SOCIAL SECURITY POLICY OPTIONS for PEOPLE with DISABILITIES in SOUTH AFRICA: an INTERNATIONAL and COMPARATIVE REVIEW

Prepared by
The Child Health Policy Institute
and
The South African Federal Council on Disability

For the
COMMITTEE OF INQUIRY INTO A COMPREHENSIVE SOCIAL SECURITY SYSTEM

March 2001

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ACKNOWLEDGEMENTS

The Team wish to thank all those who contributed sections, information and ideas to this report. In particular, members of the Disability Sector who partook in the workshops and shared their valuable insights and experiences. Also thanks to Karrisha Pillay (CRP – UWC), Sandy Liebenberg (CLC - UWC), Mastoera Sadan (IDASA), Nicole Barberton, Lizette Berry (UCT – CHU), Lydia Ntenga (Dept. of Social Development), Adriette Dekker and George Mpedi (CICLASS - RAU), and to the Social Security Law Faculty (UWC) for the use of their Social Security Law Notes.

CONTENTS

ABBREVIATIONS & DEFINITIONS

CDG	Care Dependency Grant
CHPI	The Child Health Policy Institute, UCT
CICLASS	Centre for International & Comparative Labour & Social Security Law, RAU
COIDA	Compensation for Occupational Injuries and Disease Act
CRC	Convention on the Rights of the Child
INDS	Integrated National Disability Strategy
ILO	International Labour Organization
OAU	Organization of African Unity
RAF	Road Accident Fund
RAU	Rand Afrikaans University
SADC	Southern Africa Development Community
SAFCD	South African Federal Council on Disability
UCT	University of Cape Town
UIF	Unemployment Insurance Fund
UN	United Nations
UWC	University of the Western Cape

DISABILITY

The definition of disability is dependent upon the theoretical construct one uses to understand disability. It can be viewed within the Medical model, which looks purely at the physical or mental impairment and views the degree of severity as the extent to which certain activities of daily living cannot be undertaken. Or it may be viewed within the Social Model, which views the limitations as due to the societal attitudes and inaccessible physical environment.

Thus defining and 'measuring' disability would be along different parameters, depending on the outlook. This raises numerous practical and administrative problems. Currently within the Social Security system, disability is measured and defined entirely and only by the Medical Profession. Their interpretation determines receipt of a grant or not.

SOCIAL SECURITY

Social Security refers to a wide range of public and private measures that provide cash or in-kind benefits or both (according to the White paper for Social Welfare. 1997:48). Social security includes both social insurance and social assistance. Social insurance usually entails private and contributory schemes, such as occupation retirement insurance, while social assistance is State provided and non-contributory (though usually means-tested). Benefits can include cash transfers, vouchers, subsidies and so on.

The White Paper describes the main elements of the social security system in South Africa as follows:

1. Private savings in terms of which people save themselves for unexpected or urgent events such as disability or chronic diseases.
2. Social insurance, which entails a joint contribution by employers and employees to pensions or provident funds.
3. Social assistance, which is a non-contributory and means-tested benefit provided by the State to groups such as people with disabilities who are unable to provide for their own minimum needs.
4. Social relief which is a short-term measure to help people in crisis, e.g. those affected by floods.

AIMS AND OBJECTIVES OF THIS REVIEW

1. Tender Process

The Child Health Policy Institute, experts in child disability and social security research, tendered and won the contract to undertake this review and requested the assistance of the South African Federal Council on Disability, experts in adult disability issues.

It is important that such valuable research be undertaken by this effective combination of the experience and expertise of the Disability Sector and the research institution.

2. Aim of this research study

The aim of this research study was to conduct an international comparative review regarding social security provisioning for adults and children with disabilities in order to inform the development of a comprehensive social security system in South Africa.

3. Objectives

The objectives of the review were:

- To provide an overview of the existing social security system for people with disabilities in South Africa.
  This is not a comprehensive literature review nor analysis.
- To conduct a critical, comparative review of international public social security systems in two developed countries and three developing countries, which would be relevant to the South African situation.
- To provide a framework of options for an integrated, comprehensive social security system for children and adults with disabilities in South Africa.
- To identify gaps in the literature and information requiring further research.

4. Design and Methodology

This report represents a comparative analysis and literature review conducted of the South African legislation, literature and systems of social security.
Literature regarding the social security provisioning from a few international countries was obtained. Their systems were not analysed but are merely described here.

5. Data Collection

Data was obtained through website searches, library searches, from existing databases, and through some consultation and interviews with relevant persons.

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Data Collection continued.
In addition, various workshops were held to obtain advice and input from the Disability Sector. These included:

- A national workshop held in May 2000[1] to discuss specifically social security for children with disabilities and chronic illnesses. Much of the discussion and suggestions made here regarding the Care Dependency Grant (CDG) are taken from those proceedings and thus represent the Sector's opinion.
- A workshop held in November 2000 on the Disabled Children's Budget.
- A Seminar for Social Security in South Africa held on the 6 December 2000.
- Small workshops to discuss this review report held on 20 February and 1st March 2001.

However, further consultation with the Disability Sector is required to discuss the options and solutions presented in this report. The Committee of Inquiry has indicated that it will hold a consultative workshop with the Sector to discuss its recommendations. This is imperative to the process of transforming the current system.

5. Limitations of this study

The timeframe in which to conduct this review was extremely short. In effect, the Researchers had 6 weeks in which to collect, collate and review the documents. This contributed to the inability to conduct thorough analysis of the data obtained. The Committee of Inquiry's schedule and dates for their final report to the Department of Social Development determined this timeframe.

Literature collection was extremely difficult and much of the relevant information arrived only in the middle of February. In particular it was impossible to obtain information regarding the social security systems in developing countries. This has made comparison with countries of similar socio-economic status to South Africa almost impossible. It was also difficult to get information on indirect social security provisioning, as it is impossible to extract information regarding specifically services to persons with disabilities from the various departments. Only broad provisioning for the public in general is presented here.

CHAPTER ONE
THE SITUATION OF PERSONS WITH DISABILTIES IN SOUTH AFRICA

1. Introduction

Economic, cultural and social rights cannot be separated, and are mutually dependent on each other for attainment. "Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception and in their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". (African Charter on Human and People's Rights. 1981. Preamble).

The situation of disabled people has remained unchanged since the advent of democracy within South Africa, save for a few legislation changes which is fraught with problems at implementation level. The rights of disabled people are protected within the Constitution. In addition to the protection of disabled people's right against discrimination in the Bill of Rights, the constitution also provides provision for the rights of disabled people in terms of Social Security.

The Bill of Rights (Chapter 2) says:

> Section 27 (1) "Everyone has the right to have access to… (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance" and
> (2) "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights."[1]

Despite the above protective measures disabled people continue to remain poverty stricken populous of South Africa. Their exclusion from mainstream society, their difficulty to access services and to exercise their basic rights, has contributed to a serious limitation in the capacity of provincial and local organisations to plan and implement disability related programmes, especially in the rural areas of the country. One of the key factors that contribute to this ongoing negative situation is the fact that disability issues have been addressed in a piecemeal, fragmented fashion, coupled with a serious lack of reliable information on the nature and prevalence of disability within South Africa.[2] This has resulted in very little progress

[1]: *"YOU AND SOCIAL GRANTS 2000":* Department of Social Development
[2] Bhagwanjee AM, Stewart R. *Disability research in South Africa: Vision and Imperatives for a national approach.* DATE??

being made towards redressing the status of people with disabilities, especially those living under severe socio-economic constraints.

Research Dynamics South Africa[3] in their research study articulated their opinion that government is expressing a lack of commitment to integrate people with disabilities in policy and programme planning. They based their opinion on the fact that while the government has developed numerous policies that seek to address the needs of previously disadvantaged population groups, and express the commitment for integration of people with disabilities during the post-independence period, the majority of these policies are disability exclusive. They have also articulated the fact that disabled people tend to be marginalized even amongst disadvantaged groups.

2. The Need for Social Security: Social Insurance, Social Assistance

For many people with disabilities, their reduced opportunities for education, training and employment contribute to their increased exposure to poverty and poor living conditions.

Therefore many adults and children with disabilities require income maintenance mechanisms that compensate for their loss of income and for the extra costs due to the disability. Such schemes should also improve their standards of living, while increasing their opportunities to education, training, and health services. Indeed, the United Nations Committee on Economic and Social Rights notes that social security should also promote their full development, equality and participation in society. (UN General Comment No. 3, Para 11).

The most fundamental form of provisioning entails 'safety nets', that is, various forms of social security, insurance and assistance that aim mainly at poverty alleviation, safety nets against destitution and to ensure an adequate standard of living[4]. They achieve this by: attempting to raise the incomes and standards of living of those individuals and families in dire poverty; smoothing income over the life-cycle; compensating for the inability to work (through disability,

[3] *Situation Analysis of Disability Integration in 18 National Government Departs – August 2000:* Research Dynamics South Africa.
[4] Davids D, Cheadle H, Haysom N. Fundamental Rights in the Constitution. Juta. 1997.

retrenchment, illness); and by meeting the needs of particularly vulnerable groups.

There is no universal definition of social security. Because social security has to do with protecting the individual against social risks by providing welfare and services to an individual and his/her dependants if they are unable to provide for their own basic needs, it is clear that there is an ideological and political component to the concept. This means that social security systems differ from country to country.

There are, however, three general aims to any social protection policy:

- Avoid risk where possible (prevention). An example of this in South Africa is safety legislation in the form of the *Occupational Health and Safety Act* [5]- which aims to avoid injuries in the workplace.
- Repair the damage (reparation).
- Compensation (in the form of benefits). Where an injury does occur in the workplace, the Compensations Commissioner will ensure that the injured worker is paid compensation for the injury in terms of the *Compensation for Occupational Injuries and Diseases Act* (COIDA)[6].

The concept of social security has differing interpretations in different countries, some focusing on coverage for social risks or contingencies, others include the preventative aspects, and thus definition would depend on the aim of the schemes. "Social security refers to a set of policy instruments that is set up to compensate for the financial consequences of a number of social contingencies or risks" (Moore *et al*. 1999[7]). Broader preventive measures would include preventative health care, safety in the workplace, trading and development programmes and so on.

Another aspect of social security is that of its contribution to solidarity, to stability within communities and countries, where the negative effects of social risk are seen to affect not only the individual but also the whole nation and economy. Thus a society takes measures to protect itself and its individual members from

[5] 85 of 1993.
[6] 130 of 1993.
[7] Moore V, Smit N, van der Walt A, Jansen van Rensberg L. "The Concept of Social Security" in Olivier M *et al.* (eds). Social Security Law: general principles. Durban: Butterworth. 1999.

these contingencies. Pieters[8] defines social security as "the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (that is, from paid labour) or particular costs".

The South African definition differs from the ILO definition and Pieters' definition in an important sense: both the ILO and Pieters' definitions refer to social security as public measures. The South African definition, however, includes private measures. (Private forms of social security include private medical aids, retirement schemes and life insurance). In so doing, it is far broader than international definitions of social security. On the one hand this is to be welcomed because it encompasses a wider scope of protection for more people (in line with ILO proposals). On the other hand, by bringing private measures into the definition, it serves to let the State "off the hook" (to some extent) in terms of its Constitutional duty.

Thus according to the White paper for Social Welfare (1997:48), social security incorporates a wide range of public and private measures that provide cash or in-kind benefits or both Social security includes both social insurance and social assistance. Social insurance usually entails private and contributory schemes, such as occupation retirement insurance, while social assistance is State provided and non-contributory (though usually means-tested). Benefits can include cash transfers, vouchers, subsidies and so on.

The White Paper goes on to describe how the social security system in South Africa should be structured:

- There will be universal access to an integrated and sustainable social security system. Every South African should have a minimum income, sufficient to meet basic subsistence needs, and should not have to live below minimum acceptable standards. The social security system will also work intersectorally to alleviate poverty.
- A social security system is essential for healthy economic development, particularly in a rapidly changing economy, and will contribute actively to the development process. In a society of great inequality the social security system can play a stabilizing role. It is important for immediate alleviation of poverty and is a mechanism, for active redistribution.

[8] Pieters D. Introduction into the Basic Principles of Social Security. Netherlands: Kluwer. 1993.

While South Africa's legislative framework is rated as one of the best in the world, with well established private insurance coverage, the problem remains that the majority of South Africans are poor, unemployed and in the informal employment sector, they cannot access private measures. This is where most people with disabilities find themselves in the economy as they are normally in the lower income bracket. The way in which private measures are set up excludes persons with disabilities from utilizing or accessing these measures.

3. Definitions of Disability

The Community Agency for Social Enquiry (CASE)[9] argues that:

> "The term disability probably has different meaning for each person that uses it. It is a term that can be defined in it's own right, but at the same time, tends to be used interchangeably with other terms such as impairment, handicap and disablement."

CASE further argues that the problems associated with disability definitions across countries are due to different interpretations and screening procedures used within and across countries.

The white paper on an Integrated National Disability Strategy (INDS)[10] argues that the placement of disability definition within a health and welfare framework resulted in interventions being channeled through welfare institutions, thereby perpetuating negative perceptions and attitudes towards disability (Medical Model). This perception led to:

- Isolation of disabled people and their families from their communities and mainstream activities.
- Dependency on state assistance that is disempowering to disabled people, which seriously reduces their capacity and confidence to inter-act on an equal level with other people in society, resulting in exclusion from social, political and economic rights.

The medical model of disability focuses on the impairment/impairments of the individual and the individual's inability

[9] We also count! The extend of moderate and severe reported disability and the nature of the disability experience in South Africa. CASE October 1999

[10] *White paper on an Integrated National Disability Strategy:* Office of the Deputy President T M Mbeki November 1997.

to carry out normal day-to-day activities due to the impairment – thereby constituting a "problem". For example, *you are not mobile because you have a spinal injury*[11].

In the early 1970's, disabled people at the international level, used their personal experience of disability and institutional life to show that it wasn't their impairment/impairments that caused the "problem", but the way in which society failed to make allowances for their differences, and as such, they have been excluded from accessing fundamental social, political and economic rights. This way of thinking, analyzing and discussing of disability became known as the **Social Model of Disability.** Disablement is framed within the context of any behavior or barriers that prevents people with impairments the choice of taking part in the day-to-day activities in the life of society. It is not limited by a narrow description of activities, but takes the wider view that the ability to undertake such activities is dependant upon social intervention – therefore that limitations of activities are caused by the consequence of social organization as apposed to the actual impairment.[12]

People with disabilities in South Africa took this a point further when they mobilized themselves in the early eighties. The disability rights movement of South Africa framed the definition of disability within the context of human rights and development. A human rights and development approach to disability focuses on the removal of barriers to equal participation and elimination of discrimination of disability that prevents disabled people to exercise equal rights and responsibilities.

4. Disability Prevalence

Very few reliable statistics exist on the prevalence and nature of disability in South Africa, largely due to a historical failure to integrate disability into mainstream government statistical processes[13]. Furthermore, available statistics seem to be biased towards "*obvious"* physical and medical disabilities thereby excluding those individuals with "hidden" problems, such as persons with learning disabilities[14].

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[11] Disability Net, UK 1997. *A Policy and Practice Guide for Local Government by Disabled People – Extracts*.
[12] Disability Net, UK 1997. *A Policy and Practice Guide for Local Government by Disabled People – Extracts*.
[13] *INDS* – main source of information for this section.
[14] Bhagwanjee AM, Stewart R. *Disability Research in South Africa: a vision and imperatives for a national coordinated approach.*

The INDS attributes the unreliability of statistics to the following factors:

- There are different definitions of disability;
- Different survey technologies are used to collect information;
- There are negative traditional attitudes towards people with disabilities;
- There is a poor service infrastructure for people with disabilities in underdeveloped areas, and
- Violence levels (in particular areas at particular times) have impeded the collection of data, affecting the overall picture.

Furthermore, it is likely that factors such as poverty and the continuing spiral of violence may have contributed to a greater prevalence of disability in this country than has been estimated. The INDS further ascribes the causal effects of disability to: Violence and War, Poverty, Lack of information, Failure of Medical services, Unhealthy lifestyles, Environmental factors, Accidents and Social environments.

The INDS further cites the unreliability of statistics due to the tendency of society to view people with disability as a single group, and the ignorance of society on the diversity of disability and the variety of needs experienced by people with different types of disability.

Narrow definitions of disability, a lack of consistency among agencies and the use of disparate demographic methods thus appear to result in under-estimations and under-reporting of the prevalence of disability[15]. This factor is clearly demonstrated within the surveys on disability prevalence done in recent years:

- The 1995 October Household Survey reported a prevalence rate of 5 percent.
- The 1996 South African Population Census reports a prevalence rate of 6.7 percent.
- The Department of Welfare in 1997 estimated a prevalence rate of 12.7 percent.
- CASE reported a prevalence rate of between 5.7 percent and 6.1 percent within their October 1999 survey.

[15] Bhagwanjee AM, Stewart R. *Disability research in South Africa: vision and imperatives for a national coordinated approach.*

Discrepancies are further demonstrated in reporting of disability prevalence at rural level. The 1996 population census reported that rural areas have slightly higher levels of disability than urban areas, the disability prevalence rate being 7.1 and 6.4 percent respectively.

