
**Submission by the Children's Institute,
University of Cape Town
on the draft Children's Amendment Bill, 2013**

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The Children's Institute welcomes the opportunity to comment on the draft Children's Amendment Bill, which is generally referred to as the second amendment bill. We will also refer to the more comprehensive amendment to the Act that is planned by the Department, which we will call the third amendment bill.

We wish to focus our submission on the amendment of section 150(1) (a) of the Act, which is section 3 of the amendment Bill (Notice 1106), on page 55.

It is our submission that the proposed amendment to section 150(1) (a) is not in the best interests of the two categories of vulnerable children that will be affected by this amendment. These include approximately 1.5 million orphaned children in need of timeous and adequate social grants and hundreds of thousands of abused, neglected and exploited children in desperate need of protection and care services.

We recommend that section 150 should rather be amended in line with the proposal in the draft third amendment bill, which was presented at the Child Care and Protection Forum in Johannesburg on 20 November 2013, and accompanied by an amendment to the regulations of the Social Assistance Act to facilitate the payment of an Extended Child Support Grant for family members caring for orphans.

1. The need for a comprehensive legal solution

The Department is obliged to implement a comprehensive legal solution to the foster care crisis by 31 December 2014. This is the effect of the court ordered settlement in the matter of the *Centre for Child Law v Minister of Social Development and Others 2011*¹. In this case the Centre for Child Law brought a case to court in the interests of over 120 000 children whose Foster Child Grants (FCGs) had been stopped due to the social workers and courts not extending their foster care orders in time, and hundreds of thousands of other children whose FCGs were at risk of being stopped for the same reason. The Minister of Social Development, equally concerned by the crisis, agreed to a settlement that was made an order of court. The settlement binds the Department to introduce a comprehensive legal solution to the crisis in the foster care system by amending the Children's Act by the 31 December 2014².

As a temporary solution the settlement order did two things. Firstly it "deemed" most of the expired foster care court orders not to have expired for a period of two years from the date of the order (8 June 2011 to 8 June 2013). Secondly, contrary to the express requirements of section 159 of the Children's Act, the order temporarily allows social workers to extend foster care orders administratively without having to go back to court. The solution is temporary because it is not a comprehensive legal solution but merely a holding pattern to prevent rights violations while the Department designs a more comprehensive solution.

Since this settlement order was reached, in June 2011, the Children's Institute and our partners in civil society have been waiting for the Department to design and implement

¹ Case No: 21726/11, North Gauteng High Court, May 2011[amended 8 June 2011]

² *Centre for Child Law v Minister of Social Development and Others* Case No: 21726/11, North Gauteng High Court, May 2011[amended 8 June 2011] Para 4



a comprehensive legal solution. We have also been assisting the Department to analyse the available evidence and find solutions. Together with the Community Agency for Social Enquiry (CASE) we were commissioned by the Social Security Directorate in the Department to investigate the challenges in the foster care system and make recommendations for reform to improve children's access to social grants. After assessing the evidence we concluded that it was clear that the child protection system and the FCG was not the appropriate solution for the large numbers of orphans in need of timeous and adequate social assistance. We recommended that a "kinship grant" should be created for this group that should be administered by the South African Social Security Agency (SASSA)³. We also costed the proposal and showed that it was financially feasible.

Later we provided a set of draft amendments to the Social Assistance Act regulations to the Department that showed how this solution could be implemented using the existing successful mechanism of the Child Support Grant (CSG) to pay a larger CSG to orphans in the care of family members (the Department calls this proposal the "Extended Child Support Grant"). This solution would not only ensure that the majority of orphans living in poverty with family members are able to access an adequate social grant quickly but it would also free up social workers and courts to provide better protection and care services to abused, neglected and exploited children. This solution is therefore in the best interests of both groups of vulnerable children and would promote the realisation of their rights.

We have attended two consultative workshops where the Extended CSG proposal has been presented by the Department and had been told that the concept of the Extended CSG has received the approval of the Minister and was in the process of being drafted to enable the details to be clarified and further debated.

