spoken policy and made it clear in law for the first time that family members qualify to be foster parents. One factor that militated against a different decision was that restricting the use of the foster child grant in the case of relatives would have been unpopular in the absence of a roughly equivalent alternative. Thus, the chair of the portfolio committee stated bluntly that they were not prepared to be the ones that prevented "grannies and aunts" from accessing the FCG. Nevertheless, the Portfolio Committee on Social Development (2007) noted the following in its report for the second reading debate on the Children's Amendment Bill:

"The Committee notes the phenomenal growth in the uptake of the foster-care grant which could affect the long-term sustainability of this grant and therefore requests the Department of Social Development to conduct an urgent comprehensive review of the social security policy for children and the foster-care system. It commends the department, however, for the efforts made to maximize access by vulnerable children to this form of support."

With the Minister and now Parliament making it clear that the FCG is the preferred policy option for relatives caring for orphans, a change is unlikely to occur. The debate could possibly be revived when the age limit and amount of the CSG are increased.

### **Assessment of current position**

The government's current position will not solve the problems facing children orphaned by AIDS. At the moment the only benefit reaching the vast majority of children in foster care is the FCG. This is a crucial form of support, but orphans and vulnerable children are not receiving other types of services that they desperately need. These services overlap with, but also differ in important respects from, those delivered to children who are in foster care due to a need for protection from abuse. Money is only part of the solution, because children also need care, protection and love. The value of the care of a parent has not been factored in. As a result, the new interpretation of the policy increases the perverse incentive which exists for children to be left in the care of relatives in order to gain access to the FCG.

The biggest challenge, however, is the fact that the court-based gateway to accessing the grant delays children and caregivers' access to much-needed social assistance for long periods of time. In contrast, access to the CSG is comparatively simple and does not involve the courts. The CSG is thus faster and easier to access, especially in rural areas where social workers and courts are scarce. Whether the FCG is the best policy option for orphans is therefore questionable.



## **Section 3: Discussion**

### **Constitutional obligations**

South Africa has a particularly strong Constitution, especially in the area of socio-economic rights, and even more particularly in respect of children. The policy developments described in this paper have thus often been framed in terms of constitutional rights and duties. Civil society's strong advocacy for a rights-based approach in the policy development process comes out clearly in their campaigns in respect of all three policies. The constitutional obligations of government can, on occasion, trump financial constraints arguments. The executive and Parliament have become wise to this situation after a series of successful constitutional challenges. Their awareness in this respect has made them more cautious when passing legislation out of fear of the litigation that could arise should government not deliver. In a country without similarly strong socio-economic rights for children, advocates would need to draw instead on instruments such as the UNCRC and the International Covenant on Economic, Social and Cultural Rights.

A number of cases in respect of grants have been taken to court. Even if these did not relate to the child grants in particular, the principles established by the courts apply to them afterwards. The Children's Bill deliberations revealed new areas of debate, some which reflect different interpretation of the Constitution. For example, government acknowledged that it has a constitutional obligation to deliver service in respect of children's homes because section 28(1)(b) of the Constitution states that every child has the right "to family care or parental care, or to appropriate alternative care when removed from the family environment". In contrast, government officials argued that, because there is no express provision in the Constitution that obliges the state to provide ECD, they are not required to include ECD as a statutory entitlement in the Children's Act. Child rights advocates argued that this is a very mechanical argument because the obligation to provide ECD can be read into the rights that the Constitution provides to children in respect of education, family care, protection from abuse and neglect and social services. Ultimately, it might take a court judgment to settle interpretational disputes such as this.

However, in contrast to ECD, the decision-makers who were initially opposed to including an obligation on the MECs to provide prevention and early intervention services, and not totally convinced that they had a constitutional obligation to do so, eventually appeared to have changed their minds, based on a common sense argument of 'prevention is better than cure'.

### **The perceived fiscal envelope**

Financial constraints are a recurring theme across the three policy areas. In the case of the CSG, the Lund Committee was set up as a result of the perception that the country did not have sufficient funds to roll out to all eligible caregivers the then-existing system of maintenance grants. The committee worked within a very strict fiscal envelope and proposed a grant to fit that envelope. However, after pressure from civil society which advocated from a rights and needs-based perspective, the proposal was expanded beyond

the original fiscal envelope. In the debates on the subsequent changes to the policy or calls for changes from civil society, the budgetary implications of the change are repeatedly raised by Treasury as a reason for not extending the CSG policy further. This stance is continually challenged by civil society's rights-based arguments.