The October 1999 CASE report reveals that there exists significant differences between urban and rural areas, as there findings indicated within the provinces of Eastern Cape, Mpumalanga, Free State and the Northern Province.

The United Nations Development Programme (UNDP) estimated that, in 1990, 5.2% of the world population was experiencing moderate to severe disability. This ranged from 7.7% in so-called developed countries to 4.5% in less developed areas[16].

The variance in disability prevalence; the fact that disability is still defined within a medical model; and the fact that the majority of people with disabilities in South Africa remains to be excluded from the mainstream of society, has contributed to the poor manner in which the issues of disabled people have been addressed within the framework of a social security system within South Africa.

5. The Socio-economic Context for Persons with Disabilities

The exclusion experienced by people with disabilities and their families is the result of a range of factors, for example:

- The political and economic inequalities of the apartheid system;
- Social attitudes which have perpetuated stereotypes of disabled people as dependent and in need of care; and
- A discriminatory and weak legislative framework, which has sanctioned and reinforced exclusionary barriers[17].

Vulnerable groups

Within the disability sector itself, there are people who are particularly vulnerable due to their disability type. Persons with intellectual disabilities, mental health problems and sensory impairments, such as deafness, experience high levels of exclusion,

[16] *INDS*
[17] *INDS*

resulting in most services rendered to disabled people being geared towards those with physical disabilities.

The INDS further identifies women, children, youth and elderly people with disabilities, people with severe intellectual or mental disabilities, people with Acquired Immune Deficiencies Syndrome, disabled refugees and people with disabilities living in rural areas, as particularly vulnerable sectors of the disabled community who are in need of special attention.

The key forms of exclusion responsible for the cumulative disadvantage of people with disabilities are poverty, unemployment and social isolation[18]. Research Dynamics South Africa states that disability is most prevalent among persons who have never been to school and are not working. It is thus the exclusion of people with disability from the mainstream of society that perpetuates their dire socio-economic status.

a) Disability and Unemployment

People with disabilities are often those most easily excluded from the education system and from the labour market and are therefore the most poverty stricken in any population. Related to these realities is the perception in many families who have a child with disabilities that such a child is unlikely to be employed or to be in a position to contribute to the family income. At best, the child is kept back from school until his/her more able-bodied siblings have been accommodated or at worst, is never given the opportunity to go to school or learn[19]. As a result they grow up to become disempowered adults, unable to make decisions, solve problems or take the initiative. This high level of illiteracy in turns leads to high unemployment figures amongst adults with disabilities.

The INDS estimates that a total of 99% of disabled people are excluded from employment on the open labour market. The INDS attributes this exclusion towards the following factors:

- Low skills level due to inadequate education;
- Discriminatory attitudes and practices from employers;

[18] *INDS*

[19] *Quality Education for All: Overcoming barriers to learning and development:* Report of the National Commission on Special Needs in education and Training (NCSNET) and the National Committee on Education Support Services (NCESS)

- Past discriminatory and ineffective labour legislation;
- Lack of enabling mechanisms to promote employment opportunities;
- Inaccessible public transport;
- Inaccessible and unsupportive work environments;
- Inadequate and inaccessible provision for vocational rehabilitation and training;
- Generally high levels of unemployment;
- The fact that menial labour is often the only option for poorly skilled job-seekers;
- Inadequate access to information; and
- Ignorance in society

Further to the research results on disability integration by Research dynamics South Africa is the very poor progress in the employment of people with disabilities. Government departments, which participated within the study, have employed less than 1% of disabled people, which is far less than the stipulated 2% quota within the public service. Yet, the Department of labour has put in place several pieces of legislation that promotes the integration of people with disabilities in the workplace. These are:

- The Labour Relations Act of 1995
- The Employment Equity Act of 1998
- The Skills Development Act of 1998

As a result of this poor performance, unemployment remains a fundamental problem affecting the majority of people with disability and their families. The report further indicates that if and when disabled people are employed, no significant employment accommodation is made for them within the workplace. Common modification to the workplace tends to be the improvement of physical access to the building, provision of special equipment and furniture and the modification of the workspace. The study also articulates the fact that disabled employees tend to occupy very low–level positions and are never placed within a senior management position where decision making occurs, or where they could influence the manner in which they are viewed and serviced.

It would appear that the Employment Equity Act[20], although aiming to ensure equal opportunities for people with disabilities in

[20] Act 55 of 1998.

the workplace, has so far failed to create these opportunities in reality. The definition used in the Act of disabled persons is based on the medical model and views the impairment as the cause of the inability to attain success or promotion in the workplace.

The concept and role or sheltered workshops or employment for persons with disabilities has been rejected by the Disability Sector as retrogressive and archaic – directly opposing full integration into mainstream employment. The responsibility of society is rather to create the environment for persons with differing disabilities to reach their maximum potential and to contribute to the national economy.

b) Poverty, Ill-health and Disability

Poverty is a direct cause of disability due to malnutrition, lack of safe shelter, lack of access to basic health services, crime etcetera. Disability causes and worsens poverty within families and communities due to high unemployment, lack of appropriate education provisioning, the additional costs attached to disability, disempowerment and negative attitudes.[21]

Poverty is closely linked to disempowerment, and it is when looking at the causes of the high levels of disempowerment found among people with disabilities, that one starts to understand the relationship between poverty, disability and exclusion better. The absences of fathers in the upbringing of children with disabilities are of particular concern, as this worsens the poverty situation in the family, and deepens the disempowerment linked to disability.[22]

Many of the causes of disability among children are interlinked to the manifestations of poverty. The majority of single mothers with disabled children lack the income to provide for their children, and live in underdeveloped areas with little infrastructure. The birth of a child with a disability actually contributes to poverty, as the father often divorces the mother as a direct result[23]. Children with malnutrition have ended up with permanent disability, as a

[21] *Poverty, Disability, Development and Children with Disabilities:* Presentation at the DICAG International Conference on Unveiling Article 23 of the UN Convention on the Rights of the Child 1998 by Mr Shuaib Chalklen, Director Office on the Status of Disabled People.

[22] *International Seminar Report: Unveiling Article 23 of the UN Convention on the Rights of the Child:* Disabled Children Action Group 1998

[23] C Howell: Presentation to the Community Law Centre Conference on the Rights of people with disabilities- November 1996.

consequence of lack of access to education, health care and adequate intervention programmes. The disability is further compounded due to lack of services and necessary intervention. The reality therefore, is that many children become disabled through diseases that are preventable. A recent survey indicated that most children suffering from malnutrition and ill health live in rural areas, and that 75.2% of all children living below the poverty line are based in rural areas.[24]

It is therefore clear that the relationship between poverty and disability is not only caused by the lack of sustainable and sufficient financial income, but also by the educational, social, political and economic exclusion of people with disabilities.

The INDS elaborates that the International Labour Organization (ILO) and the UN Development Programme (UNDP) state that a key indicator of poverty is the degree to which people are excluded from accessing basic goods and services. Poor people do not have sufficient income to purchase goods. Furthermore, the majority of people with disabilities reside in the most poverty stricken and underdeveloped areas of South Africa, creating a vicious cycle where poverty renders people vulnerable to disability and where disability reinforces and deepens poverty. This means not only that there is a higher proportion of disabled people amongst the very poor, but also that there is an increase in families living at the poverty level AS A RESULT OF DISABILITY.

The role, manner and form in which Social security addresses the poverty situation of people with disabilities remains crucial and of utmost importance to people with disabilities and their families.

6. Progress to Date

In 1997, the INDS made specific recommendations to address the issues of people with disability more effectively. These recommendations called for disability integration into all departmental policies, strategies and programme planning. The recommendations covered the following areas which are in line with

[24] *Child poverty and the budget: are poor children being put first?* Cassiem S, Perry H, Sadan M et all IDASA 2000

the UN 22 Standard Rules on the Equalization of people with disabilities:

- Preconditions for equal participation
- Target areas for equal participation
- Implementation measures
- Monitoring mechanisms

In August 2000, the Office on the Status of Disabled People (OSDP) commissioned Research Dynamics South Africa to assess the extent of disability integration within National Government Departments. The research covered 18 National Government Departments.[25]

The main findings were as follows:
Departmental programmes are still located within a Medical Model, resulting in inadequate budgetary allocations that could address the issue of disability integration more effectively. Policies that were developed during the post-independence period are exclusive of people with disabilities. Where people with disabilities were included, it was found that these policies generally did not translate into strategies and programmes that would ensure the inclusion of people with disabilities into mainstream society.

In addition to this, the study found that there is poor and insufficient, outdated incomprehensive disability researched information within government departments. This attests to the fact that departments have done very little to create public awareness, or to develop comprehensive strategies for awareness on disability issues and disability integration among staff, resulting in very limited capacity to integrate disability issues within departments. This coupled with the fact that government department do not involve disabled people's organizations strategically within the formulation and implementation of department initiatives, substantiates the level of exclusion of people with disabilities.

Within employment initiatives, the study revealed that less than one percent of disabled people have been employed within government departments, at low-level positions and inadequate employment accommodations. It is of great concern that the study revealed that

[25] *Situation Analysis of Disability Integration in 18 National Government Departments: Research Dynamics South Africa:* Office on the Status of Disabled People August 2000

where disabled people have been employed, structural barriers and inaccessibility remained within their working environments.

The report further revealed that there has been no progress with regard to disability prevention, save for three departments[26] that initiated programmes on disability prevention. With regard to rehabilitation services, the study found that these services are still primarily located within the Medical Model, and predominantly based within the departments of health and welfare, with the department of labour having developed some vocationally orientated rehabilitation programmes.

7. The needs of persons with disability

Over and above the need for disabled people to be effectively included in policy planning and programme development, "is the need for effective budgetary allocations to appropriately address the issues of disabled adults and children within government programmes and planning", as clearly stated through the results of the study undertaken by Research Dynamics South Africa:

The disability sector of South Africa has repeatedly provided information on the needs of disabled people as a means to strengthen the concept of a caring society. Some of these needs that specifically relate to Social development are as follows[27]:

- The need of disabled people from government to inculcate within their departments a paradigm shift from the medical and welfare model of disability to that of the social model of disability that would bring about a sound understanding of disability, and a significant change within the lives of people with disabilities.
- The need for a comprehensive framework of social support and individual empowerment that is linked to other ministries and departments.
- The need for recognition and acceptance of people with disabilities as having the same rights as non-disabled people and therefore deserves the same access to services with additional support.

[26] *Departments of Health, Labour and Transport.*
[27] South African Federal Council on Disability presentation to the Ministry of Welfare and Population Development's national consultative process on Social Development.

- The need to recognize the fact that within the disability context, people with disabilities have unique needs, which is best addressed through a range of integrated mainstream support.
- The specific need and expectation of people with disabilities from the department of Social Development to embrace the concept of Social Support rather than Social Security when addressing the issue of Social Welfare Provision of Persons with Disabilities.
- Within the framework of social support, the department of social development needs to consult with and coordinate other departments such as:
    - The department of transport that needs to facilitate access to affordable and accessible transport,
    - The department of health that needs to provide access to specialized healthcare and assistive devices,
    - And the department of communications that needs to provide access to information.
- The need for continued support in the transformation of protective workshops that will positively contribute to and ensure the equal participation of people with disabilities within mainstream economy.

These needs were echoed within the INDS policy guideline in 1997, and reiterated at various platforms that sought to redress the social crises which South Africa is currently experiencing.

The articulation of these specific needs, confirms the overall need for effective inclusion within policy and legislation development, and the effective articulation thereof within budgets and programme planning.

CHAPTER TWO
SOCIAL SECURITY AS A BASIC HUMAN RIGHT FOR PERSONS WITH DISABILITIES

1. Introduction

Social security law, design and implementation must be placed within a rights-based framework. “The right to social protection is a fundamental human right in all modern states and an essential mainstay of society” (van Steenberge J *et al.* 1999[28]).

There are many international instruments, ratified by South Africa, as well as the South African Constitution and legislation, which promote and uphold the rights of persons with disabilities to access to social security and other social services. While these reflect a clear commitment to the rights of persons with disabilities, their practical attainment is lacking.

"In the course of examining the rights of access to social security… reference will be made to relevant international law provisions as the South African Constitution largely mirrors many of the international human rights instruments. Furthermore, international instruments are an important interpretative aid when interpreting the provisions of the Bill of Rights. Section 39 of the Constitution provides that when a court interprets a right in the Bill of Rights, it “must consider international law”. Pillay & Proudlock (2000)[29].

This Chapter seeks to examine South Africa's international and constitutional obligations, as well as review the existing and developing policy and legislation, as it pertains to social security.

2. South Africa’s International Obligations with regard to Social Security

The various international instruments are described briefly below, with specific attention to the provisioning regarding social security. Note that there are only two pieces which specifically refer to children, these being the African Charter on the Rights and Welfare of the Child (1990) and the Convention on the Rights of the Child.

[28] Van Steenberge J, Jorens Y, van Eeckhoutte W. Foreword in Olivier M *et al.* (eds). Social Security Law: general principles. Durban: Butterworth. 1999.
[29] Pillay K, Proudlock P. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

The remaining are assumed to include children in their coverage, as human beings.

Protocols for the Southern African Development Community (SADC) also impinge on South Africa's social security provisioning. These are not covered here due to the shortage of time allowed for the collection of this information.

a) The Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights (UDHR) was adopted by the General Assembly on December 10, 1948. It recognises that the inherent dignity and the equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world.

The Rights upheld in the UDHR include: the right to life, liberty and security of person, equality before the law and entitled without any discrimination to equal protection by the law, the right to privacy, freedom of movement and residence, to a nationality, to freedom of thought, conscience and religion, and the right to take part in the governance of the country.

Article 22 states everyone, that as a member of society, has the right to social security and is entitled to the realisation, through national effort and international co-operation *and in accordance with the organisation and resources of each State*, of the economic, social, cultural rights indispensable for his dignity.

It would appear that this right, while not limited by right 'of access to', is nevertheless limited by the concept of 'available resources.'

Everyone has the right to work, and to protection against unemployment (Article 23), as well as the right to a standard of living adequate for health and well-being of himself and his family, including food, housing, medical care, social services, and to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control.

Here social security and social insurance are viewed as necessary for smoothing the income cycle and as safety nets for the loss of income due to social risks.

While the UDHR is not a treaty but a non-binding declaration in international law, it is generally accepted that it has attained the status of customary international law. "In this respect, judicial authorities in the domestic arena as well as legislative drafters in the evolution of authoritative legal norms have invoked its provisions"[30].

b) The African Charter on Human and People's Rights (1981)

The African Charter on Human and Peoples' Rights (which South Africa ratified in 1996) pledges member States to eradicate all forms of colonialism from Africa, to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa.

It calls for "particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception and in their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights". (Preamble). The Charter is one of the first international attempts at including socio-economic rights alongside civil and political rights in a single document, as well as providing for the same enforcement method for both[31].

The Charter emphasises the family as the natural unit and basis of society, which should be protected by the State. It further obliges the State to assist the family, which is the custodian of morals and traditional values recognised by the community. The Charter further recognises that the aged and disabled shall have the right to special measures of protection in keeping with their physical or moral needs (Article 18).[32] In addition, it states that individuals shall have duties towards his family and society.

Unfortunately the Charter does not enact the right to social security or to an adequate standard of living. This may be considered a "significant letdown from the promise of the

[30] Goosen C *et al.* "International and comparative social security standards" in Olivier M *et al.* (eds). Social Security Law: general principles. Durban: Butterworth. 1999.
[31] Goosen C *et al.* "International and comparative social security standards" in Olivier M *et al.* (eds). Social Security Law: general principles. Durban: Butterworth. 1999:527-584.
[32] Pillay K, Proudlock P. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

preamble" of the connection between socio-economic and political rights, observes Oloka-Onyango[33].

Perhaps the exclusion may imply that social security as known in modern European societies is a foreign concept to the African context, where traditionally informal social security was considered the responsibility more of the family, community and individual, as opposed to the State's responsibility.

c) The African Charter on the Rights and Welfare of the Child (1990)

The Organisation for African Unity (OAU) noted that the situation of most African children remains critical due to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger.

The African Charter upholds a similar range of rights for children,as does the Convention on the Rights of the Child. However it also places emphasis on the duties of the child, as well as on the preservation and strengthening of positive African moral, traditional values and cultures.

Article 13 refers to the special protection to be awarded to mentally or physically disabled children, in accordance with his/ her special needs, to promote his self-reliance and active participation in the community.

d) The International Covenant on Economic, Social and Cultural Rights (1976)

The South African government has signed the Covenant and is expected to ratify it in the near future. Although the General Comments of the Committee are not legally binding, they constitute an important interpretative guide.

The Covenant recognises the right to work, and calls States to take steps to achieve this right through technical training and guidance, polices and programmes.

[33] Oloka-Onyango. *Struggle for Economic and Social Rights* 42. in Olivier M *et al.* (eds). Social Security Law: general principles. Durban: Butterworth. 1999:550.