We were very surprised therefore to see the Department's proposed amendment to section 150(1) (a) of the Children's Act as this amendment entrenches the use of the

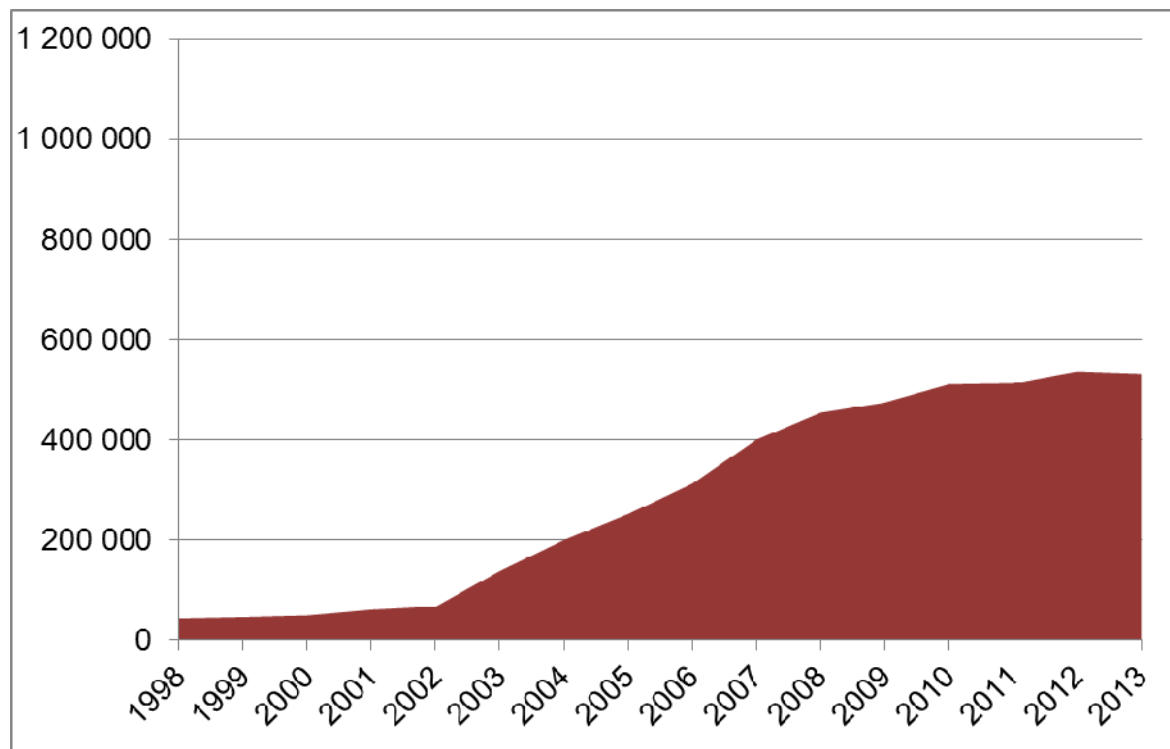
³ Community Agency for Social Enquiry and the Children's Institute, University of Cape Town (2012) *Comprehensive review of the provision of social assistance to children in family care*. Prepared for the Department of Social Development.

child protection system and the FCG as the state's grant of choice for the 1.5 million orphans in the care of family members.

The amendment to section 150(1) (a) is not a comprehensive legal solution. On the contrary it is likely to have the effect of creating greater inequality and suffering for children in South Africa. It will not pass the reasonableness test as set out by the Constitutional Court in the *Grootboom* and *Treatment Action Campaign* cases⁴ and is not in the best interests of the very vulnerable children currently negatively affected by the crisis in the foster care system.