In the case of the Children's Act, the Bill was subjected to a detailed costing exercise which took a rights-based approach and which revealed that the government was only financing a fraction of its existing obligations under the 1983 Child Care Act, never mind the functions that would be imposed by a new Act. In costing the new Bill, the actual demand and need for services were factored into the calculations. It resulted in a realistic costing, but one which was far higher than the current budgetary allocations. The shock of these high figures could have sunk the entire Bill. However, the costing report pointed out clearly that the large cost was mainly as a result of existing Child Care Act obligations not being implemented. It exposed the serious lack of capacity within government in the area of social welfare services for children and the dire need for reform and a legislative framework that could address the capacity problems. The fact that the first Bill had already been passed by Parliament by the time the costing report was released meant that the foundation of the policy was already cast. It made it more difficult to make major changes to reduce the costs.

In the latter part of discussions on the Bill, there was also much debate as to the advantages and disadvantages of changing the words "may provide" to "must provide". Financial constraints were offered as a reason for using the word "may". However, despite the sharp difference between current expenditure and the costed expenditure, Parliament did not dilute the Bill in any way to reduce the cost; it in fact strengthened many of the provisions instead.

In the case of the FCG, there has been no explicit policy-making process over the last 13 years, and thus no explicit public discussion of budget implications. Nevertheless, the amount allocated for this grant has expanded at a rate far beyond inflation because numbers of beneficiaries have soared. The numbers are set to expand further with the Minister's declaration that grandparents caring for orphans should get this grant rather than the CSG, which has a much lower monetary value. The roll-out of cluster foster care is also likely to result in a sharp increase in take-up. The silence in respect of the financial implications, including from the National Treasury, is thus surprising. The portfolio committee, however, raised the red flag in its report on the Children's Amendment Bill (2007). In recognition of the steep increase in take-up and the possible lack of sustainability of the grant, the committee called for a comprehensive review of social security policy for children, including the foster child grant.

The South African government is in a much stronger financial position than many other countries. The government's reported deficit decreased steadily from 3.4% in 1997/08 to 0.3% in 2006/07 (National Treasury, 2007a: 186-7; National Treasury, 2001: 202-3). The 2007 budget predicted a surplus of 0.6% for 2007/08, followed by very small deficits in the succeeding two years. (National Treasury now refers to what was previously called

“surplus” as “budget balance” in its publications to allow for the fact that there is sometimes a surplus.)

The National Treasury has recently started arguing that it cannot treat the current surpluses as if they are a permanent feature because they are the result of the cyclical good economic conditions. Instead, it is of the opinion that government should be looking at the “structural budget balance”, which would present a less optimistic picture in which the surplus will not be sustained (National Treasury, 2007c: 3). It is interesting that this argument has only recently emerged as the Treasury struggled to explain why it is not willing to fund certain programmes, such as an extension of the CSG to children under 18 while sitting on a substantial surplus. Even if Treasury’s argument has some validity, the South African government is clearly not cash-strapped. Having a surplus thus seems particularly inappropriate when there are deep levels of need among vulnerable groups such as poor children.

A further question relates to the fact that the reason for the expectation that the current surplus will change into a small deficit is a planned reduction of the total revenue: A Gross Domestic Product ratio from 28.1% in 2007/08 to 27.0% in 2009/10. Taxation accounts for the overwhelming bulk of revenue in South Africa and there is a similar decline in the tax: A GDP ratio from 28.7% in 2007/08, through to 28.3% in 2008/09, to 27.7% in 2009/10. This reduction again seems inappropriate given the need to finance increased expenditure.

The case studies discussed in this paper raise the question of the weight that should be attached in the decision-making process to the financial implications of the various policy options on the table. For purposes of good planning it is essential that all policy options should be costed and that the cost of the reform should be considered as one of the factors in the decision-making process. However, it should not be the main factor and should definitely not lead the debate. Decision-making on policy should be based on a range of factors including, most importantly, the need to give effect to the rights in the Bill of Rights.

The case studies suggest that the financial question is likely to be emphasised when government does not want to do something. However if government itself is fully behind a reform or is persuaded to make a reform by dialogue with or pressure from civil society, financial implications become peripheral. Thus, the apparent constraint on allocating more for a new grant than what was allocated for the state maintenance grant was ignored when Cabinet announced the introduction of the CSG with an amount and target that would exceed this constraint. The expansion of the age group covered since that time means that, although the CSG is today still the smallest grant in monetary value (R200 per month in 2007/08), it accounts for 31% of the total social assistance grant budget. Minister of Social Development Zola Skweyiya’s recent pronouncements that grandparents of orphans should get the FCG again indicates limited concern with budgets when there are political reasons for increasing a grant.