Article 9 recognises the right of everyone to social security, including social insurance. It calls for the widest possible protection and assistance to the family. Social security would then be viewed as a basis safety net for families in distress. The Covenant also calls for protection for mothers before and after childbirth and special measures of protection for all children and young persons. Article 11.1 recognises the right of everyone to an adequate standard of living for himself and his family. Thus the Covenant views social security as measures to protect vulnerable persons at vulnerable periods in their lives.

It is useful to pay attention to the General Comments of the Committee on Economic, Social and Cultural Rights, on the realisation of these rights, analysed and explained below by Pillay and Proudlock[34].

The United Nations (UN) Committee on Economic, Social and Cultural Rights has noted that these measures must be "deliberate, concrete and targeted as clearly as possible" towards meeting the obligation of ensuring everyone in need of the right of access to social security. (General Comment No. 3, Para 2)

It should also be noted that the right of access to social security is subject to *progressive realisation* as opposed to *immediate implementation*. Hence, whilst the ultimate goal is to provide social security (as defined above) to everyone in need thereof, due to resource constraints, the Constitution allows for this goal to be realised over a period of time and on a progressive basis. The UN Committee on Economic and Social Rights has interpreted the phrase "progressive realisation" to mean an obligation on the part of the state "to move as effectively and expeditiously as possible to securing its ultimate goal." The Committee has however noted that the phrase "should not be misinterpreted of depriving the obligation of all meaningful content." It has further expressed that "any deliberately retrogressive measures will have to be fully justified." (UN General Comment No 3, Para 9.)

The Committee has further stated that it is incumbent on state parties to ensure a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of

[34] Pillay K, Proudlock P. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

the rights. In order for a state to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to ensure that all resources that are at it disposition in an effort to satisfy, as a matter of priority, those minimum core obligations. (UN General Comment No 3, Para 10). The Committee has further emphasised that in times of severe resource constraints, *vulnerable* members of society can and indeed must be protected. (UN General Comment No 3, Para 11).

The Committee has noted that governments must do more than merely abstain from taking measures, which might have a negative impact of persons with disabilities. "*The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources would need to be made available for this purpose and that a wide range of specially tailored measures will be required*." (UN General Comment No 5, Para 9)

The Committee further notes that social security and income maintenance schemes are of particular importance for people with disabilities and that such support should reflect the special needs for assistance and other expenses often associated with disability. (UN General Comment No 5, Para 28). The Committee also emphasises that everything possible should be done to enable disabled persons to live with their families when they so wish. (UN General Comment No 5, Para 30). The Committee has stressed that children with disabilities are especially vulnerable to exploitation, abuse and neglect and are entitled to special protection. (UN General Comment No 5, Para 32).

e) The International Labour Organisation (ILO)[35]

Early principles governing social security can be found in the ILO Convention 102 of 1952. This Convention is a landmark source in international social security legislation. It covers the nine "classic" benefits that an individual would be entitled to in the event of the applicable risk occurring. The benefits provided for

[35] This paragraph was contributed to by Sipho Gcaza (SAFCD).

in the Convention include: medical/health, sickness, unemployment, old age, employment injury, family (maintenance of children), maternity (pregnancy, confinement and suspension of earnings), invalidity (permanent or long-term inability to engage in any gainful employment/activity) and survivor's benefits (loss of support suffered by a spouse or a child as a result of the death of the breadwinner).

Article 68 of the Convention provides that non-national residents have the same rights as national residents to social security benefits.

The ILO defines social security in the following terms:

> "The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families with children".

The ILO sets minimum standards and outlines the risks to be protected by providing social security. The ILO is somewhat outdated because it has been based on trends of the 50's and some of its terminology is now irrelevant or inappropriate for the present. For example the use of invalidity instead of disability - language usage is not acceptable to persons with disabilities worldwide.

f) Social Security Convention concerning Minimum Standards of Social Security. ILO. (1995).

The Convention sets out minimum requirements for social insurances, including: Medical Care, Sickness Benefit, Unemployment Benefit, Old-Age Benefit, Employment Injury Benefit, and Family, Maternity, Invalidity and Survivors' Benefits. It indicates rates of benefits, classes of persons eligible, the minimum provisioning, periods of protection, and qualifying periods.

The Convention introduces the idea of a general level of social security that should progressively be attained everywhere,

since the system can be adapted to the economic and social conditions prevailing in each country, whatever the degree of its development[36].

g) UN Standard Rules on the Equalization of Opportunities for People with Disabilities. (1993).

The 22 standard rules indicate the preconditions necessary for equal participation, such as awareness, medical care, rehabilitation, and support services. It calls for equal participation in the areas of accessibility, education, employment, income maintenance and social security, family life and personal integrity, culture, recreation and sports, and religion. They then discuss the implementation measures and finally monitoring mechanisms.

Rule 7 says that States should recognise the principle that persons with disabilities must be empowered to exercise their human rights, particularly in the field of employment. Laws must not actively discriminate against disabled persons. The state should actively support their integration into the employment field, and provide training.

Rule 8 says that States are responsible for the provision of social security and income maintenance for persons with disabilities. It should ensure adequate income support where loss of income is due to the disability or disability-related factors. Social security systems should not exclude persons with disabilities, and should include incentives to restore the income-earning capacity of persons, such as through training, assistance in seeking a job, and incentives. Income support should be maintained as long as the disabling conditions remain. Thus social security is not seen purely as cash transfers, but as having a developmental and restorative function.

h) International Guidelines on HIV/AIDS and Human Rights. (UNCHR) 1997.

The guidelines call for the protection of human rights in the context of HIV and AIDS. It emphasises the need for intensified efforts to ensure universal respect for and observance of human rights and fundamental freedoms for all, to reduce vulnerability to

[36] Goosen C *et al.* "International and comparative social security standards" in Olivier M *et al.* (eds). Social Security Law: general principles. Durban: Butterworth. 1999.

HIV/AIDS and to prevent HIV/AIDS related discrimination and stigma.

There are guidelines regarding: the establishment of a national framework for a co-ordinated, participatory, transparent and accountable response; community consultation and enable organisations activities; a review public health laws and make them consistent with international human rights obligations; a review of the criminal and correctional laws and systems; strengthen anti-discrimination laws; regulation of HIV-related goods and services; implementation of legal support services; provision of on-going creative education; translation of human rights principles into codes of professional conduct; the development of monitoring and enforcement mechanisms to guarantee these rights; an co-operation with all relevant programmes.

Guideline 8 says that States should, in collaboration with the community, promote a supportive and enabling environment for women, children and other vulnerable groups by addressing underlying prejudices and inequalities.

As women and children infected and affected by HIV/AIDS are a particularly vulnerable group, the State should provide some basic form of social assistance and/ or social insurance.

i) The Convention of the Rights of the Child[37]

The Convention on the Rights of the Child is the key international law instrument on children's rights which has been signed and ratified by the South African government in 1995. It incorporates civil and political rights as well as a wide range of social, economic and cultural rights. These include the right to health care, education, protection from abuse and neglect, equality and non-discrimination, survival and development, privacy, social security and an adequate standard of living. In recognition of the fact that certain groups of children are more vulnerable than others and often find themselves in need of extra protection, the Convention lists a number of vulnerable categories of children, including children with disabilities, and expressly prohibits discrimination against such children (art. 2).

[37] This section is quoted directly from: Pillay K, Proudlock P. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

The Convention on the Rights of the Child encourages the State's role in providing assistance to parents and legal guardians. It recognises that although parents and legal guardians have the primary responsibility for the upbringing of their children, State parties must render appropriate assistance to parents and legal guardians in the performance of these responsibilities (art. 18). This provision has special significance for children with disabilities, as it obliges the State to assist the parents and caregivers of children with disabilities.

Article 23 of the Convention on the Rights of the Child accords special attention to children with disabilities. It recognises the right of the disabled child to special care and encourages, subject to available resources, assistance which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. It further recognises that such assistance should be provided free of charge, taking into account the financial resources of the parents or others caring for the child. The Convention also emphasises that assistance shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development[38].

Some of the international instruments which impinge on South Africa's social security provisioning are described above, not covered are the relevant SADC Protocols. Below are analyses of South Africa's Constitutional and legislative framework.

[38] Thanks to Pillay & Proudlock for the use of their Document. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

3. South Africa's Constitutional Obligations with regard to Social Security.

a) An Overview of the Rights to Equality and Human Dignity in the South African Constitution

(Pillay & Proudlock 2000).[39]

In examining the constitutional rights of access to social security, it is important that these rights are not examined and analysed in isolation. The Constitution protects a wide range of rights, many of which affect and have implications for the right under discussion. This section will provide an overview of the right to equality and the right to human dignity. Both these rights should underpin the realisation of the rights of people with disabilities.

Section 9 of the Constitution provides for the right to equality. Section 9(1) provides in no uncertain terms that everyone is equal before the law and has the right to equal protection and benefit of the law. The term "everyone" in this provision clearly ensures its application to adults and children with disabilities.

Section 9(2) of the Constitution recognises that equality includes the full and equal enjoyment of all rights and freedoms. As the Constitution provides for economic and social *rights*, section 9(2) of the Constitution effectively ensures that all persons including people with disabilities enjoy these rights on the basis of equality. The section further provides that in order to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be undertaken. As people with disabilities clearly constitute a group that have been disadvantaged by unfair discrimination, they would be included within the ambit of this section. This subsection would accordingly require that the State undertake positive measures to promote equality for adults and children with disabilities.

Section 9(3) of the Constitution further provides that the State may not unfairly discriminate directly or indirectly against anyone on a host of grounds. Direct discrimination refers to laws, policies, practices and conduct that are overtly discriminatory. In other words, it would mean a set of benefits is extended to one group of

[39] Pillay K, Proudlock P. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

people and not to the other. For instance, if the requirements for admission to a particular school specifically stated that children with disabilities would not qualify for admission to the school, this would constitute an example of direct discrimination. This example effectively results in children who are disabled not being able to gain access to a particular school on account of their disability.

Indirect discrimination on the other hand, refers to laws, policies, practices and conduct, though neutral on their face nevertheless have a discriminatory impact on certain groups or individuals. The grounds on which discrimination is prohibited in section 9(3) include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience, belief, culture, language and birth. Notably, this provision expressly prohibits unfair discrimination on the ground of disability.

It should be further noted that section 9(3) prohibits discrimination on *one or more grounds*. This provision recognises that particular individuals or groups of individuals may experience unfair discrimination on a multiplicity of grounds as opposed to unfair discrimination, solely on the ground of disability for example. This point has been aptly made by one of our Constitutional Court Judges, Justice Yacoob in noting: "In this sense, it may be said that the disabled African girl from a poor rural community is, general speaking, much more disabled than a white boy from an affluent, urban background who suffers from more or less the same physical disability." (Yacoob, *The Constitution with reference to the equality clause and what it means for children with disabilities, p4, paper on file with the authors*).

The developing jurisprudence of our Constitutional Court also recognises that the prohibition of unfair discrimination clearly does not require identical treatment in all circumstances. The emerging jurisprudence of the Court supports a substantive conception of equality as opposed to formal equality. Substantive equality demands that we take account of the actual circumstances that people find themselves in and adopt specific measures to address those circumstances. In other words, to echo the words of Justice O'Regan: "insisting on equal treatment in circumstances of established inequality may well result in the entrenchment of that inequality." (*President of RSA v Hugo 1997 (6) BCLR 708 (CC) at para 112).* When this understanding of

equality is applied to children with disabilities, it would effectively demand that we take account of the actual realities and specific needs of people with disabilities, and adopt specific measures to address these needs and realities. This approach would accord with the requirements of the constitutional right to equality and should inform all measures that seek to realise the rights of people with disabilities. For example, taking account of the actual needs of children with visual impairments would demand that educational institutions make provision for Braille and audio taped materials to ensure the right to education of children with visual impairments.

Section 10 of the Constitution provides everyone has inherent dignity and the right to have their dignity respected and protected. The right to human dignity applies to "everyone" which clearly includes people with disabilities. Human dignity has been described as that which gives a person intrinsic worth *(De Waal et al, Bill of Rights Handbook (1998) 176)*. The right to human dignity effectively requires that all persons are ensured access to their fundamental human rights in a way that respects their human dignity.

b) The Right of Access to Social Security The Right of Access to Social Security

Section 27(1)(c) of the Constitution provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

Section 27(2) obliges the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to social security. The wording of this section bears close resemblance to the International Covenant on Economic, Social and Cultural Rights. The question of reasonableness must be determined in relation to the ultimate goal of providing access to social security to all those in need thereof, the special needs of particularly disadvantaged and vulnerable groups (such as children with disabilities) as well as the resources available to the state. Section 27(2) clearly refers to the fact that in addition to legislative measures, financial, administrative, judicial, economic, social and educational measures must be taken. Reference to "other measures" that are reasonable in the context of children with

disabilities would clearly include adequate financial assistance for children in need thereof.

Section 27(2) of the Constitution also makes the realisation of the right subject to the availability of resources. It obliges the state to take reasonable legislative and other measures *within its available resources* to achieve the progressive realisation of the right. The qualifier refers to the fact that even where available resources are demonstrably inadequate, the state should still strive to ensure the widest possible enjoyment of the right under the prevailing resource constraints. (UN General Comment No 3, Para 11). In realising the right of access to social security services, it is important that the available resources are effectively and equitably utilised.

In summary, Sipho Gcaza, of the SAFCD, points out that in writing the South African legislative framework appears progressive and committed to providing social security for all, including persons with disabilities. Yet the constitution and the White paper on Welfare (refer to next section) do not complement each other, and thus the implementation of these two pieces of legislation into actual services remains the root cause of the problem for people with disabilities. Thus the provisioning of Social Security for persons with disabilities at large is always hindered by cost implications for the state, therefore remains the prerogative of the government to provide at the end of the day.

Power is vested in the courts (especially the Constitutional Court) and the Human Rights Commission (in terms of section 184(3) to monitor compliance with, and support, the development of this right. In certifying the text of the Constitution, the Constitutional Court stressed that the socio-economic rights contained in the Constitution are justifiable, even though the inclusion of the rights may have direct implications for budgetary matters.[40]

The Constitution gives the right of access to social security – including the right to social assistance – to everyone. The entitlement of non-citizens to exercise basic rights has been raised in respect of other Constitutional rights, in a number of Constitutional Court cases. Permanent residents are as entitled as citizens to have their fundamental rights protected. The Courts in this regard have struck down distinctions between

[40] *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) par 76-77.

citizens and non-citizens. In the context of social security, this principle is of particular importance to migrant workers who have been granted permanent residence status, and to refugees.

Section 27 of the Constitution expresses the right to social assistance to everyone, and it outlaws discrimination. However, social assistance in the form of disability grants is not paid to persons with disabilities who are non-nationals, even when in fact they have acquired their disabilities while working as migrant workers in South Africa.

4. South Africa's Legislative Framework with Regard to Social Security – Policies and Legislation

POLICIES & DRAFT POLICIES

a. **White Paper for Social Welfare (1997)**
The White Paper sets out the VISION and MISSION of the Department of Welfare in relation to social welfare.

Social welfare refers to an **integrated** and **comprehensive** system of social services, facilities, programmes and **social security** to promote social development, social justice and the social functioning of people.

The paper starts off by setting out the Department's GOALS - the first of which is "to facilitate the provision of appropriate developmental social services to all South Africans, especially those living in poverty, those who are vulnerable and those who have special needs. These services should include rehabilitative, preventative, developmental and protective services and facilities, **as well as social security**, including social relief programmes, social care programmes and the enhancement of social functioning."

The White Paper therefore recognizes that social security is an integral part of the national developmental social welfare strategy, and indeed should be targeted at people with disabilities, as those living in poverty, vulnerable and with special needs.

The Paper sets out the PRINCIPLES upon which all welfare policies and programmes will be based. These include:
1) Securing basic welfare rights
"The government will create the conditions which will facilitate the progressive achievements of every citizen's **right to social security** and social welfare services through a combination of private and public financing methods."
2) Non-discrimination
"Social welfare services and programmes will promote non-discrimination, tolerance, mutual respect, diversity, and the inclusion of all groups in society. Women, **children, the physically and mentally disabled**, offenders, people with HIV/AIDS, the elderly, and people with homosexual or bisexual orientations will not be excluded." *Unfortunately this statement excludes persons with sensory disabilities and is itself discriminatory.*

The AGENDA FOR ACTION lists a number of tasks facing the Welfare Department, one of which is the **restructuring of the social security system.**

An area within social security that is marked for attention is the assessment procedure for grants for people with disabilities. The White Paper says, “Uniform, simplified and more effective assessment procedures for grants for people with disabilities are being developed”. Sustainable and affordable options of social security for families and children will also be developed.

The SOCIAL SECURITY CHAPTER states that of the total South African population, 1.6% receives a disability grant, which is much lower than the percentage of disabled people[41].

The chapter then lists some problems that have been identified with regards to social security for people with disabilities. At the top of the list is the problem, that disabled people’s organizations have generally been excluded from social and economic policy formulation.