2. The evidence shows that the foster care system and FCG fails the reasonableness test

We have been monitoring the FCG take-up since 1998 and while there was significant growth between 2002 and 2008 we have observed a slow-down in the growth of the FCG over the past five years. See the graph below:



K Hall analysis of SocPen monthly reports

⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) and *Minister of Health and Others v the Treatment Action Campaign and Others* 2002 (5) SA 703 (CC)

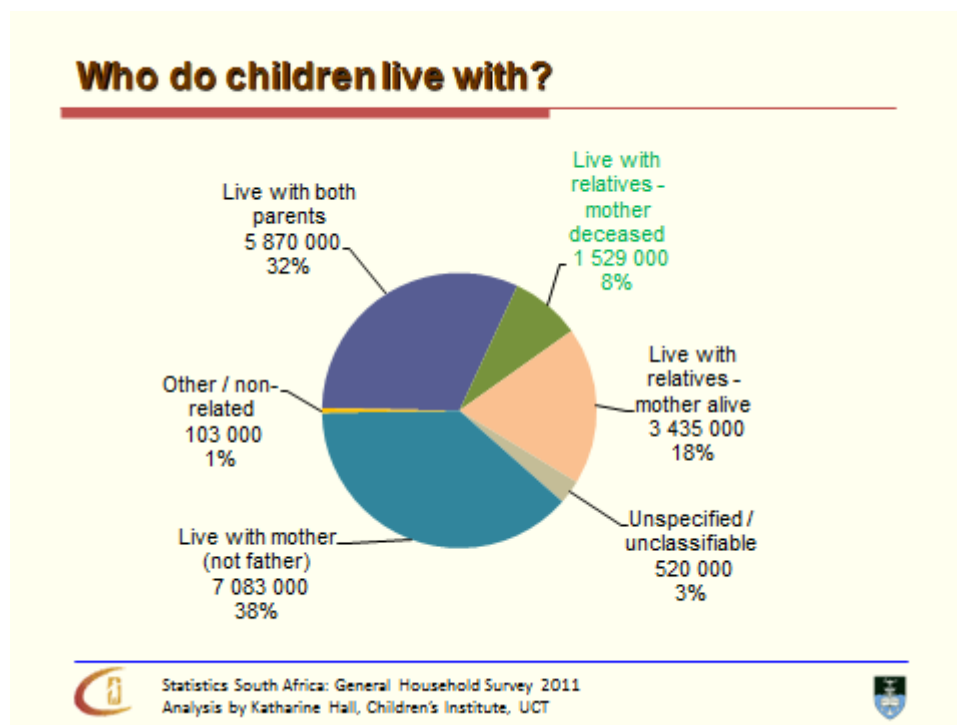
In fact for the first time in ten years we observed a decrease in the total amount of FCGs in payment when comparing April 2012 with April 2013. See the table below:

	2009/10	2010/11	2011/12	2012/13
Total FCGs in payment at end of financial year (31 March)	510 760	512 874	536 747	532 159
Actual increase in FCGs over period	36 001	2114	23 873	-4588

K Hall analysis of SOCPEN/DOWBOX data, extracted by SASSA on request

This data shows that the crisis in the system is not being addressed but is in fact getting worse. This is despite a major growth in the number of social workers over this same time and a number of ad hoc measures taken by the Welfare Services Directorate to attempt to keep up with the demand for foster care.

There is a total of just over 1.5 million orphans in the care of family members. See the green slice of the pie chart below:



Our analysis of Statistics South Africa's General Household Surveys reveal that only 460 000 of these orphans living with family members are getting the FCG. If you look at the first graph you can see that it has taken South Africa over 10 years to reach 460 000 orphans. If we are to reach the other 1.1 million orphans it will take us over 20 years by which time the orphans will no longer be children and the moment to support them to survive and develop to their potential would have been lost. Because of this mismatch between the size of the problem and the size of the solution the foster care system and FCG, as the vehicle for providing social assistance to orphans in the care of family, would not pass the reasonable measures test if challenged in court. This is because its design is not capable of achieving its objective⁵ and because the children who are suffering due to this failure are "those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril"⁶.

3. The State has a duty to devise a solution that is in the best interests of all children affected by the crisis in the foster care system

The Department indicated at the Child Care and Protection Forum on 20 November 2013 that the reason for introducing the second amendment bill is to respond to various court cases. The court cases relating to s150(1) (a) are the cases of *SS v The Presiding Officer of the Children's Court, District Krugersdorp and Others 2012*⁷ and *M and Others v The Presiding Officer of the Children's Court, District Krugersdorp and Others 2013*⁸.