At the time when the three policies were being developed, Parliament did not have the power to amend money Bills, which include budgets. They could only accept a budget as tabled, or reject it completely. The latter is clearly not a real option in a situation where the

ruling party has a two-thirds majority in Parliament. The Constitution provides for the national legislature to have powers to amend money Bills but only once a law is passed by Parliament to set out the process whereby such amendments will be done. There has been no concrete progress on this law for more than 10 years after the adoption of the Constitution. During the time of the three policies discussed here, the real decision-making power on the Budget remained with the National Treasury and Cabinet.

It is essentially through passing laws which specify people's entitlements and government's obligations, such as the Social Assistance Act and the Children's Act, that Parliament can direct the allocation of resources. Given the legislature's inability in the past to influence budget decisions directly, it is even more important that Parliament's decision-making role in relation to law-making is not ruled by fiscal envelopes dictated by the executive. Open dialogue within Parliament on policy choices and fiscal constraints helps ensure that decisions are made by democratic deliberation rather than by the executive behind closed doors.

### **Human resources**

The Children's Act case study reveals the large gap between policy and the budget needed to implement it. However, even if the money were to be allocated, it would not solve the problem. As this policy emphasises services strongly, there is a large-scale need for trained personnel to deliver them. One problem has been the requirement that some services only be provided by highly-trained workers, such as social workers. This problem has been partially addressed by relaxing this condition in respect of some services, requiring instead that a 'social service professional' deliver the services. However, child and youth care workers are still not fully recognised as social service professionals, and there remain a largely insufficient number of social workers to deliver the services reserved for them.

The human resource problem has a financial angle in terms of the pay received by those who deliver the services. Firstly, social worker salaries are very low given the length of study involved. The government has for several years spoken about increasing the pay of teachers, social workers and nurses and there have been some improvements in recent years. The level is still, however, relatively low. Secondly, social workers outside of government are generally paid noticeably less than those inside government. This happens because government, where it funds these services through subsidies, covers only part of the salary, and on a lower scale than for government social workers. A third problem is that the other 'social service professionals' earn even less than social workers. Some are regarded as 'volunteers' and can at best expect a small stipend or travel money.

The low pay for this type of work almost certainly partly reflects the fact that many women provide similar services unpaid to others in their household. Unless it is addressed, there will continue to be grave shortages of these workers, and those who are in place will tend to feel overburdened, resentful and angry. As a result, their services will often not be as good a quality as should be.

## Public participation

In respect of the CSG, the technical committee which developed the policy was set up in a way that did not provide for significant public participation. While Parliament debated and passed the Bill that introduced the CSG, and provided a space for civil society to be heard, Parliament and civil society both played very small roles in actually shaping the policy. This policy was developed at a time when many other policy processes that emerged in the post-1994 flurry of revising all government policies provided for substantial public participation. Civil society has, however, influenced the way the policy has been expanded, as well as the way in which it has been implemented. It has, in particular, highlighted ways in which poor people have been prevented from accessing the grant due to problems in the policy design and implementation.

While civil society did use various parliamentary forums to raise problems with the grant, and Parliament had an opportunity to introduce major reforms when the revised Social Assistance Act was on its table for passage in 2003, Parliament did not act as if it had the political mandate to make any substantial changes. The terrain is complicated further by the fact that most of the problematic aspects of the grant are located in the regulations, which lie within the executive's mandate rather than the legislature's. In contrast to law-making processes, there is no explicit constitutional obligation on the executive to involve the public in the regulation-making processes although one could argue that sections 195(e), (f) and (g) of the Constitution place some obligation on the executive to consult.

The Promotion of Administrative Justice Act encourages notice and comment procedures with regards to regulations. There is, however, no obligation to consider the comments or dialogue with civil society. The lack of a clear obligation to promote participation in regulation-making processes makes it more difficult for civil society to influence the policy-reform process. This situation helps explain why three of the major policy flaws (which are all part of the regulations rather than the Act) are now the subject of court cases brought by the same civil society organisations who have been attempting to bring the problems to the attention of the executive and Parliament since 2000.