The Department’s approach to address the **restructuring of the social security system** includes the following:

[41] It is not clear whether this figure includes children with disabilities

- There will be universal access to an integrated and sustainable social security system. Every South African should have a minimum income, sufficient to meet basic subsistence needs, and should not have to live below minimum acceptable standards. The social security system will also work intersectorally to alleviate poverty.
- The social security system will aim for co-responsibility between employers, employees, citizens and the State.
- Social security is an integral part of the RDP and the government's proposed national growth and development strategy.
- A social security system is essential for healthy economic development, particularly in a rapidly changing economy, and will contribute actively to the development process. In a society of great inequality the social security system can play a stabilising role. It is important for immediate alleviation of poverty and is a mechanism, for active redistribution.
- The social security strategy must mediate the changes in demographic patterns as regards affordability and sustainability. There will be more elderly people in future in addition to the continuing need for the support of broken families. The spread of HIV/AIDS will also increase the demands on the social security budget.
- A social security strategy will build on constructive elements already present, e.g. the determination of the Ministry of Welfare to deal with inefficiency and fraud and the new national commitment to eradicate poverty.

The Department's specific strategy for social security for people with disabilities is also set out. Most of the strategy relates to adults with disabilities:

- The Department of Welfare will hold consultations with the Department of Health about adequate access to health care for people with disabilities.
- The Department of Welfare will be guided by organizations of people with disabilities and representatives of those constituencies who are unable to represent themselves.
- Options will be explored to provide financial support for home caregivers in respect of people with disabilities. An investigation will be conducted to assess care-dependency and grants-in-aid.

- Uniform, simplified and more effective assessment procedures with regard to grants for people with physical, mental and sensory disabilities are being developed.

The White Paper also includes an extensive FAMILY AND LIFE CYCLE CHAPTER WHICH includes a section on disability and children with chronic diseases. It outlines the services, calling for accessibility, changes in attitudes, as well as for social security, grants and support for caregivers of children with disabilities.

The White Paper clearly recognizes the need for continued provision of social security for persons with disabilities and commits the Department to extend welfare services and social assistance to families caring for children with chronic diseases and HIV/AIDS.

However according to the SAFCD this commitment is not adequately reflected in the Constitution, where social security provisioning is limited by progressive realization and available resources.

b. The Minister's Ten Point Plan January 2000. Dept of Welfare.

On 14th January 2000, the Minister of Welfare, Dr Zola Skweyiya, launched a 10-Point Programme of Action for the Welfare Ministry and Department.

The Minister's 10-Point Programme was formulated after an extensive consultation process. In his speech at the launch, the Minister said, "despite many courageous and sensitive responses to the challenges that we face, the welfare system has been failing those who most need its support." He went on to say that "South Africa is experiencing a deep social crisis" and that "we are sitting on a time bomb of poverty and social disintegration".

"Our social policies assume the ability of families and communities to respond to the crisis. Welfare has proceeded as if these social institutions are fully functional and provide the full range of social support that is required to restore the

well being of people. Such a “business as usual” approach cannot continue.”

The Minister lists 10 priorities that need to be addressed over the next five years.

Priority number 3 stipulates that the department will develop a comprehensive social security system that builds on the existing contributory (e.g. UIF, Workman’s Compensation) and non-contributory schemes (eg. child support grants, care dependency grants) and prioritizes the most vulnerable households. The new system must reduce dependency on non-contributory cash payments and give consideration to food security. Part of this comprehensive social security system will be a new Basic Income Grant, which is in the process of being developed. (A task team has been set up to formulate policy and is required to report back to the Minister in July 2000). A new welfare payment and information service will be established to improve the administration of grants.

Priority number 5 states that welfare programmes will include a range of services to support the community-based care and assistance for people living with HIV/AIDS. Particular attention will be given to orphans and children affected by HIV/AIDS. The Department is finalizing a National Strategic Framework for Children Infected and Affected by HIV/AIDS as a priority (see page 17 of this paper).

Priority number 8 says that the Department will redesign services to people with disabilities in ways that promote their human rights and economic development. The Department will also support and advocate for the appropriate production and supply of assistive devices. The Department commits itself to work with people with disabilities to ensure that their needs are met without further marginalizing them.

c. The Integrated National Disability Strategy. 1997. Office of the President.

The Integrated National Disability Strategy (INDS) states that "the present social security legislative framework, its administration and allocation systems; tend to be discriminatory, punitive, insensitive to the specific needs of

people with disabilities, uncoordinated, inadequate and riddled with high levels of fraud".

It goes on to say that an equitable and just social security system that aims to meet the basic needs of people with disabilities who are unable to support and maintain themselves, should include:

- Appropriate assessment mechanisms;
- Accessible information and pay-out facilities;
- Appropriately trained officials and administrative staff;
- Effective feedback mechanisms; and
- A co-ordinated social security safety net.

The paper sets out the policy objectives in this regard:

- To provide for a co-ordinated and equitable system of social security to meet basic needs and to develop capacity for **independent living, self-sufficiency** and **integration** of people with disabilities into the mainstream of society.
- To increase the supply of **accessible information** to consumers on how to access benefits, criteria for qualification and the availability of mechanisms to assist with problems which may arise.

The paper mentions that the majority of people with disabilities in South Africa depend on social welfare grants for their survival. Once receiving the grant, the income of many disabled people and their families still falls far below the estimated subsistence level.

The INDS calls for inter-sectoral collaboration between various departments that administer social security legislation and the re-training of personnel involved in the administration of social security benefits.

d. Draft Strategy on Social Assistance to Persons with Disabilities

The Department of Social Development, the Social Security Directorate, was developing this draft strategy. However, recently MINMEC suggested that it be suspended until the Committee of Inquiry into a Comprehensive Social Security System put forward their suggestions, so that the strategy can be developed in lines with these.

The objectives of the strategy were:

- To contribute towards sustainable living and to remove barriers for those who can work, enabling their integration into mainstream society
- To provide income benefits only to persons who cannot permanently provide for themselves financially
- To increase the supply of accessible information to consumers on how to access benefits, criteria for qualification.

While the principles underlying the strategy include respect for the right of persons with disabilities to their have basic needs met with the provision of appropriate assistance, it also states that it is an attempt to align limited resources available to the basic needs, with emphasis on integration and self-sustainability in the employment market, and provision on services. There was concern among the Disability Sector that this was merely an attempt to cut government spending on Disability Grants, by narrowing eligibility criteria and by supposedly shifting budgets to social development and services. Obviously reducing social assistance can only occur once projects for social development, training and integration are functioning and proven to be effective. There should also be *concurrent* spending on social services with social security spending, rather than an either/ or approach.

The strategy outlines the supportive services that should be available to persons with disabilities, such as allowances for: water and lighting, food, skills training, assistive devices and attendant care allowances. These are important forms of indirect social security and should be provided, in conjunction with social assistance. The current Disability Grant should not be reduced in terms of coverage or amount.

e. The Draft National Strategy Framework for Children Infected and Affected by HIV/AIDS 2000. Dept of Welfare.

The draft document recognizes that the HIV/AIDS epidemic is the principal challenge/threat facing South Africa and that the epidemic will have an enormous impact on children in the next ten years. Appropriate strategies are therefore urgently

required to ensure that the rights of children infected and affected by HIV/AIDS are protected.

The Inter-Ministerial Committee on HIV/AIDS therefore requested that the Welfare Department develop a National Strategic Framework for Children infected and affected by HIV/AIDS in collaboration with all sectors.

The Strategy stresses that when a department drafts policy, legislation and programmes relating to children infected and affected by HIV/AIDS, there are four key rights that should be protected and promoted: survival; protection; development; and participation.

The paper incorporates the principles of the child and youth care system and stresses that these principles must be taken into account when planning intervention strategies for children infected and affected by HIV/AIDS. The principle of community and family preservation is stressed throughout the paper. The principle states that all services and programmes must prioritize the need to have young people remain within the community and family wherever possible. **Such an approach requires that the family is provided with the necessary support and resources to enable them to care for their children.**

The document states that in keeping with this principle, families caring for children infected or affected by HIV/AIDS need to be strengthened. This requires a multi-sectoral and multi-pronged approach which would include linking these families with poverty alleviation.

Of concern is that the document does not specifically state that social security should be provided to persons infected by HIV/AIDS, yet these are particularly vulnerable groups of people whose means of income generation are terminated due to their ill-health. Children both infected and affected by HIV/AIDS should automatically qualify for child support grants.

LEGISLATION AND REGULATIONS AND DRAFT THEREOF

f. The Promotion of Equality and Prevention of Unfair Discrimination Act (No.4, 2000)

The Promotion of Equality and Prevention of Unfair Discrimination Act (No 4, 2000) was passed on the 2nd February 2000. It gives special attention to unfair discrimination on the ground of disability. It recognises that the failure to take steps to reasonably accommodate the needs of persons with disabilities would constitute unfair discrimination. For example, a public school which denies a child in a wheel chair admission to the school because the school does not have ramp, would be failing in its duty to reasonably accommodate the needs of children with disabilities. In this example, the child's right to equality, right to education, the principle of inclusion and the child's right to participate in everyday society would be affected. The Promotion of Equality and the Prevention of Unfair Discrimination Act also imposes a clear and unequivocal duty on the State to take special measures to promote the rights of persons with disabilities (s 28).

The legislation prevents and prohibits unfair discrimination through providing for procedures and substantive requirements for a determination of unfair discrimination to be made. It further provides for the measures through which hate speech and harassment can be eradicated. The Act also promotes equality through enlisting the duties and responsibilities of the State and all individuals.

g. Employment Equity Act (No. 55 of 1998)

"The Employment Equity Act is of great importance in order to ensure equal opportunities for people with disabilities in the workplace" (Truter 1999:196[42]). The legislation not only prohibits discrimination in the workplace on the grounds of disability and other arbitrary grounds, but it also allows for affirmative action measures in favour of persons with disabilities and other groups.

The Act is indeed welcomed by the Disability Sector as progressive and as attempting to rectify the disadvantages faced by people with disabilities in the workplace previously. However, the definition used in the Act of disabled persons is criticized as being based on the medical model and views the

[42] Truter L. "People with Disabilities". In Olivier MP, Okpaluba MC, Smit N, Thompson M. (eds) Social Security Law – general principles. Butterworth. 1999.

impairment as the cause of the inability to attain success or promotion in the workplace.

It must be stressed again that the concept and role or sheltered workshops or employment for persons with disabilities has been rejected by the Disability Sector as retrogressive and archaic – directly opposing full integration into mainstream employment. The responsibility of society is rather to create the environment for persons with differing disabilities to reach their maximum potential and to contribute to the national economy.

h. Compensation for Occupational Injuries and Diseases Act (COIDA) (No. 130 of 1993)

This Act provides for the oldest form of employment-based social security existing in South Africa[43]. The scheme provides for the payment of benefits to workers who are injured on the job or who develop occupational diseases, as well as for survivor benefits for dependants of victims of employment related fatalities.

Unfortunately the Act fails to cover large groups of people who are not in formal employment and domestic workers. Please refer to Chapter Four, Section 3b for a full analysis of COIDA.

i. Social Assistance Act (No. 59 of 1992) and Regulations (1998)

The Social Assistance Act provides for the rendering of social assistance to persons, national councils and welfare organizations.

The Disability Grant for Adults

The Act stipulates qualifying criteria for the disability grant: the applicant must be over the age of 18 years and have a physical or mental disability of no longer than six months duration which renders him or her unfit to provide sufficiently for his or her maintenance. In addition, he/she must:

- Be a South African citizen;
- Be resident in South Africa at the time of the application;

[43] Truter L. "People with Disabilities". In Olivier MP, Okpaluba MC, Smit N, Thompson M. (eds) Social Security Law – general principles. Butterworth. 1999.

- Be a disabled person, who has attained the age of 18 and as a result of the disability is unable to obtain employment or does not have any other resources to support him or herself
- The period of disability for all work must either be permanent or for a continuous period of six months or one year;
- Not refuse to undergo the necessary medical treatment, unless the treatment may be life-threatening;
- The spouse must also comply with the means test;
- Not be maintained or cared for by a state run institution; and,
- Must not be in receipt of another social grant, in respect of him or herself.

The temporary disability grant will continue to be received by the recipient until it lapses. If it is a permanent grant then it will continue until the recipient reaches the age of 60 or 65 years, at which stage it will then be converted into an old age grant. The grant will also lapse on the last day of the month in which the beneficiary dies or when the beneficiary is admitted to a state institution.

The Care Dependency Grant for Children

Section 2 (g) of the Act stipulates that the Minister of Welfare shall make "a care-dependency grant to a parent or foster parent in respect of a care-dependent child."

The Minister is required to make these grants, subject to the provisions of the Act and with the concurrence of the Minister of Finance, out of money set aside by the Provincial Legislature concerned, for the rendering of social grants.

The definitions section (section 1) further explains the meaning of section 2(g) by specifying that a "care-dependent child" means a child:

- between the ages of one and 18 years
- Who requires and receives permanent home care
- due to his or her severe mental or physical disability

A "parent" means the legal parent of the child, while a "foster parent" means any person, except a parent of the child concerned, in whose custody a foster child has been placed under Chapter 3 or 6 of the Child Care Act, 1983, or section

290 of the Criminal Procedure Act, 1977, or a tutor to whom a letter of tutorship has been issued in terms of the Administration of Estates Act, 1965.

"Permanent home care" and "severe disability" are not defined in the Act or the regulations.
Section 6 specifies that any parent who wants a care dependency grant for their child must apply to the Director-General for the grant. The application must be done in the prescribed manner (specified in regulations) and accompanied by the prescribed (specified in regulations) information.

If the grant is refused, the parent may appeal to the Minister to reconsider his or her decision (s.10). Such appeal must be lodged within 90 days of being notified of the unsuccessful applications and must be in writing. The Minister must then confirm, vary or set aside his or her decision. Further appeal mechanisms are not mentioned in the Act. The parent would have to approach an advice office for assistance or institute legal proceedings in order to take the matter further. These proceedings would follow the procedures set out the Promotion of Administrative Justice Act 3 of 2000.

Section 19 says that the Minister may make regulations to flesh out the provisions of the Act. The regulations which apply were published in the Gazette on 31 March 1998[44]. They came into force on 1 April 1998 and replaced the previous regulations that were issued in 1996.

Regulation 5 gives more detail on who is eligible for care-dependency grants:
A parent of a care dependent child shall be eligible for a care-dependency-grant provided that:

- The medical report from a *medical officer*[45] confirms that the child in question is a care dependent child as defined in the Act;
- The medical report has been approved by a *medical pensions officers*[46]; and

[44] Regulation Gazette No. 6134, Vol. 393, No.18771, 31 March 1998, No. R. 418
[45] The regulations (Reg.1) define a **"medical officer"** as any medical practitioner in the service of the State, including a provincial government.
[46] A **"medical pensions officer"** is defined as a medical pensions officer designated or appointed as such by the Director-General.

- The combined income of the family, after all permissible deductions, does not exceed R48 000 per year, or such higher amount as the Minister may from time to time determine.

If the parent is a foster parent, than the income requirement does not apply. In other words, they do not have to pass a means test.

Regulation 8 & 9 set out the procedures to be followed in applications for grants, and list the required documents and information.
Regulation 14 specifies how the income of the family is determined, and Regulation 15 lists the permissible deductions.

Criteria for receiving a grant are stipulated in Regulation 22. The child must remain in the parent's care, with accommodation, food and clothing and necessary medical and dental care. When the child is 6 years old, the parent must take the child to be evaluated to determine his or her educability and trainability for attendance of a school for specialized education, nor must the child be permanently cared for in a state run psychiatric hospital or care and rehabilitation center[47].

The care dependency grant shall lapse when the parent or child dies; when the child reaches the age of 18 years; or when the child is admitted to a state run psychiatric hospital or a care and rehabilitation center (this does not include temporary admission to a psychiatric hospital for a period not exceeding 6 months). (Regulation 24).

The application process involves two forms. Firstly, the application form is a general form for all people applying for a variety of social assistance grants. Secondly, the medical assessment form is specific to the care dependency grant and must be filled in by a medical officer. In the medical form, the medical officer is asked to state his or her opinion as to whether the child is severely, mildly or not at all disabled. He or she is also asked to state his or her opinion as to whether the child requires permanent home care due to his or her

[47] A “care and rehabilitation centre” is not defined in the Act or the Regulations.

severe disability. Finally, the medical officer is asked to give a recommendation as to whether the child needs full-time care, part-time care or is able to care for him or herself.

j. Draft Social Assistance Amendment Bill and Draft Regulations 2000

In all the sections of the proposed Amendments to the Social Assistance Regulations that affect adults with disabilities there are no substantial amendments suggested, as they are all referred to the Disability Task Team's outcomes. However in recent communiqués with the Department was is indicated that this Task Team's activities had been suspended until the recommendations of the Committee of Inquiry into a Comprehensive Social Security System were available.

However, we wish to make the following comments on the definitions, but these would require further legal interpretation, and due to limited timeframe of the research this will not be achievable.

Section (1), which defines a disabled person as follows:
" disabled person" means any person who has attained the prescribed age and is, owing to his/her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her maintenance.

The above definition is not inclusive of all disabled persons as it excludes sensory disabilities, and therefore creates administrative problems for persons with sensory disabilities when wanting to access disability grants.
The committee must investigate the progress of the "Disability Task Team" as it is noted that they will amend this definition.