The judgments by the South Gauteng High Court in the "SS" and "M" cases relate to four orphaned children who were in the care of family members. Both were appeals to the High Court against decisions by the Krugersdorp Children's Court.

The High Court was concerned primarily with the best interests of the four children before the court and essentially had only two choices available to it – turn the appeals

⁵ *Grootboom* para 41

⁶ *Grootboom* paras 43 and 44

⁷ South Gauteng High Court Case No: 14/1/4-206/10

⁸ South Gauteng High Court Case No: A3075/2011

down and force the families to survive on the small CSG (R300/child in 2013) or uphold the appeals so that the families could get the larger FCG (R800/child in 2013). To further the best interests of the four children in front of it - the Court therefore had to find an interpretation that would result in the four children being able to access the higher FCG. To do that the Court crafted an interpretation of the words “without visible means of support” in s150(1) (a) that resulted in these four children getting the FCG.

However, the High Court’s decision is not necessarily in the best interests of all the other children affected by the decision as the High court did not consider the evidence on the broader group of children (See section 4 below for an analysis of the court’s interpretation).

There is nothing preventing the Department of Social Development from amending the Children’s Act in a way that is different to how the South Gauteng High Court interpreted the Act. The state should be concerned not only with the rights and protection of four children, or the rights and protection of the 460 000 children already on the FCG, but also with the rights and protection of the over 1 million other orphans who will not be reached in time with the FCG and the hundreds of thousands of abused, neglected and exploited children who are receiving poor social work services because social workers are overwhelmed by high foster care case loads.

The State should consider all the available evidence on the barriers being faced by these two very vulnerable groups of children and all the available research on possible solutions and make a policy choice that enables their care, social security and protection rights to be realized.

4. The implications of “means testing” foster care and the FCG

The draft Bill removes the words *‘is without any visible means of support’* and substitutes *‘does not have the ability to support himself or herself and such inability is readily evident, obvious or apparent.’*

The draft bill takes words used in the “S” and “M” judgments and uses them to replace the words “*is without any visible means of support*”.⁹ Social workers and magistrates using the new proposed section 150(1) (a), to determine whether an orphaned child can be placed in foster care, are therefore likely to rely on the two court cases as the source of the meaning of the new words.

The South Gauteng High Court interpreted the phrase ‘*is without any visible means of support*’ in s150(1) (a) to mean that the court should inquire into whether the child has his or her own income and if not, whether the child has an enforceable claim of support against his or her caregiver¹⁰. The *M* judgment provides that working out whether the child has an enforceable claim of support requires the court to look at the total income and expenses of the caregiver and determine whether or not they have sufficient income to care for the child. In the *M* case the income and expenses of the caregiver were accepted without interrogation by the court and the caregiver was assessed not to have sufficient income to care for the children based on there being a shortfall of R380 between her expenses and her income¹¹.

The South Gauteng High Court’s interpretation of the words “is without any visible means of support” are that the income and expenses of the caregiver may be accepted without interrogation by the court. If the caregiver cannot meet those expenses, then the child can be placed in foster care with the caregiver and the caregiver can get the FCG. The court did not apply any objective income threshold or means test formula, as is standard practice in South Africa when means tests are applied to determine eligibility for social grants.

This re-wording of the Act to fit the Court’s interpretation that magistrates must apply a means test to the child and the caregiver, substantially changes the rationale of the FCG - from a grant that was intended for children in need of state care and protection - to a poverty alleviation grant.

⁹ *SS v The Presiding Officer of the Children’s Court, District Krugersdorp and Others 2012* at para 31

¹⁰ *M and Others v The Presiding Officer of the Children’s Court, District Krugersdorp and Others 2013* at paras 30 to 32 and *SS v The Presiding Officer of the Children’s Court, District Krugersdorp and Others 2012* at para 30

¹¹ *M and Others v The Presiding Officer of the Children’s Court, District Krugersdorp and Others* at para 32

Due to the absence of any objective means test formula - each social worker and magistrate is likely to have their own subjective opinion as to what sufficient income is. The result will be inequity in access to the FCG depending on the subjective opinion of magistrates across the country. Furthermore as the court is required to assess the child's income, if the child is found to have an inheritance this is likely to bar that child from being placed in foster care.