The Children's Bill process has seen substantial public participation during the technical committee, executive and parliamentary phases, and has also involved active engagement of the legislatures, over a long period. This participation and engagement have resulted in a better policy, as well as the side-benefits of a more democratic process and a learning process for all involved – the executive, legislature and civil society. It may have contributed to an increase in the length of the process, but this increase in time seems worth the resulted benefits.

In respect of the shift in use of the FCG, there was initially no consultation. The policy question was first bounced between the SALRC and the Taylor Committee of Inquiry, later bounced between the Children's Bill and the Social Assistance Act and it eventually found a partial home in the Children's Amendment Bill deliberations. The Children's Bill process provided the opportunity for the policy shift to be discussed, but a sensible decision is difficult without changes in the other grants, such as an increase in the amount and

extension of the age limit of the CSG. The decision was finally made by the portfolio committee, without much debate, late at night, during the committee's second last day of deliberations on the Children's Amendment Bill. Politicians in the portfolio committee were clearly uncomfortable with coming out against a provision that benefited many poor, ordinary people (voters). The Minister's recent pronouncement has further 'cemented in' a policy that treats children and caregivers with similar needs differently. In particular, the current approach disadvantages young women who are caring for their children, often without any assistance from the fathers.

Adding to their potential disadvantage, substantial numbers of these young women are HIV positive or living with AIDS. The fact that their own parents might access a FCG if they abandon their child into their care, or after their death, can offer little consolation while these young women struggle with their situation. However, the lack of an established channel for public participation in the decision on how to address this problem means that the young women remain disadvantaged in relation to a group – "orphans and their grannies" – that has more political appeal.

One of the contrasts between civil society engagement in the CSG and Children's Bill processes is the degree to which, in the latter process, civil society attempted to speak with one voice. In the CSG process there were a range of organisations that intervened, almost all of which were aligned with the ANC. Nevertheless, the focus of the advocacy and the associated 'demands' differed (Haarmann, 1998). Some, in particular, wanted the state maintenance grant to be retained. These groups were accused by some proponents of the new grant of representing primarily coloured women who benefited from the SMG, rather than the many poorer African women who would benefit from the CSG. Other civil society groups recognised that an argument in favour of retaining the SMG was unlikely to be successful. They therefore focused on advocating for a higher grant amount and a larger age group to be covered by the new grant.

For the Children's Bill, civil society came together at an early stage in an attempt to speak with one voice. Significant effort was put into maintaining this alliance, and into reaching common positions where these did not initially exist. Significant effort and resources were required to achieve this due to the large number of topics covered by the Bill.

### **The impact of the HIV/AIDS lobby**

The CSG, the Children's Act and the FCG are mainstream policies which have an enormous impact on children affected by HIV/AIDS, and their families. The fact that they were not conceived specifically as policies to combat the effects of the HIV/AIDS pandemic and that their targets go beyond orphans meant that the HIV sector did not always focus their energy on the campaigns. During the Children's Bill process both committees in Parliament and the Department of Social Development were very sympathetic to the problem of orphans and other children affected by HIV/AIDS and the HIV lobby was mostly successful whenever they did engage with the process. Examples of victories included the issues of consent to medical treatment and support to child-headed households.

Key HIV/AIDS-related victories were also won by other sub-groups. It was, for example, the disability sector that campaigned for the insertion of the clause dedicated to the rights of children with disabilities and chronic illnesses. A further example comes from education, where one of the major demands of the HIV sector was for schools to be used as 'nodes of care and support' to children affected by the pandemic. During the Children's Bill campaign this issue was left to the education sector, who accepted the government line that it would be considered in the education law reform. The HIV sector failed to unite behind a single solution with regards to the foster care problem, therefore the campaign was weak and what we were left with is a compromise.

In a country where the causes of vulnerability are varied and complex, it is essential to integrate services for children affected by HIV with those for other vulnerable groups. Parallel policy development processes for 'orphaned and vulnerable children' tended to divert the HIV sector within civil society from concentrating on the Children's Bill campaign, despite the fact that the services being provided and regulated in the Bill would form the bulk of services to be delivered to orphaned and vulnerable children. The role of the international and donor community in calling for targeted interventions for orphans and vulnerable children tends to reinforce diversion of both government and civil society attention from larger, mainstream policy processes that ultimately could have a greater impact on improving the lives of children infected and affected by HIV/AIDS.

### **Lack of cross-sectoral planning and dialogue**

The discussion in this paper suggests a relatively smooth passage from formulation to implementation for the CSG. In practice, the passage was not that smooth as there were many obstacles and hitches along the way. It was an area in which civil society played an important role in pointing out the problems, suggesting solutions, and agitating for them to be imposed – including through litigation.