The other definition, which refers to adults with disabilities is financial award;
" financial award" means a financial award contemplated in section 5.
Section 5 stipulates that the Minister may make financial awards to

(a) any welfare organization which undertakes or takes or co-ordinates organized activities, measures or programmes in the field of developmental social welfare services;
(b) any organization contemplated in section 1 of the Fundraising Act, 1978 (Act No. 107 of 1978)which in terms of its constitution has the care of mentally or psychiatrically disabled persons as one of its objects.

There are no amendments to this definitions that take into account the new "Financing Policy" and Non Profit Organization (NPO) Act. The definition suggests that the Department of Social Development will only fund these organizations that work with specific or selected disabilities.

The definition of grant in aid as stipulated in Section (1) is as follows:
"grant in aid" means a grant made in terms of section 2 (b); which stipulates that the Minister shall make payments of grants,

> 2(b) in addition to a social grant, a grant in aid to or on behalf of any person referred to in paragraph (a) who is in such a physical or mental condition that he requires regular attendance by any person.

The way that the grant in aid is defined above shows again a bias towards selected disabilities, therefore denies access of this grant to persons with other forms of disabilities for example sensory disabilities.

With regard to children with disabilities, the draft amendments propose the following:
The definition of "care dependent child" will be amended by the substitution of the words "permanent home" with the phrase "24 hour care". If this amendment is implemented, the definition for a care dependent child will therefore read as follows:
"Care-dependent child" means a child between the ages of one and 18 years, who requires and receives **24 hour care** due to his or her severe mental or physical disability. The rationale and potential impact of this proposed amendment to the definition needs to be carefully explored.

Regulation 5 “must be amended within the context of the amendments to the child care act”.

Regulation 22 which deals with “special conditions regarding care dependency grants” will be amended by the deletion of sub-regulation (c) - the requirement that a care-dependent child must be evaluated at age 6 to determine whether he or she can attend a school. It would appear that this sub-regulation was not being adhered to generally and therefore became obsolete.

k. Draft Child Care Bill (2000)

The South African Law Commission has been mandated by the Minister of Welfare to draft a new Child Care Act. The SALC Project Committee on the Review of the Child Care Act has published an issue paper outlining the areas it hopes to cover in the new Act.

It has also set up various committees to investigate the different aspects which could be covered. A committee on social provisioning for vulnerable children has been constituted and tasked with investigating all the aspects dealing with social services, social grants and welfare programmes for vulnerable children. This investigation includes looking at the social assistance needs of children with disabilities and chronic illnesses.

The draft bill will include a chapter on Children's Rights which in all probability will re-iterate the rights expressed in the Constitution and the Convention on the Rights of the Child. These rights include the rights of children with disabilities and chronic illnesses to survival, participation, equality, social services, social assistance and education.

CASE LAW

l. Grootboom Case (this Section was contributed by Sandy Liebenberg, Community Law Centre, University of the Western Cape).

A seminal Constitutional Court judgment interpreting the economic and social rights in the Bill of Rights was handed down in October last year, *The Government of the Republic of South Africa and Others v Grootboom and Others* [hereafter, 'the *Grootboom* case'][48] Although this case concerned the right of access to housing (s 26) and the right of every child to shelter (s 28(1)(c)), the approach adopted by the Court is highly relevant to the interpretation of the other socio-economic rights in the Bill of Rights, including the right to social security. It is also the first time that the Constitutional Court has interpreted the children's socio-economic rights enshrined in section 28 of the Constitution.

The *Grootboom* case referred to above arose from the following facts. The applicants, including a number of children, had moved onto private land from an informal settlement owing to the "appalling conditions" in which they were living.[49] They were evicted from the private land that they were unlawfully occupying. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed during the eviction. They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation. The High Court ruled that the appropriate organ or department of state was obliged in terms of section 28(1)(c) of the Constitution to provide shelter to homeless children. It also declared that the parents were entitled to be accommodated with their children in the aforesaid shelter. Although the parents did not have an independent right to shelter, they enjoyed a derivative right based on the constitutional stipulation that a child's best interests are "of paramount importance in every matter concerning the child". It would not be in children's best interests to break up the family unit without justification: "This would penalise the children and indeed their parents who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children."[50] All

[48] 2000 (11) BCLR 1169 (CC).
[49] Described thus by Judge Yacoob in *Grootboom*: "The root cause of their problems is the intolerable conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing" para. 3.
[50] *Grootboom v Oostenberg Municipality and Others* 2000(3) BCLR 277(C), 289 C – D.

three spheres of government (national, provincial and local) appealed to the Constitutional Court against this order of the High Court. [51]

The Constitutional Court started by affirming that all the rights in our Bill of Rights "are inter-related and mutually supporting". As expressed by Yacoob J:

> "There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2 [the Bill of Rights]. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential." [52]

The Court then proceeded to analyse the provisions of section 26 and the obligations that they impose on the State.[53] It held that section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing. In any challenge based on section 26 in which it is argued that the state has failed to meet the positive obligations imposed upon it by section 26(2), the key question will be whether the legislative and other measures taken by the state are "reasonable". The court emphasised that it would not enquire "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent." It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations.[54]

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[51] The SA Human Rights Commission and the Community Law Centre (UWC) intervened jointly as *amici curiae* in the case.

[52] *Grootboom*, para. 23.

[53] Section 26 reads as follows:

(1) Everyone has the right to have access to adequate housing

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

[54] *Grootboom*, para. 41.

A key feature of the judgment is the emphasis that the Court placed on the implementation of legislation and policy. It is not enough to devise reasonable policy and legislative measures aimed at realising socio-economic rights, these must also be reasonably implemented: "An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations." [55]

In assessing the "reasonableness" of the measures adopted by the State, the following would be taken into consideration:

> "In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review. Reasonableness must also be understood in the context of the Bill of Rights as a whole. The right of access to adequate housing is entrenched because we value human beings and want to ensure that they are afforded their basic human needs. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."[56]

[55] *Grootboom*, para. 42.
[56] Paras. 43 - 44.

The Court interpreted the phrase "progressive realisation" in section 26(2) to impose a duty on the state to progressively facilitate the accessibility of housing by examining legal, administrative, operational and financial hurdles and, where possible, lowering these over time. Housing should be made accessible "not only to a larger number of people but to a wider range of people as time progresses."[57] The UN Committee on Economic, Social and Cultural Right's interpretation of the duty of "progressive realisation" in article 2 of the Covenant was cited with approval by the Court. As we noted above, the UN Committee is of the view that the State bears the burden of justifying any retrogressive measures (e.g. cut backs in social programmes) adopted by it. According to the Court, the interpretation of "progressive realisation" by the Committee is "in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived." [58] This paves the way for future challenges to the repeal of legislation or programmes that have the net effect of undermining people's enjoyment of economic and social rights. At the very least, the state should be required to show that it has put in place alternative programmes that guarantee the same or better access to the rights.

The State's positive obligations to fulfil the rights in sections 26 and 27 are qualified by reference to its "available resources." According to the Constitutional Court, this means "that both the content of the obligation in relation to the rate at which is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources."[59] However, the Court did not indicate how it would assess the availability of resources. Would it accept without question the budgetary allocations by the three spheres of government, or would these also be subject to review for their 'reasonableness'? What about macro-economic policy that determines the availability of resources for social spending? The State did not definitely resolve these questions. However, there are a number of indications in the

[57] *Grootboom*, para. 45.
[58] *Grootboom*, para. 45.
[59] *Grootboom*, para. 46.

judgment that the different spheres of government must make reasonable budgetary provision for giving effect to the obligations imposed by the socio-economic rights.

The Court concluded that section 26(2) of the Constitution "requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing."[60] This includes the obligation "to devise, fund, implement and supervise measures to provide relief to those in desperate need." [61] In its order, the Court declared that the State housing programme did not comply with section 26(2) "in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."[62]

The South African Human Rights Commission was given the task "to monitor and report on the compliance by the state of its section 26 obligations in accordance with this judgement."[63]

The Court found a violation of section 26 of the Constitution, but not of the right of children to shelter in terms of section 28(1)(c).[64] The Court held that the obligation created by section 28(1)(c) "can properly be ascertained only in the context of the rights and, in particular the obligations created by sections 25(5), 26 and 27 of the Constitution."[65] Sections 28(1)(b) and (c) must also be read together. Thus 28(1)(b) defines those responsible for giving care while subsection 1(c) "lists the various aspects of the care entitlement" - basic

[60] *Grootboom*, para. 99
[61] *Grootboom*, para. 96.
[62] Ibid.
[63] *Grootboom*, para. 97. The South African Human Rights Commission is one of the 'state institutions supporting constitutional democracy' established in terms of chapter 9 of the Constitution. It has the power:
"(a) to investigate and to report on the observance of human rights; and
(b) to take steps to secure appropriate redress where human rights have been violated." (s 184(2)(a) and (b)).
It is also given a specific constitutional mandate to require relevant organs of state to provide it with information on the measures that they have taken toward the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment (s 184(3)).
[64] Thus reversing the High Court judgment which found no violation of section 26 (government had "produced clear evidence that a rational housing programme has been initiated at all levels of government"), but a violation of section 28(1)(c).
[65] Para. 74.

nutrition, shelter, basic health care services and social services. At this juncture, we can note that although nutrition and shelter are aspects of care that parents traditionally provide to children, "social services" by their vary nature imply some form of public services. It is thus difficult to conceive of social services as aspects of the care that parents provide to their children.

Based on this construction of section 28, the Court went on to hold that the obligation to provide shelter in terms of subsection (1)(c) is imposed primarily on the parents or family, "and only alternatively on the state." The State incurs an obligation to provide shelter only in respect of those children who are removed from their families:

> "It follows that section 28(1)(c) does not create any primary state obligation to provide shelter on demand to parents and their children if children are being cared for by their parents or families." [66]

However, the court emphasised that this did not mean that the state incurred no obligation to children who were being cared for by their families. The state must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by section 28. This obligation would "normally be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the other forms of abuse of children mentioned in section 28."[67] In addition, the state is required to fulfil its obligations to provide families with access to land in terms of section 25, access to adequate housing in terms of section 26 as well as access to health care, food, water and social security in terms of section 27. As we have seen, these sections require the state to provide this access through "on a programmatic and coordinated basis, subject to available resources."[68] The Court specifically referred to "a social welfare programme providing maintenance grant and other material assistance to families in need in defined circumstances" as one of the ways in which the State would

[66] Para. 77.
[67] Para. 78.
[68] Para. 78.

meet its section 27 obligations.[69]

Thus in terms of the *Grootboom* judgment, children who are orphans, abandoned or not in the care of their families for other reasons have a direct claim against the state to be provided with "basic nutrition, shelter, basic health care services and social services" in terms of section 28(1)(c). The justifiability of any limitations imposed by the State on these positive duties would fall to be considered under the general limitations clause, section 36.[70]

As the children in this case were under the care of their parents or families, the Constitutional Court did not grant any relief on the basis of section 28(1)(c).

A final point to note from the *Grootboom* judgment is that the provisions relating to socio-economic rights in sections 26 and 27 are closely interwoven. Thus if under section 27 the state "has in place programmes to provide adequate social assistance to those who are unable to support themselves and their dependants, that would be relevant to the state's obligations in respect of other socio-economic rights " (for example, the right of access to sufficient food).[71]

5. Conclusions

Pillay and Proudlock (2000[72]) note that in reviewing the social security system and ensuring its compatibility with the South African Constitution and relevant international law, it is crucial that the key principles noted above underpin the principles, policies and implementation of the system. In particular, it should be noted that although the Constitution provides for a right of access to social security which is subject to the availability of resources and progressive realisation, this right engenders a minimum core obligation on the State to ensure that *at least* minimum essential levels of the right are fulfilled. Furthermore, international law has reiterated that the needs and rights of *disadvantaged and vulnerable*

[69] Ibid.
[70] See part 2(b) above.
[71] Para. 36.
[72] Pillay K, Proudlock P. "South Africa's Constitutional and International Obligations with regard to Children with Disabilities" May 2000. *Child Health Policy Institute, UCT.*

groups such as people with disabilities should be prioritised in the implementation of this right. It has further stressed that *specially tailored measures* should be taken to meet the needs of people with disabilities and that *additional resources* invariably need to be made available for such purposes. There is also substantial support in international law that there should be an emphasis on persons with disabilities living with their families. The *maintenance of the family unit* is particularly important, in respect of children in general, and specifically children with disabilities for reasons noted below. This would require that principles of equity, special regard for adults and children with disabilities, emphasis on the family unit, participation from the beneficiaries of the grant, an adequate amount of the grant as well as the proper administration thereof inform the review of the social security system.

As can be seen from the description of South African policies and legislation, government policy clearly recognizes the need for comprehensive social security, social assistance and social services for persons with disabilities and commits the government to provide for this need. The legislation and regulations on the other hand take a minimalist and uncoordinated approach which does not reflect the policy plans or commitments.

A great deal needs to be done in devising a comprehensive, integrated and holistic system of social security for people with disabilities, and thus an integrated system of social security law, legislation and policies must be concurrently developed. This will obviously be a long-term process, with stages of development, dependent on the prioritisation of needs of certain groups.

CHAPTER THREE
INTERNATIONAL COMPARATIVE REVIEW

1. Introduction

A variety of social security policy options and systems have been implemented internationally, with differing purposes, targeting, accessibility and administrative structures, and which have had varying degrees of effectiveness. Many lessons can be learned from the experiences of other countries and these could inform the development of a holistic, comprehensive social security system for the South African situation.

Thus, in the process of developing a viable and comprehensive social security system for South Africa it is useful to examine the existing systems and laws of other countries. However "the organic relationship of the law to the society in which it operates makes problematic its transportation from one society to another"[73] and thus we must be cautious of the wholesome importation of non-indigenous prescriptions[74].

This chapter provides a brief description of the relevant aspects of the social security systems of other countries. A thorough comparative analysis of their laws and entire systems was not possible in the short time frame, and the gathering of the information was particularly problematic.

Compounding this problem was the difficulty in finding developing countries with similar socio-economic status to South Africa and with similarly developed social security systems.

Below are descriptions of the relevant aspects of social security provisioning in Australia, Ireland, Mauritius, Nigeria and a few other developing countries. Only aspects, which could be useful and implemented in the South African context, are reported.

2. Australia's Social Assistance For People With Disabilities

[73] Legran P. "The Impossibility of 'Legal Transplants'". *Maastricht Journal of European & Comparative Law.* 1997;4:111.
[74] Von Maydell B. "Social Secuirty Reform in Central & Eastern Europe – Opening Address" in *EISS Yearbook 1992 – Reforms in Eastern & Central Europe: Beveridge 50 years after.*1993:1-15.

Australia provides assistance for disabled adults and the caregivers of disabled adults and children. Australia uses a system identical to that of their Old Age Pension to provide benefits (pensions or grants) to those over the age of 21 who are permanently disabled, as well as to the caregivers for "severely" disabled adults and "profoundly" disabled children. Australia also has a separate system to provide benefits (grants) to permanently disabled citizens age 18-20, and to the caregiver of an adult (16 or older) or child (younger than 16) who has a disability, or is frail aged, or is chronically ill.

This two-tier system provides for differing degrees of severity, from severe to moderate disability and chronic illnesses, with a resultant differential scale of benefits. This appears to be on a needs-based approach.

a) Administration

The Department of Family and Community Services undertakes the general supervision, while Centerlink undertakes the administration of programs through 401 customer service centres and 16 area support offices.

b) Definitions

A child is defined as disabled if determined so by the Child Disability Assessment Tool (CDAT). This tool assesses the child's functional ability in relation to age and also takes into consideration behavior and special care needs.

An adult is defined as disabled if determined so by the Adult Disability Assessment Tool (ADAT).

The CDAT and the ADAT therefore define what encompasses moderate, severe and profound disability. These tools might be extremely useful in informing the development of appropriate South African tools.

The Chronic Illnesses qualifying for assistance are defined by the list of chronic illnesses covered. Again, this list might be of relevance in determining which illnesses the South African system might cover.

In the Australian system, an 'Adult' is a person aged 16 years or more. A 'child' is a person aged less than 16 years.

c) Coverage and Eligibility Criteria

Disability Grants (cash):
Those aged 21years and older receive up to A$178.65 a week for singles and A$149.05 a week for each member of a married couple.
Those aged 18–20 years receive A$132.45 a week for those living away from home, and A$87.15 a week for those living at home.
Single disability pensioners under the age 21 may also be eligible for a Youth Disability Supplement of A$37.45 a week.
Children receive no direct benefits except for a Health Care Card in their name provided under the Carer Allowance.

Care-giver Disability Grants (cash):
The **"Carer Payment"** is an income support payment to a person who provides full time personal care to someone who meets the following criteria.

1. A person with "severe" disability (age 16 years or older).
2. A person with a "moderate" disability who has the responsibility for a child.
3. A child (under 16 years) with "profound" disability.
4. Two or more children (under 16 years) with disabilities who, together, require a level of care that is at least equivalent to the level of care required by a child with a "profound" disability.