Section 150(1) (a) was never intended to act as the eligibility criteria for accessing the FCG. It was intended to allow the court to consider the circumstance of the child and make a care order. The question of whether the family then qualifies for a grant is determined by the Social Assistance Act and its regulations. The Social Assistance Act is the law that provides for and regulates eligibility and means test for social grants. This Act clearly provides that the FCG is not a means tested grant. However the amendment to the Children's Act proposed by the second amendment bill would have the effect of changing the FCG to a means tested grant, and requiring the means test to be applied by social workers and courts without any prescribed threshold or formula.

5. The potential financial implications of the amendment

Section 35 of the Public Finance Management Act No 1 of 1999 (PFMA) mandates that:

“Draft national legislation that assigns an additional function or power to or imposes any other obligation on a provincial government must, in a memorandum that must be introduced into Parliament with that legislation, give a projection of the financial implications of that function, power or obligation to that province.”

We have not had sight of any memo in relation to the financial impact of the amendment to s150(1) (a). Our research indicates there are between 1 million and 1.5 million maternal and double orphans living with family members who could qualify for the FCG depending on what income threshold the magistrates apply. If the over 1 million orphans not yet in receipt of the FCG successfully apply for the FCG the cost to the fiscus would be in the region of an extra R11 billion annually. There is currently no provision in the MTEF for such expenditure. Such expenditure would triple the current



FCG budget line-item in the National Department of Social Development budget vote (currently at approximately R5.5 billion). This estimate is based on only counting orphans under the age of 18 years. However the FCG is available to children up to the age of 21 years if they are furthering their education. The annual cost of this amendment therefore is likely to be more than an extra R11 billion if orphans in the age group 18 to 21 years are also included.

Our estimate only considers the direct costs of the grant. The cost to the fiscus of increasing the case load of social workers (provincial DSD budgets), and the case load of the Children's Courts (Department of Justice budget) has not been costed by ourselves, but it would very likely have increased financial consequences for the fiscus.

While the proposed amendment to s150 in the second draft amendment bill has not been costed - the financial consequences of creating an Extended Child Support Grant for family members caring for orphans has been costed by the Social Security Directorate and has been found to have minimal impact on the budget. This is because as the FCG numbers gradually come down, so the Extended CSG numbers increase. The effect on the budget is therefore likely to be that the FCG line item will decrease while the CSG line item expands.

6. The tagging of the amendment

The Bill is draft national legislation which imposes an obligation on Provinces, and therefore has financial implications for the Provinces.

We believe the Department has incorrectly tagged the Bill a section 75 bill, as a Bill not affecting Provinces. The consequence of this is that the legislation may be struck from the statute books¹².

Each foster care order requires a children's court to make a finding that the placement of the child is appropriate. For the court to find that, they need a report from a social worker. To write a report the social worker needs to visit and interview the child and

¹² See *Tongoane and Others v Minister of Agriculture and Land Affairs and Others* (CCT 100/09)

family and help the family get birth certificates, identity documents and death certificates. The social workers salaries, cars, petrol expenses and office rental are paid for out of the budget of the provincial departments of social development. The proposed amendment to s150(1) (a) will increase the foster care application and extension caseloads for social workers. This in turn will require provincial departments to employ more social workers and equip them with cars and offices. The amendment to s150(1) (a) therefore does have an effect on the mandate and budgets of the provincial departments of social development which potentially makes it's a matter that should follow a s76 process in National Parliament to ensure that the provinces are sufficiently consulted and agree to the increased mandate and budget.

7. The proposed third amendment bill – towards a comprehensive legal solution

On 20 November 2013 we attended the Department's Child Care and Protection Forum where the service provider commissioned to draft the comprehensive third amendment bill, presented the first draft of the bill for discussion.