One factor which assisted with the relatively smooth implementation, and relatively quick changes in process once obstacles were acknowledged, was that it was a single department that was responsible for this grant. With the other two policies, division of responsibilities across different agencies created problems. Thus, in the case of the FCG, the Department of Justice is implicated alongside the Department of Social Development, as it is the courts that must approve the foster placement of the child before the grant can be awarded. Furthermore, within the Department of Social Development there are two separate directorates responsible for the policy. It appears as if these two directorates did not manage to find the time to discuss the policy sufficiently to arrive at a common approach.

Similarly, with ECD, one of the factors delaying rapid progress has been the splitting of responsibilities between the Departments of Education and Social Development, and the relatively weak position of Social Development when compared with the Department of Education. It was a problem because Education is responsible for the final pre-school 'reception year' (Grade R) while Social Development is responsible for younger children. The Department of Education has also been allocated overall responsibility for ECD. The gap between the relative strengths of the two departments was widened by the fact that the

pre-school year is widely recognised to have a definite 'efficiency' effect in terms of later school achievement, while ECD for younger children is still seen largely as a welfare issue. The sector's desire to expand the notion of ECD to cover children up to nine years, and to include a range of auxiliary services that would include health care, add to the challenges of effecting and implementing policy change.

### **The locus of decision-making**

This paper reveals a range of government-related actors and institutions playing a part in the policy-making process. From the side of the executive, it includes technical committees, ministers, departmental officials and inter-departmental committees. From the side of Parliament, it involves the NCOP and National Assembly, the parliamentary committees through which much of parliamentary work is effected, and the ANC caucus (which includes members of the executive). Also active in respect of both the CSG and Children's Bill processes was the social cluster in Cabinet.

It is, however, difficult to pinpoint a single place where the 'real' decisions are taken. In reality, what happens in one forum will influence decisions in another forum. Further, there is an overlap of actors between forums. Thus, for example, officials of the Department of Social Development and the SALRC were present and participated actively as advisors to the parliamentary committee throughout most of the public hearings on the Children's Bill. Rather than a single decision-making point, it seems more likely that options are discussed until there seems to be enough 'buy-in' across a number of forums.

The fact that South African politics is heavily dominated by a single party, the ANC, facilitates such cross-influences. Thus, for example, the fact that a portfolio committee, which will have a majority of ANC members, is concerned about a particular aspect of policy is likely to result in the social cluster in Cabinet giving serious consideration to the issue. Discussions and resolutions adopted at ANC policy conferences also influence decision-making, as do decisions of the ANC NEC. The dominance of the ANC extends to much of civil society, which facilitates advocacy based on alliances between civil society (including the trade unions) and government and parliamentary actors.

### **Evidence-based policy-making**

The Lund Committee was explicit about wanting to present policy proposals that were firmly grounded on the best information available. In pursuit of this, it commissioned several pieces of research. The SALRC's recommendations for the new Children's Bill drew heavily on the latest international and national research on child care and protection. Civil society's engagement in the CSG, Children's Bill and foster care debates has also drawn heavily on research and consultative evidence. The emphasis on solid evidence has contributed to advocates being taken seriously and being considered as important stakeholders in the decision-making processes.

The ability to engage in evidence-based policy-making in South Africa has increased significantly over the years covered by this paper. In the mid-1990s there were few reliable



statistics available. The 'new' South Africa brought together the four provinces of the 'old' South Africa, as well as ten 'homelands', four of which the apartheid government claimed were independent countries. Official statistics did not cover the four 'independent homelands', and were usually of poor quality in respect of areas within 'white' South Africa inhabited by African people. Budget data were not easily available, even to those inside government.

These difficulties severely hampered the Lund Committee and subsequent task team when, for example, they wanted to know how much the state maintenance grant cost, and how many children would be eligible for the new grant under different conditions. By the mid-2000s, relatively good budget data were available, as were data relating to grant take-up and demographics. Budgeting was also based on a three-year medium-term expenditure framework, which gave a better sense of the government's intention for the coming few years. Nevertheless, data were still far from perfect in relation to aspects such as income.

For the Children's Bill costing, the absence of government data on the various categories of vulnerable children (such as street children, abandoned children, children involved in child labour) made it difficult to calculate measures of need and demand. Government statistics were based on actual service delivery and not on need. The process highlighted the need for reliable statistics on vulnerable children to enable informed decision-making. As the attention now turns to implementation and budget allocations, monitoring of need and service delivery becomes important.