To receive a Carer Payment one must also meet income and asset eligibility requirements (the same means test as Australia uses for it's old age pension). A caregiver may not receive the Carer Payment at the same time as they are receiving any other pension or income support payment. A caregiver may however receive the Carer Payment and the Carer Allowance (mentioned below) together. A caregiver is allowed up to 20 hours a week of time to engage in education, training, unpaid volunteer work or paid work. Paid work does count towards the income test. They may also receive the "Pensioner Concession Card".

The **"Carer Allowance"** is a social security payment started 1 July 1999 to people caring for someone who has a disability, or is frail aged, or is chronically ill. It is split into two separate categories, child and adult.

1. Carer Allowance Child: Is for people caring for a person (under the age of 16years) with a disability. It is assessed using the CDAT. Children with a severe condition as determined by a list of severe disabilities and chronic illnesses are "fast tracked" to expedite the receipt of the Carer Allowance.
2. Carer Allowance Adult: Is for people caring for a person (age 16years or older) with a disability. It is assessed using the ADAT.

There is no means test for the Carer Allowance (presumably because of the smaller amount) and those who receive the payment get a flat sum that is subject to annual indexation.

Those eligible for a Carer Allowance receive A$76.40 a fortnight. They also receive the "Pensioner Concession Card" and the Health Care Card.

Respite and Hospitalisation provisions: Under both the Carer Payment and Carer Allowance grant programs caregivers are allowed up to 63 days a year for respite provisions ("temporary cessation of care provisions") without loosing their payment. These programs also provide an additional 63 days a year where the person they care for is hospitalised and the caregiver is involved in the hospital care.

d) Indirect forms of social security

Pensioner Concession Card: Carer Allowance and Carer Payment recipients receive a "Pensioner Concession Card." This card covers the Carer, their partner and any dependant children to concessions on prescription medicine. In addition the State, Territory and local governments give cardholders reductions on transport fares, rates, power bills and car registrations. Cardholders may also be eligible for reductions in optometry and hearing aid consultations as well as be eligible for reduced charges for ambulance services.

Health Care Card: Those who qualify for a Carer Allowance to care for a child with a disability are also entitled to a Health Care Card for that child. Even those children whose functional disability as measured by CDAT does not quite meet the criteria to receive a Carer Allowance may still receive a Health Care Card

if they require at least 14 hours a week of additional care and attention. (Carer's Guide)

3. Ireland's Social Assistance for People with Disabilities

Ireland offers means tested social assistance programs to the persons with severe disabilities requiring full-time home care and their caregivers. There is also a general assistance (not means tested) for those who have children.

a) Administration

The Department of Social, Community and Family Affairs undertakes the administration of the programmes.

b) Definitions

Ireland uses the requirement of full-time home care as the definition for 'disabled', which must be verified by a Meidcal Certificate.
A 'child' is aged 16 years or under.

c) Coverage and Eligibility Criteria

Disability Grants (cash):
The **Disability Allowance** is paid to "residents with limited means, aged 16-66 years and who are physically or mentally disabled and substantially handicapped in undertaking suitable work. The allowance is means-tested.

Those eligible for a Disability Allowance receive 70.50 Irish pounds per week plus 41.20 per dependant adult and 13.20 per dependant child.

Children are covered under a general non-means tested **child benefit** for those under age 16. In the case of a child with a mental or physical disability this benefit is extended until age 19. The amount of the benefit varies depending on the size of the family.

The **Carer's Allowance** is given to residents with limited means, aged 18 or older, living with and caring for disabled (or aged requiring constant attendance) at home. The Carer must not be

otherwise employed and not receiving any other social welfare benefits.

The person receiving care must be so disabled as to need full-time care and attention (medical certification is required), not normally living in a hospital, home or other institution, not be 66 years or over, or under age 66 and getting a Blind Person's Pension, Invalidity Pension or Disability Allowance.

The Carer's allowance is means tested. Caregivers are allowed to participate in 10hours of community service or volunteer work a week as well as 10hours of employment per week although this income is subject to the means test.

d) Indirect forms of social security

Those who receive a Carer's Allowance are entitled to:

1. Butter Vouchers
2. A Companion Free Travel Pass (good for caregiver and receiver)
3. A Free Travel Pass (good for caregiver)
4. May also qualify for assistance under Supplementary Welfare Allowance Scheme

4. Social Security Systems in Developing Countries

Most third world countries and especially other African countries have no social assistance provisioning comparable to South Africa's. Most only have private and contributory social insurance schemes, for the formally employed, and often only providing lump sum payments. Work injury insurances are often contributed to entirely by the employer. While Nigeria does not offer social assistance in the form of cash transfers, its interesting legislation provides a wide range of indirect social security through free and subsidized services.

Of the Southern Africa Development Community (SADC) countries only Mauritius offers a dual universal and social insurance system. Other third world African, Asian and South American systems are presented briefly below.

a) Mauritius

The information below on the Mauritian system was contributed by Lizette Berry (2000[75]).

Mauritius offers an interesting system, and is of a similar socio-economic status as South Africa. However, it has a much smaller population of just over 1 million (versus over 40 million in South Africa) and thus makes provisioning much more achievable.

Mauritius provides an Invalid's Basic Pension and Social Aid (non-contributable, social assistance, cash transfers) under the National Pensions Act and the Social Aid Act, respectively, as well as a Compassionate Carer's allowance to parents of children with disabilities.

The National Pensions Act

This Act makes provision for the working age group. It consists of basic pensions, contributory pensions, and industrial injury pensions, insurance and general provisions.

The Basic Pensions make provision for:

- Persons who have attained the age of 60 receive the basic retirement pension;
- Widows who are under the age of 60 and have not contracted a subsequent marriage;
- Unmarried orphans under the age of 15, or under the age of 20 if the orphan is receiving full-time education;
- Persons caring for orphans receive a guardians allowance;
- Persons eligible for the widow's basic pension, the invalid's basic pension or a survivor's pension who have at least one dependant child shall receive a child's allowance; and
- Persons residing at a charitable institution are not eligible for a basic pension, but can receive an "inmates' allowance".

Invalid's Basic Pension

Eligible citizens of Mauritius are those who have reached the age of 15 years and are under the age of 60, and are certified by a Medical Board as either permanently or substantially

[75] Berry L. in Madotyeni Z. An Overview of social welfare provision of Britain, Germany, Hong Kong and Mauritius. *Paper presented at the Workshop on Social Assistance for Children with Disabilities.* CHPI. 2000.

incapacitated to work to a degree of 60%. These persons who are likely to remain incapacitated for a period of at least 12 months receive a monthly Basic Invalidity Pension. This pension is adjusted annually. This grant does not appear to be means-tested.

This Act also makes provision for an Invalid's Contributory Pension, available to persons with a "substantial" disability who are likely to be disabled for at least 12 months. A Disablement pension is also available to an employee with a disability, and is dependent on the severity of the disability.

The Ministry of Social Security provides a number of free rehabilitative devices (e.g., wheelchairs, hearing aids, spectacles, and walking sticks), to low-income groups who qualify in terms of a stipulated annual income ceiling. The Ministry of Social Security also refunds the transport costs of children with disabilities attending special schools, and their accompanying parents.

An Income Tax Rebate is allowed to the heads of households if any member of the family has a disability. The National Council for the Rehabilitation of Disabled Persons (an umbrella body for NGO's), under the auspices of the Ministry of Social Security provides a monthly stipend to students with disabilities pursuing mainstream secondary and tertiary education. NGO's are provided with a matching grant if they are involved in direct service to persons with disabilities and are required to meet a number of criteria to ensure the accountability and sustainability of the organization.

The Social Aid Act

The Social Aid Act states that any person who is temporarily or permanently incapable of earning his livelihood adequately and has insufficient means to support himself and his dependants shall be qualified to claim social aid. This includes persons who are entrusted with the care of orphans and abandoned children.

The Act makes provision for persons who are in receipt of other benefits (such as the Basic Retirement Pension) and has insufficient means to support themselves and their dependants. *Thus persons may be in receipt of two grants.* Provision is also made for the spouses of persons who are in police custody or serving a term of imprisonment, as well as those who are

admitted to a Government hospital for treatment. The Act also makes provision for private or charitable institutions who provide free board and lodging to persons unable to maintain themselves. These institutions must meet certain prerequisites to become eligible for social aid.
In terms of the Social Aid Act, any parent whose child is:

- "Severely handicapped, mentally or physically, as certified by an approved medical practitioner;
- Is under 15 years of age; and
- Requires 'constant care and attention' may be granted social aid if the annual aggregate income of the parents does not exceed 100 000 rupees.

Compassionate / Carer's Allowance

Any disabled person under the age of 15 years receives a compassionate carer's allowance, which is less than the Basic Invalidity Pension. The objective of the carer's allowance is to assist parents from low-income groups to meet the special needs of their children. The quantum of Allowance and income ceilings is adjusted annually according to the increase in cost of living.

Thus the Mauritian social assistance system for adults and children with disabilities is very similar to the South African system, with definition of disability and thus qualifying criteria determined by a medical assessment, with children receiving a separate grant. However, Mauritius offers more in terms of indirect social security, such as transport and educational subsidies, provision of assistive devices, as well as Tax Rebates.

b) Nigeria

Of particular interest is the "Nigerians with Disability Decree" of 1993. While it makes no specific mention of social security for persons with disabilities, it commits the government to the provision of a range of services and subsidised or free benefits.

It guarantees equal treatment and promotes the full integration of persons with disabilities into the national economy. A disabled person is entitled to a permanent Disability Certificate, which then entitles him or her to the provisions in the decree. These include: free public medical and health services for all disabled persons (this is not limited to primary or basic health care services), no taxation or levies on the purchase or importation of health

materials, provision of prosthetic devices and functionality training and therapy, free transportation by bus or rail, child care services for the children of disabled persons, free education in public institutions at all levels, adequate vocational training, and that not less than 10% of all educational expenditure be committed to the education needs of the disabled at all levels. Regarding education, the Decree in particular provides for the specialised training of teachers, the establishment of specialised institutions, the accessibility of all educational buildings, with specialised equipment and curricula, and calls for on-going improvement of university facilities to the maximum benefit of persons with disabilities.

The Decree establishes vocational training centres in all local government areas. It stipulates that employers shall reserve not less than 10% of their work force for persons with disabilities, and that private employers who employ disabled persons will be entitled to a 15% tax deduction.

With regard to housing, the State shall provide reasonable subsidised housing, apportion not less than 10% of public houses to disabled persons, and make these accessible.

Such indirect social security measures would be appropriate to the South African system, and could be relatively easily implemented and administered, with inter-departmental collaboration.

c) India

India provides a provident fund system (with no government contribution), with deposit links insurance and pension and gratuity systems for industrial workers. Payment is a lump sum, equal to the employer and employee's contribution plus interest. For the Work Injury Programme, the costs are split between employer, employee and the government, with benefits based on the wage class and granted for total or partial disability.

India has a fairly comprehensive Act known as the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act of 1995, which spells out the state's responsibility towards prevention of impairments and protection of their rights in health, education, training and employment and rehabilitation, as well as emphasizing the principles of

equalization of opportunities and integration. However this Act does not call for the right to social security nor social assistance.

d) Pakistan
Pakistan provides a social insurance system for formally employed workers, with no employee contribution, and only 5% contribution of the employer. The State subsidizes the remaining amount. The work injury programme is covered by the employer and only pays out a lump sum.

e) Chile
In Chile there exists both an old social insurance system and a new mandatory private insurance system, with wage and salary workers covered under both, and the self-employed under the old system.

Under the new system the disability pension is granted after certification by a medical committee, and is equal to 50 – 70% of the base salary for total disability with lesser percentage for partial disability.

f) Brazil
Brazil offers a social insurance system for all formally employed and self-employed (based on 20% of income level and time at that level). Criteria for qualification are permanent incapacity to work. There are also 'constant attendant' allowances.
The work injury programme is contributed to entirely by the employer.

g) Ghana
Ghana has a voluntary social insurance system for formally employed and the self-employed. The work injury programme is based on employer liability/ compulsory insurance with a private carrier.

Ghana's Disabled Persons Act of 1993 provides for discrimination, participation and the establishment of a Council to provide rehabilitation and services, but it does not provide for the right to social security for persons with disabilities.

h) Botswana
Botswana has a *universal pension programme* for all citizens but has no disability benefits. Private work injury insurance exists

where the employer bears the full costs, and benefits are a lump sum payments based on full or partial disability.

i) Kenya

The Kenyan Constitution is based on the principles of non-discrimination and equality, and persons with disabilities are entitled to the fundamental rights and freedoms of every human being, as enshrined in the Bill of Rights. Kenya is also party to the African Charter on Human and People's Rights. However, there are no special laws for the preferential treatment of persons with disabilities.

However there have been initiatives to address their special needs through social and general welfare interventions. A National Fund for the Disabled was established which aims to meet the welfare needs of a large proportion of the disabled in need[76]. Unfortunately no further information could be obtained on the eligibility criteria, targeting or assessment procedures for this Fund.

In addition, a Task Team was established in 1993 to review all the laws relating to persons with disabilities and to make recommendations on legislation which focuses on the special needs of persons with disabilities. The Report remains confidential and awaits implementation.

Social security in Kenya incorporates a provident fund system, which covers formally employed workers and a lump sum payment.

j) Uganda

Unfortunately no information on the Ugandan social assistance programmes could be obtained in the short timeframe. It is reported that they have an interesting and effective system.

With regard to their social insurances, a provident fund system exists which offers lump sum benefits to employees. The government does not contribute to this; the employee contributes 5% of earnings and the employer 10% of payroll. It provides for an old age benefit, a disability benefit and a survivor benefit

[76] Social Secuirty Law. January 1999. Suppl. 25:276-279.

5. RELEVANCE AND RECOMMENDATIONS FOR THE SOUTH AFRICAN SITUATION

As can be seen, very few developing countries of similar socio-economic status to South Africa have as developed social security systems, particularly with regard to social assistance provisioning.

This underlies the uniqueness of our system and the achievements gained, particularly considering our Gross Domestic Product in comparison to that of developed countries, as well as our relatively large population living under the poverty datum line.

The systems of Australia and Ireland are presented here as having possible relevance and facing similar problems of fiscal constraints and per capita income.

Australia makes use of a two-tier (or differential benefit) system for children: one for permanent home care for severely disabled persons, the second being a lesser payment for those with disabilities and chronic illnesses who require care but not permanent home care. This assumes an assessment made on level of severity and need, with benefits varying accordingly. Also where the child's degree of disability does not entitle him/her to the grant, he/she may still receive the Health Care Card and benefit from free health services.

These are important possibilities for South Africa where the current Care Dependency Grant is limited to those severely disabled children requiring permanent home care, and fails to provide for the many more children with moderate disabilities and chronic illnesses, whose needs are often greater. A differential scale of benefits based on the need of the applicant would also ensure channelling of resources to the most needy, although being cumbersome to administer. Extra research and thought should go into how to achieve devise and implement such a system.

Australia also has a system for fast tracking applications from carers of children with severe conditions or chronic illnesses, as determined by a list of these. This list could also provide some insight into which chronic illnesses should be covered in South Africa.

The South African Department of Social Development certainly needs to improve its administration of the grants and the turn around time from application to receipt of grants. A system is required to fast-track applications by people, especially children, with severe chronic illnesses, in particular HIV/AIDS. Payment of at least part of the grant could begin immediately upon application.

Both Australia and Ireland make use of a medical assessment to measure disability and to determine eligibility for the grants. The Australian tool might offer some useful guidelines in the development of assessment tools for the new South African system. However, it is suggested that South Africa move away from a medical assessment towards a multi-disciplinary needs-based assessment.

It would be an innovative development to make use of a multi-disciplinary panel which would also include the parents of children with disabilities, as is suggested in the Department of Social Development's Draft Strategy Social Assistance to Persons with Disabilities (2000) and the draft Amendments to the Regulations.

Mauritius offers two grants for different purposes; one to enable permanent home care of the extremely disabled (the invalid's basic pension), and the other as a poverty alleviating measure for those who cannot work or support themselves (Social Aid Grant). It would be useful to ascertain how they measure incapacity to work and what tools or guidelines are used. However, the Disability Sector in South Africa does not support the idea of the grant being only for those unable to work, as the high rates of unemployment in the country contribute more to this state than does the disability type and severity. However, it is suggested that South Africa consider some form of 'basic income' or social relief grant for all those with no source of income, as well as the disability grant to meet the extra needs due to the disability and to maximise the person's opportunities and development.

Regarding indirect social services, many options are obtained from the different countries' experience. Australia makes use of 'cards' while Nigeria uses 'Certificates' which then qualify the bearer to a range of services, including free health care services, free transport, and free or subsidised education, training and housing. Employment securing and incentives or development projects are other possibilities. Mauritius offers an income tax rebate for heads of

households with any members with a disability. While this might encourage families to take care of their disabled members, in reality in South Africa very few of these families fall within the taxable income brackets and therefore would not benefit from such rebates.