The draft bill includes an amendment to s150 that takes us towards a comprehensive legal solution. See annexure A for the draft that was presented. The amendment proposes to divert orphan children who are living safely with their family members away from the child protection system, to SASSA to apply for the Extended CSG. It builds in a number of safeguards to ensure that the few orphans who may not be safe with their families are provided with care and protection services by social workers. It also aims to promote these families gaining access to social services that can be provided by a range of social service practitioners including child and youth care workers (in the Isibindi programme) and community development practitioners.

This proposal is similar to that proposed by the SA Law Reform Commission in 2002 and complements the Extended CSG proposal. It also has the support of the main civil society organisations working for and with children.

We recommend therefore that the amendment to s150(1) (a) in the second amendment bill should be withdrawn and replaced with the amendment proposed in the third amendment bill.

8. Time for consultation towards a comprehensive legal solution

We caution that the second amendment Bill is very unlikely to be passed in the lifetime of this Parliament. Even if the bill is introduced in the first quarter of next year, there will not be enough time to pass it before the house rises for the general elections, in which case the bill will lapse. It is therefore likely that the second amendment bill will only be able to be processed by the new Parliament starting in July 2014.

There is therefore time between now and July 2014 for the Department to consider the issues that we have raised, consult further with civil society and consult with Treasury and the Department of Justice to ensure that the solution being proposed will further the best interests and rights of all the vulnerable children affected.

9. Recommendations

We therefore recommend that the Minister:

1. Withdraw the amendment to s150(1) (a) from the second amendment Bill.
2. Substitute it with the amendment to s150 that is proposed in the third amendment Bill
3. Amend the social assistance legal framework to create an accessible and adequate Extended Child Support Grant for family members caring for orphans.
4. Facilitate consultative workshops to enable consultation on the details of the reform proposals.

Annexure A

DRAFT THIRD AMENDMENT BILL

This draft was presented at the Child Care and Protection Forum in November 2013

- Text that is in **[brackets and bold]** is to be deleted.
- Underlined text is to be inserted
- Plain text is merely repeating what is already in the Act (to enable understanding of the scheme of the amendment)
- Coloured coded **highlights** are to assist with navigating the sections

Definitions

“**family member**”, in relation to a child, means—

- (a) a parent of the child;
- (b) any other person who has parental responsibilities and rights in respect of the child;
- (c) a grandparent, brother, sister, uncle, aunt or cousin of the child; or
- (d) any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship;

Child in need of care and protection

150. (1) A child is in need of care and protection if **[, the]** such child-
- (a) has been abandoned or orphaned and is **[without any visible means of support]** not in the care of a family member as defined in paragraph (c) of the definition of family member in section 1;
 - (b) displays behaviour which cannot be controlled by the parent or care-giver;
 - (c) lives or works on the streets or begs for a living;
 - (d) is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
 - (e) has been exploited or lives in circumstances that expose the child to exploitation;
 - (f) lives in or is exposed to circumstances which may seriously harm that child's physical, mental or social well-being;
 - (g) may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;



- (h) is in a state of physical or mental neglect; or
- (i) is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person **[under]** in whose **[control]** care the child is.

(2) A child found in the following circumstances may be a child in need of care and protection and must be referred for **[investigation]** initial screening by a **[designated social worker]** social service practitioner in the prescribed manner:

- (a) a child who is a victim of child labour; **[and]**
- (b) a child in a child-headed household; **[and]**
- (c) a child who has been abandoned or orphaned but is in the care of a family member as defined in paragraph (c) of the definition of family member in section 1.

(3) If after **[investigation]** initial screening **[a]** the social **[worker]** service practitioner finds that a child referred to in subsection (2) is not a child in need of care and protection as contemplated in subsection (1), **[the]** such social **[worker]** service practitioner must where necessary take measures to assist the child, including counselling, mediation, prevention and early intervention services which may include assistance to the family to apply for any appropriate social grants, family reconstruction and rehabilitation, behaviour modification, problem solving, formalising parental responsibilities and rights in terms of section 22, 23 or 27, and referral to another suitably qualified person or organisation.

(4) If after initial screening the social service practitioner finds that a child referred to in subsection (2) is a child in need of care and protection as contemplated in subsection (1), the social service practitioner must refer the child for an investigation by a designated social worker in terms of section 155 (2).