## **Targeting**

This paper was commissioned out of a concern as to whether and how children affected by HIV/AIDS should be targeted in public policy. Some would argue that all children in a society such as South Africa are affected by HIV/AIDS in some way. This generalisation is not particularly helpful, as some children are clearly affected more than others. In particular, those who are orphaned, those who are themselves infected, and those whose caregivers are infected are especially affected. However, recognition of the special needs of children affected by HIV/AIDS does not remove their simultaneous need to access mainstream programmes such as water, health care services, social welfare services and social assistance. The concentration on targeting can divert attention from the need to mainstream the needs of children affected by HIV/AIDS in the sense of addressing their needs in general measures and ensuring that their needs which are not specific to HIV/AIDS are also addressed.

In respect of the FCG, it has been argued that there should not be special targeting of AIDS orphans or, indeed, of orphans more generally (Meintjes et al, 2003). Given historical child-rearing practices in the country, it is nothing new for grandmothers, in particular, to care for grandchildren in the absence of parents. The scale might have increased as a result of HIV/AIDS. But these children are not necessarily especially 'vulnerable' simply because they are receiving care from grandparents rather than care from parents. The main vulnerability factor is usually poverty, and that can affect parents as much as grandparents. Indeed, given that the overwhelming majority of old people in South Africa receive the old

age pension, poverty might be more likely for unemployed parents than for grandparents. This is not to deny that there are children, some who may be orphans, who have special care needs and who need the FCG and its associated provisions. What we are saying is that a definition that suggests that all orphans need 'special' care is a blunt instrument.

For the Children's Bill process, the Working Group had a sub-group that focused on HIV/AIDS. For the most part this sub-group, too, did not argue for special, separate provisions in respect of children affected by HIV/AIDS. Instead, its focus was on ensuring that all services considered what might sometimes be special needs of affected children, and/or considered the extent of particular needs that might arise because of the HIV/AIDS pandemic.

There were also some issues discussed that might not have arisen, or not evoked the same intensity of discussion, were it not for the pandemic. These included, for example, the heated debate around virginity testing, and the ability for children to agree to medical procedures and access contraception without parental consent. All these issues are particularly pertinent in the context of a pandemic that is sexually transmitted and that is widespread among the population.

The arguments against targeting might be less strong in a country in which the pandemic is less widespread and where it might therefore be easier to focus on a limited number of children with particular needs. The arguments against targeting might also be less strong in a country where resources are more constrained and it is therefore financially more difficult to make services available for all.

## **In conclusion**

This study set out to examine how three policies in relation to financial and other care for children have been formulated since the mid-1990s in the context of an HIV/AIDS pandemic. The paper was commissioned to contribute to the debate on how best to meet the needs of children in the context of HIV/AIDS, and how the particular context of policy-making influences what can be and is done. For the authors, a subsidiary aim of the paper was to document the policy-making process and content of policy in respect of three major interventions affecting children.

The paper focuses on three 'mainstream' policies rather than policies which are specifically intended to address the needs of children affected by HIV/AIDS. In all three cases, however, there has been an attempt to ensure that the mainstream policy addresses the needs of these children. For South Africa, where children are adversely affected by many factors, a mainstream approach seems preferable to a targeted one in respect of poverty alleviation and social services outside of health.

The paper described how the policy processes have encompassed a mixture of activism, advocacy and policy dialogue on the part of civil society as well as, where necessary, the use of litigation. The overall political context has been relatively favourable for the development and implementation of progressive legislation. As a result, in a short space of

time, South Africa has institutionalised responses that are helpful to many children. Nevertheless, the needs of South Africa's children, including those affected by HIV/AIDS, are far from being met. In this respect the three policy stories illustrate the importance of advocacy continuing long after the decision is taken to implement a new policy. Ongoing vigilance is needed during implementation to ensure that the envisaged benefits of a policy are realised and that problems that emerge during implementation are addressed.

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## About this publication

This case study is an output of the Evaluation Project of the Children's Institute.

The project aims to record the Institute's (and often its partner organisations') involvement in policy-reform processes and to analyse the strengths and weaknesses of the advocacy methodology employed in each process. The lessons learnt from each evaluation inform the methodologies adopted for new policy reform projects, are captured in a case studies series and in occasional papers, and shared with relevant target audiences.

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