Other forms of indirect social security would be most appropriate to South Africa. It would enable greater inter-departmental collaboration and thus share the burden of the cost of the system. The services would also directly benefit recipients, especially children, with possibly less perverse incentive effects. Access to the services could be achieved upon receipt of a card, after passing a means-test. Also interesting is the use of NGOs in Mauritius to administer the educational stipends. NGOs in South Africa could similarly distribute various indirect social security benefits. CBOs would also be better placed to assess child applicants who do not have any adult supervision, i.e. children living on streets, child-headed households.

However it must be stressed that indirect forms should not *replace* the existing social assistance system of cash transfers, but should *compliment* it. Great care must be taken when cutting back on grants on the premise that such social services will be provided. As experience with the phasing out of the State Maintenance Grant has shown, this does not occur. While developed countries do have the infrastructure and human resources to administer these, South Africa's resources are lacking in this regard.

With regard to social insurances, it would appear that schemes through private carriers, that are contributed to by both employer and State, and which pay out a pension amount, versus a lump sum payment, would be the most beneficial. The benefit amount should be linked to the degree of disability and need, as pertinent to the applicant's situation. This should involve a broader assessment than purely a medical certificate.

CHAPTER FOUR
THE CURRENT SOCIAL SECURITY SYSTEM

The Integrated National Disability Strategy (INDS) states that "the present social security legislative framework, its administration and allocation systems; tend to be discriminatory, punitive, insensitive to the specific needs of people with disabilities, uncoordinated, inadequate and riddled with high levels of fraud".

However, when we compare the South African system with those of countries of similar socio-economic status, then it must be acknowledged that the State has managed to create and maintain a system of adequate coverage for a relatively large group of adults with disabilities. However, the provisioning for children with disabilities is far less successful.

This chapter seeks to describe the current provisioning, both of non-contributory systems (or social assistance), and contributory social insurance schemes. With regards to private insurances, time did not allow for a thorough collection of information regarding their coverage and schemes, however, information regarding the discrimination endured by people with disabilities within these is reported.

Finally the gaps, limitations, overlaps within the whole system are highlighted, which directly inform the following chapter which seeks to advise on improvements and options for an integrated, comprehensive social security system.

1. Non-Contributory Systems (Social Assistance)

Social Assistance - the first level provides minimum protection is non-contributory and provides the widest coverage.

The Social Assistance Act provides for three types of financial benefits to indigent individuals, all of which are non-contributory and means test; Social grants, Child-care grants, and Financial awards.

Social grants

Grants are paid to persons who are unable to care for themselves due to old age, disability, or as war veterans. Benefits will only be paid out to those who would be unable to provide for their own

maintenance without such assistance. Various requirements have to be fulfilled before the benefit is paid out. Requirements include:

- Means test must be passed;
- Residence in South Africa at the time of the application, and citizenship;[77]
- Proof of the applicant's – and his/her spouse's – inability to support and maintain him-/herself;
- Proof that a disabled person has a degree of disability which makes him/her unfit to earn a living, and that he/she does not refuse employment within his/her capability; and
- The applicant must not already receive a social grant.

a) The Disability Grant for Adults

Purpose

The purpose of the Disability Grant for adults is income maintenance for persons who cannot provide for themselves due to the disability.

Eligibility Criteria

To qualify for a disability grant the applicant has to be over the age of 18 years and have a physical or mental disability of longer than six months duration which renders him or her unfit to provide sufficiently for his or her maintenance.

In addition, the applicant:

- Must be a South African citizen;
- Must be resident in South Africa at the time of the application;
- Must be a disabled person, who has attained the age of 18 and as a result of the disability is unable to obtain employment or does not have any other resources to support him or herself
- The period of disability for all work must either be permanent or for a continuous period of six months or one year;
- Must not refuse to undergo the necessary medical treatment, unless the treatment may be life-threatening;
- The spouse must also comply with the means test (i.e. Household income is assessed)
- Must not be maintained or cared for by a state run institution; and,

[77] Benefits under the *Social Assistance Act* are only being paid out to South African citizens. This practice is contrary to the Constitutional Court's decision in *Larbi-Odam*, discussed above.

- Must not be in receipt of another social grant, in respect of him or herself.

Benefits
Payment is a monthly pension. The current maximum amount is R520,00[78] (to be increased to R570 as of June 2001) and the amount payable is determined in accordance with a set formula. The maximum amount payable is multiplied by one-and-a-half times the applicant's income if he or she is single (or by half of the applicant and his or her spouse's income) and is subtracted there from. If the amount is less that R100,00, then no grant is payable. In addition, where the applicant's assets exceeds 30 times the maximum annual grant payable (or 60 times the total assets of the applicant and spouse) no grant is payable.

In reality this sliding scale of benefits is rarely used as the majority of applicants fall well below the means-test and therefore qualify for the full amount.

Lapse
The temporary disability grant will continue to be received by the recipient until it lapses if it is a temporary disability grant. If it is a permanent grant then it will continue until the recipient reaches the age of 60 or 65 years, at which stage it will then be converted into an old age pension. The grant will also lapse on the last day of the month in which the beneficiary dies or when the beneficiary is admitted to a state institution.

The grant also lapses when the recipient becomes employed and his/her income rises above the threshold amount of the means-test. This creates perverse incentives and a poverty trap – most people with disabilities receiving the grant are totally dependent upon the amount and cannot seek other forms of income.

Assessment
Assessment is undertaken by a Medical Officer with the final approval given by the Pension Officer, who does not see the applicant. This is highly problematic.

[78] GN No. 20237

Uptake
In January 2001, SOCPEN recorded that almost 650 000 disability grants were paid out, amounting to R370 million.

If between 5% and 12% of the South African population have a disability, then we may guess that approximately 7% have a severe disability, which equates to around 3 million persons, of which nearly 1 million would fall in the poorest quintile (30%).

This would equate then to approximately **60%** uptake of the persons eligible for the grant.

Please refer to the next section for an analysis of the social security expenditure.

b) The Care Dependency Grant for Children

Purpose
The purpose of this grant is to enable parents or foster parents to care for children with physical or mental disabilities in their homes.

Eligibility criteria
A child between the ages of 1 and 18 years may qualify for a Care Dependency Grant if he/she requires and receives permanent home care due to his or her severe mental or physical disability.

Benefit
A monthly pension of R540 (to be increased to R570 as of June 2001) is paid to the parent/s of the child.
The grant is means-tested: the combined annual income of the family after all permissible deductions must not exceed R48 000. (Foster parents are exempt from the means-test). The grants are awarded until the child is 18 years of age, or until the child is no longer cared for by his/ her parents.

Assessment Procedure
A parent or foster parent can apply for a Care-Dependency Grant (CDG) if a medical report from a medical doctor who is employed in a government hospital shows that the child in question needs care and that the parents are in fact able to care for the child at

home. Applications are made at the local welfare offices and in order to qualify, the child must remain in the care of the parents, must have adequate accommodation, food, clothing and medical care, and must be tested to determine whether he/she can attend a specialized school at the age of six years. The child must not be permanently cared for in a government hospital.

While a few children with chronic illnesses, such as epilepsy, may receive the CDG, generally this group of children, including those with moderate disabilities and those affected by HIV/AIDS, are not covered by the current provisioning and receive no form of assistance to meet their extra needs.

Uptake

In April 1999, 17 721 beneficiaries received the CDG, this increased by 30.9% to 23 200 in April 2000, and to 30 737 in January 2001. It is a positive trend that these numbers are steadily increasing, indicating improving accessibility.

This section was compiled by Nicole Barberton (2000[79]):
The following table shows the number of grants that were paid out in different months from April 1997 to March 2000, as reflected in the national SOCPEN system.

Table 1 Number of Care Dependency Grants

	Number of Grants				Percentage change		
	April 1997	**Feb. 1998**	**March 1999**	**March 2000**	**1997 to 1998**	**1998 to 1999**	**1999 to 2000**
					%	%	%
Eastern Cape	1 308	1 996	2 481	4 892	52.6	24.3	97.2
Free State	62	228	574	785	267.7	151.8	36.8
Gauteng	793	1 075	1 523	2 237	35.6	41.7	46.9
KwaZulu-Natal	33	465	5 918	7 990	1309.1	1172.7	35.0
Mpumalanga	29	202	311	889	596.6	54.0	185.9
Northern Cape	51	189	407	582	270.6	115.3	43.0
Northern Province	128	842	1 215	2 216	557.8	44.3	82.4
North West	70	216	636	1 384	208.6	194.4	117.6
Western Cape	421	1 298	2 169	2 730	208.3	67.1	25.9
Total	2 895	6 511	15 234	23 705	124.9	134.0	55.6

Source: National SOCPEN data, National Department of Welfare, Barberton's calculations

[79] **Barberton N. Budgeting Concerns Around The Care Dependency Grant And Rough Estimates Of The Cost Of Extending The Grant To Children Affected By Hiv/Aids**

Revised version of a paper written for the national workshop on Social Assistance Policy for Children with Disabilities and Chronic Illnesses, held on 15 and 16 May 2000.

The last three columns show that the initial increase in the number of beneficiaries (or grants paid) was very high. The rate of increase in take-up then levels off as there are more beneficiaries already on the system than new applicants.

The following is a rough estimate of the take-up for the Care Dependency Grant for each of the provinces. Data on the number of children in South Africa and estimates for the number of severely disabled children is given in the Appendix.

Table 2 Estimated take-up of the Care Dependency Grant (number of grants given as a percentage of the estimated number of severely disabled children in the province)

	1997	**1998**	**1999**	**2000**
	%	%	%	%
Eastern Cape	4.6	6.9	8.4	16.2
Free State	0.7	2.4	5.8	7.7
Gauteng	3.8	5.1	7.0	10.1
KwaZulu-Natal	0.1	1.3	16.7	22.0
Mpumalanga	0.3	1.7	2.6	7.3
Northern Cape	1.6	5.8	12.3	17.2
Northern Province	0.5	3.5	4.9	8.8
North West	0.5	1.6	4.7	10.0
Western Cape	3.3	9.8	16.0	19.7
Total	1.9	4.1	9.3	14.2

Source: Barberton's calculations

The table shows that take-up of Care Dependency Grants has increased considerably in each province from 1997 to 2000. For instance in the North West it has risen from under one per cent to just over ten per cent and in KwaZulu-Natal from under one to over twenty per cent. For the country as a whole over 14 per cent of severely disabled children are currently receiving the Care Dependency Grant. According to Idasa (1999) the take-up for the child support grant in July 1999 was only 4,1 per cent, which means that in comparison there is a higher take-up rate for the Care Dependency Grant at that time.

As in the case of the take-up rates for the Child Support Grant, provincial differences in the take-up rates of the Care Dependency Grant could be linked to the previous access to other grants (in this case the State Maintenance Grant) (Robinson and Sadan referenced in Idasa, 1999).

c) Indirect Social Assistance

The South African government has shown the will to respond to the needs of people with disabilities by working with them in developing the progressive Integrated National Disability Strategy concerning the realization of socio-economic rights of people with disabilities. ***The Constitution of the Republic of South Africa Act 108 of 1996 calls on the state to "respect, protect, promote and fulfill the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and environment."***[80]

The Equality Clause in the Bill of Rights further affirms this. However despite the progress in legislation and the attempts by certain governments departments to speed up service provision to disabled people, the disability sector still faces multiple challenges. Therefore circumstances facing the majority of poor disabled people in particular are bleak, and cultural differences are not clearly understood by individuals and/or organizations when designing programmes or services for people with disabilities and this increases the gaps in service delivery further.

HEALTH

The Sotuh African Human Rights Commission (SAHRC) report (2000[81]) states that, Central to the government's provision of health care services has been the transformation of the public health care sector to a district based service providing primary health care (PHC). District Health Services accounted for one of the largest programme allocation increases in spending. However, a disproportionately high amount of the budgetary increases has been spent on personnel, to the detriment of non-personnel expenditure. Whereas personnel expenditure increased by 32.8% from 1996/1997 to 1998/1999, non-personnel expenditure decreased by 83% over the same period. The distribution of financial resources for health to provinces has resulted in some of the historically poorer provinces experiencing an increased allocation at the expense of some previously favoured provinces.

[80] Section 7(2) of the Constitution of the Republic of South Africa Act 108 of 1996.
[81] SAHRC. Second Economic & Social Rights Report (1998-1999). September 2000.

This particularly affects people with disabilities as they unable to access private health care and are dependent on public health care. Furthermore most disabled people are resident in the rural or peri-urban settings. Primary health care services are almost non existent to disabled people as their needs are catered for at district level due to the facilities are restructuring and the focus is on human resource development. Community Based Rehabilitation (CBR) is not seen as a viable alternative for addressing some of these needs, irrespective of the fact that these are proven good CBR models in the country for example the Department of Health & Disabled People South Africa (DPSA) partnership in Mpumalanga. Indicators for human resources show gross disparities both between the private and the public health care sectors and between provinces.

People with disabilities are forced to use their disability grants to pay for private or public health care, and are therefore completely dependant on social assistance for example unavailability of medicine and medical supplies resulting in numerous hospital visits. The situation is exacerbated by the fact that there is no National Rehabilitation Policy, as the policy has been in a draft format for the four years. Provincial Health Departments are not legislatively obligated to seriously address rehabilitation needs of people with disabilities.

Presently some Provincial Health Strategies are not inclusive of rehabilitation at district level for example rehabilitation services are currently centralized at specialist hospitals and are not available to people outside urban areas. Also most people with disabilities who need assistive devices are without them as they are not easily available, appropriate and affordable. This further results in people with disabilities being dependant on the health system developing secondary disabilities, which makes economic liabilities of the state.

FOOD

Despite the constitutional provisions for the right to food, vulnerability to food insecurity continues to impact on the lives of many South Africans. The challenges that need to be addressed to improve on the right to have access to sufficient food are that, more policies should be developed to target women, children, children & people with disabilities, and people living in rural areas

(including farmers) and informal settlements. The SAHRC report (2000) recommends that:

- School feeding programmes need wider coverage, as the majority of children with disabilities are not found in the formal schooling system and therefore not benefiting from the scheme.
- Addressing the problems of stunting and wasting in children under five, and in particular children with disabilities, as they are vulnerable beyond the age of five.
- Providing an enabling environment for people to gain access to food.

EDUCATION

Educational opportunities are less available and affordable. Service delivery and focus has been mostly on special schools, which are primarily focused on white children with disabilities and the legacy of the past is still carrying over. Schooling for poor disabled children is still limited and most black disabled children do not get education at all, and where there are special schools within their community, the subjects offered are limiting the children from ever going to a high school or a university, or going for formal employment as they are not equipped with skills to work. The current composition and curriculum for poor children with disabilities in these special schools is still inherently flawed. In some provinces there are schools, who, still remain predominantly for white and Indian children.

According to the SAHRC report (2000), the National Department of Education (NDE) has made significant progress in policy developments. The programme on Early Childhood Development (ECD) has reached about 2 800 non-governmental Early Childhood Learning sites serving approximately 70 000 disadvantaged learners.

Despite the progress of the ECD policy, some questions remain unanswered. For example how many disabled children are integrated within these sites, and how many of these sites are specifically targeted towards disabled children. Many children continue to be cared for by their mothers at home, and this results in mothers not being able to be economically active; and ultimately they become solely dependant on social assistance

Furthermore on the report it is stated that, ABET, which addresses the problem of adult illiteracy, is seen by government as an important tool for social participation and economic development. A number of provinces have formal ABET programmes with learning centers for adults and youth. ABET is one the most critical ways of alleviating dependency on social assistance, because it creates opportunities for persons with disabilities to access formal employment, but it is quite evident that almost of all the mainstream learning centers are inaccessible for disabled adults. This results in organizations for disabled people setting up their own learning centers, thereby drawing up on limited resources to operate and maintain these centers.

The report also states that, the Education for Learners with Special Education Needs (ELSEN) policy is meant to make education more responsive and sensitive to learners with special education needs. In KwaZulu-Natal there are 58 ELSEN schools with the necessary support resources and the Western Cape instituted a policy on the inclusion of learners with disabilities into mainstream schools.

The report emphasizes that, the South African Schools Act 84 of 1996 provides for compulsory education for learners between the ages of seven to fifteen years. The adoption of national norms in April 1999 has meant that no learner can be denied education due to inability to pay school fees. Expenditure for education constitutes almost 22%. However, schools spend more money on personnel than on non-personnel issues.

We acknowledge the progress by the Department of Education in terms of mainstreaming learners with special needs, it is however discouraging to note that the is still no National policy in South Africa (i.e. the White Paper on Inclusive Education is still a draft due to lack of financial resources for implementation. A majority of disabled children are still denied their right to education in both mainstream and ELSEN/special schools. In mainstream schools the problems arise from the infrastructure and incompetence of educators to teach learners with special needs.

Within special schools the issue is around the rigid assessment procedures, and another one is that most ELSEN schools are urban based, as a result inaccessible to rural learners with

special needs. Therefore most disabled children of school going age are predominantly cared for at home, dependent on social assistance and are never going to access any educational subsidy. If at 10% of the total education expenditure can be spent on mainstreaming learners with special needs/disabilities, then the current expenditure on specials will decrease significantly.

HOUSING & TRANSPORT

Housing and transportation services are inadequate, as they keep the majority of poor disabled people inside their houses. Currently the mainstream transport services remain inaccessible for people with disabilities, and no access to transport has serious effects on disabled people's integration and economic activity. Physical environment presents people with disabilities with many difficulties, as most facilities have been built by and for non-disabled people without consultation with disability sector.

According to the report, the White Paper on Housing was developed with the principal aims of stabilising the housing environment and providing subsidised affordable homes to the disadvantaged.The amended subsidy scheme allows persons with disabilities access to additional subsidy money for the necessary improvements to their units such as ramps, special doors, handrails and other design interventions.

Access to this intervention for people with disabilities is non-existent and attitudes of administrative staff towards d8isabled people when applying is normally negative resulting in the abandoning the application process.

The NEDLAC Job Summit agreement around housing obligates Department of Housing (DoH) to ensure that 10% of all new units must be accessible to people with disabilities. The problem, however arises at implementation level as accessibility is only limited to physical disability and people with other disabilities do not access this provision. This results in them being "trapped" in their house or residing in informal dwellings where they acquire secondary disabilities. For example a person who has a physical disability, who due to inaccessibility of his/her home falls and sustain a head injury that results in an intellectual disability.

Access to public transport is integral to the independence and development of people with disabilities, but it receives the least attention. There is no National Policy on Access to Transport for people with disabilities, which informs implementation at provincial level. This has lead to organizations for people with disabilities taking this responsibility on themselves and receiving subsidies from the Department of Social Development. The financial resources spent on "specialized" transport is costly and could be used elsewhere if the Department of Transport took its responsibility by ensuring that people with disabilities had accessible public transport that would enable them to actively participate in society. Various initiatives on making public transport accessible for disabled people have been undertaken by some provincial and local authorities, but this is almost useless in the absence of a National Transport Policy that demonstrates the commitment of the ministry towards people with disabilities.

EMPLOYMENT

Employment opportunities are few and far between, or only in the form of sheltered or protective employment. This form of employment furthermore perpetuates the image of disabled people as expensive burdens, for whom special provision must be made.

FUNDING OF DISABILITY PROGRAMMES

The other issue which is critical, that threatens stability and transformation in the disability sector, is funding. Some government departments are still currently funding organizations *for* disabled people but not *of* disabled people. These organisations continue to build institutions, which separate disabled people from their families. It is within these institutions that gross human rights violations occur. In these institutions people with disabilities are not empowered to take action to improve their lives, they become a drain to scarce resources.

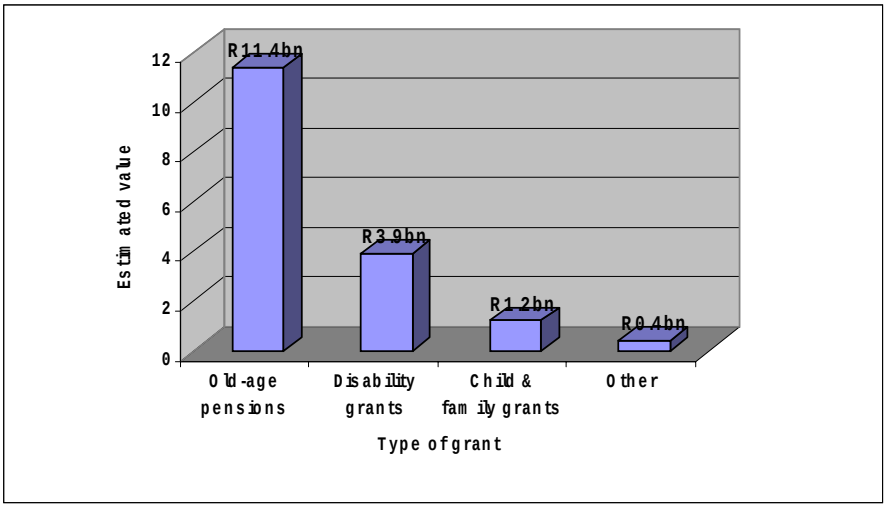
Services for people with disabilities remain very institutionalized and "top down", and people with disabilities still suffer at the mercy of services providers. This means the majority of poor disabled people's needs and potentials remain unmet.

2. CURRENT EXPENDITURE ON DISABILITY

In 1989, the State spent R3,9 billion on social assistance benefits (of which two thirds was spent on old age pensions)[82]. This provisioning was targeted at particular minority racial groups. The Social Security Budget has increased from R16 000 million in 1996/7 to R21 000 million in 1999/00. This represents an increase in total expenditure of only 4.2%, and an actual decrease in per capita expenditure of 2.7%[83]. The social security budget represents about 88% of the total social development budget and about 7,5% of government spending.

While budgetary allocations for social assistance expenditure have risen significantly over the last eleven years, the overwhelming need for social assistance grows at an even greater rate; particularly as racial parity in payments and the new constitutional requirements for equity have increased demands on the welfare budget.

Breakdown of Social Security budgets 1999/2000
Source: Estimate by Budget Office, Dept. of Finance 2000



The Table above indicates that:

- 61% of social security budget is spent on pensions
- 10% on children from poor families
- **25% on grants to people with disabilities, of which 2% is for children**
- **The CDG = 0.5% of total social security budget.**

[82] Tilley. Social Security Notes. UWC. 2000.
[83] COSATU. Submission on Comprehensive Social Security. Dec 2000.

Provincial Expenditure on Disability Grants 1999/2000 – 2000/2001

This Section was contributed by Mastoera Sadan of IDASA.

The following three tables present information on the provincial expenditure of disability grants for the financial years 1999/2000 to 2000/2001. Due to the fact that not all the provinces provide disaggregated data, it is difficult to conduct a complete analysis across the nine provinces.

Table 1. Provincial Expenditure on Disability Grants, Care Dependency Grants and Grant in-aid, 1999/2000 – 2000/2001 (R thousand)

Provinces	1999/2000	200/2001
Eastern Cape	824044	835849
KwaZulu/Natal	774619	689658
Northern Cape	129567	143584
Mpumalanga	1917	7063
Gauteng	395910	419717
Free State	240914	250607
Western Cape	580302	609875
North West Province	289653	285777
Total	3236926	3242130

Source: Provincial Estimates of Expenditure and own calculations, 2000/2001
Note: Table 1 excludes the Northern Province as this province does not provide disaggregated data.

Table 1 above shows the amounts allocated for disability in eight of the nine provinces. The Northern Province is excluded as disaggregated data is not available for this province. From the above table we see that the Eastern Cape allocates the most for disability grants and Mpumalanga the least amount.

Table 2. Disability Grants as a % of Provincial Social Security Expenditure, 1999/2000 – 2000/2001

Provinces	1999/2000	2000/2001
Eastern Cape	23.92	22.76
KwaZulu/Natal	21.69	18.21
Northern Cape	24.07	25.48
Mpumalanga	0.20	0.63
Gauteng	19.53	19.90
Free State	23.06	22.41
Western Cape	31.45	32.45
North West Province	22.39	21.24

Source: Provincial Estimates of Expenditure and own calculations, 2000/2001.
Note: Table 2 excludes the Northern Province, as this province does not provide disagregated data.

From Table 2, we see that the Western Cape followed by the Northern Cape pays out the highest proportion of its budget compared to the other eight provinces. Coverage of the disability grants is skewed because of apartheid and the better infrastructure in these provinces. Coverage in Mpumalanga is extremely low. Disability grants account for approximately 25% of all grants paid out by provincial departments of welfare. The majority of provinces spend 20% to 25% of their social security budget on disability grants.

Table 3 below, illustrates how information should be presented, so that one can compare across provinces. In addition to KwaZulu/Natal, only three other provinces provide disagregated information, these are the Northern Cape, Free State Province and the Western Cape.

Table 3. KwaZulu/Natal Province Disability Grant Budget Allocation by type, 1999/2000 – 2000/2001
(R thousand)

Grant Type	**1999/2000**	**2000/2001**
Disability Grant	722569	652667
Care Dependency Grant	51775	36702
Grants in aid	275	289
Total	774619	689658

Source: Provincial Estimates of Expenditure, 2000/2001

Please note that IDASA are conducting an extensive analysis: "Disabled People's Budget Project", for the Office on the Status of Disabled Persons, in the Office of the Presidency. This will provide extremely valuable information to guide the committee of Inquiry's processes.

3. GAPS, LIMITATIONS, DISCREPANCIES IN THE SOCIAL ASSISTANCE PROVISIONING

a) Legislative Limitations

There are different pieces of policy and legislation which govern the different parts of social security in South Africa. These pieces of legislation tends to contradict each other, for an example the employment equity act (EEA) promotes employment of people with disabilities whilst the social assistance act discourages the people with disabilities from seeking formal employment.

Limitations with the Disability Grant

b) Perverse incentives – Poverty Trap creation

Targetting of the poorest persons through the application of the means-test discourages persons from meaures to raise their own levels of income. They become increasingly more dependent upon the cash grant. Yet although a person with disabilities may be formally employed, added disability expenses incurred are not considered, and inevitably the disability grant becomes a disincentive for persons to work.

c) Purpose

The poverty alleviating purpose of the grants for persons unanble to provide for themselves and their incapacity to work due to the disability, is essential and obviously necessary. However, as mentioned above, there are many other additional costs and needs that are not considered in this narrow purpose of social assistance.

d) Definitions and measurement of disability

In terms of defining disability the legislation on social security seems to have different approaches. On the one hand the social assistance act concentrates on the diagnosis when determining the degree of disability, whilst COIDA gives a percentage based on the number of limbs lost as a result of the injury (refer to Appendix 11. COIDA Scehdule). In terms social assistance act you are seen as permanently disabled if the assessment shows 50% or more disablement based on your diagnosis. Whilst in COIDA the more serious the disability, the higher percentage e.g. the most injury is called a 100% disability (e.g. total paralysis). The smallest injury is called a 1% disability (e.g. loss of a toe).

e) Assessment Procedures

The Assessment procedure is entirely the subjective decision of the the district surgeon, who acts as the Medical Officer, and then the final approval by the State Pensions Officer who has not physically seen the applicant. The medical officer produces a report on the person applying for the disability grant. In that report the district surgeon attempts to reflect the level of disability suffered by the individual as a percentage; where the report reflect more than 50% disablement the person is entitled to receive a disability grant. Thus the right to administrative justice and self-representation for people with disabilities is non-existent.

Persons with hearing impairments are particularly discriminated against in the assessment process as usually the Medical Officer cannot communicate with the applicant.

The assessment is clearly done in the medical framework and does not consider the socio-economic impact of disability. The functional assessment is limited to physiological inabilities and does not extend to environmental factors and barriers to community participation.

The Act identifies disability type by category for eligibility excludes large numbers of disabled people that do not meet the criteria for example sensory and intellectual disabilities, and non-evident disability like epilepsy. In addition, the application forms are designed in such a way that they exclude certain disabilities such as blindness and autism.

The Means-test is inappropriate as it is done only once when an application for a disability grant is made, and it does not take into account changes in income in the lives disabled. The means test is based on the income bracket and ignores your disability specific needs.

f) Review processes

The review of the disability grants is at the discretion of a medical officer, and it discriminates against people with disabilities as it takes away their right to appeal against the decision. In many instances where the person has been assessed as 100% disabled and not fit to work the pensions medical officer who, without seeing the applicant, reject the application. In these

instances the applicant is referred back to the medical officer for another medical report. Where a temporary disability is concerned and a grant is given there are many instances where the grant comes up for review. There is no consistency in terms of the time period applied to when the grants should come up for review and in many instances the grant is simply deleted from the system and in order to receive the grant, the person must reapply.

In the review process the beneficiary is not given an opportunity to make representations about the state of their disability.

Issues/ problems with the Care Dependency Grant (CDG)

g) Purpose of the CDG

- The current purpose of the CDG to enable permanent home care, only for permanently disabled children, is limiting and inadequate, and open to different interpretations.
- The purpose of the CDG should not be poverty alleviation, but rather to meet the extra needs of the child due to the illness or disability. It should be to promote their survival, development, protection and participation.
- Eligibility criteria should be determined by the need resultant from the particular disability of illness, and not dependent on the nature or severity of the disability or illness.
- Attention should be paid to the family context of the child, to improving their environment.

h) Definitions

- There is a lack of clear definitions (disability, severe/moderate, permanent home care) in the current legislation. This has serious implications for inclusion/ exclusion criteria and makes targeting extremely difficult.
- There is lack of clear definition between non-disabling or intermittent chronic illnesses and those that lead to disablement.
- The current definition is purely a medical definition of disability. Economic and social aspects are not considered, nor the 'cost', or burden on the family.

i) Eligibility Criteria

- Currently the CDG benefits only severely disabled children permanently at home, and do not cater for the many others with milder disabilities, or those in day care facilities.
- There is no provisioning at all for children with chronic illnesses, including HIV/AIDS. These children have many additional needs and expenses and caring for them constitutes a large burden on the family's resources.
- It is extremely difficult for care-givers (non-parents and 'non-formal' foster parents) to access the grant. Access should be granted to this group of carers, and should include child-headed households, which will be more common in the future.
- There is a lack of clarity regarding the eligibility of children in daycare centres or LSEN schools for the CDG, and there exists differing practices among different provinces. Uniformity in definition and eligibility criteria is essential.
- There are many children who are not in receipt of the CDG and who attend state subsidized special schools, yet require special home care after school hours and during the school vacation. There are no policy guidelines for special after care.
- There is a lack of clarity with regard to foster parents receiving a foster grant as well as receiving the CDG. Some provinces do allow receipt of both grants. Again, clarification and uniformity in practice are necessary.
  It should be noted that the grants are for different purposes, and therefore these parents should be entitled to both. It would encourage people to foster children with disabilities and HIV/AIDS.

j) Targeting

- **Means-testing:** while means-testing enables targeting of the poorest quintiles, in practice it is rarely used correctly, is administratively demanding and has been reported as demeaning.
- Sometimes the extra expenses incurred by tighter targeting mechanisms cannot be justified and make the programmes unsustainable. The costs of administration could be channelled into providing a universal grant to more recipients.
- It is therefore suggested that eligibility criteria for a Needs Test, which considers the extra needs and costs should determine social assistance incurred by the child due to his/her illness or disability. There could be a scale of benefits depending on the need.

- It is difficult to target expenditure within households, and thus to ensure that the child benefits from the social assistance. Provisioning to the primary caregiver is based on the assumption that if the household benefits, and then the child within the household should also benefit. Other forms of social assistance such as vouchers and subsidies would target the child more directly.

k) Assessment procedures

- Due to the unclear eligibility criteria, the assessment test can be highly subjective and open to the personal interpretation of the Medical Officer.
- There is lack of training and guidelines in the assessment procedure.
- A child can only be assessed and qualify once one year old. This delay can cause suffering to new-born babies requring extra care due to their disability or health condition.
- Currently the assessment is on purely medical grounds. It should also take into account the costs of the required medical treatment, the level of care required (hours & intensity), the costs of assistive devices, specialised clothing and nutritional needs, transport costs and the need for special schooling.
- There are problems identifying what constitutes 'permanent home care'. Perhaps this clause should be removed entirely, and eligibility determined by need.
- Reviewing of cases must also be examined.

l) Administrative Problems common to all the grants

- Delays, inconsistencies and confusion in assessments, demeaning attitudes of officials etc.
- Lack of awareness of the grants available.
- Current systems, delays and frustrations are degrading and embarrassing for carers. Any new system must be streamlined for efficiency and must have due consideration and respect for human dignity.
- Attitudes of welfare officials contribute to the process being humiliating for the applicants. They remain disrespectful and inconsiderate towards recipients of grants.
- Delay and 3-month limitation on back pay: given that applications invariably take at least 4-5 months to be processed.
- Problems with incorrect documentation.

- Lack of awareness of processing requirements and eligibility by welfare officials. This may be due to inadequate training of officials and there needs to be standard and comprehensive training to facilitate a smooth processing procedure.
- There is need for uniform standards, assessment guidelines and procedures, with the possibility of one means-test for eligibility to all the grants.
- Provincial budget allocation and administration must correlate to National standards and norms.
- Efforts must be made to educate the public on their rights, on the grants available and the procedures for accessing these.
- Lack of Inter-sectoral collaboration. This is essential to the development of a holistic approach to the provision of social security. There must be the involvement of all the relevant departments, with perhaps one department to guide and co-ordinate the process.

4. CONTRIBUTORY SOCIAL SECURITY SYSTEMS

Contributory social security schemes are those social insurances, apart from private retirement fund schemes, which are financed entirely from employer and employee contributions. The following are examples of social insurance schemes.

a) ROAD ACCIDENT FUND (RAF)

Introduction

The Road Accident Fund Act of 1996 is a complex legal instrument, which has been the subject of extensive legal interpretation and associated rulings. This summary provides a broad outline of the RAF, which should not be construed a comprehensive interpretation of the Act.

Background To The RAF

The Road Accident Fund is the current third party motor vehicle accident insurance cover. It has evolved from the Motor Vehicle Accident Fund (MVA) and the successor to the MVA, the Multilateral Motor Vehicle Accident Fund (MMF), which was developed to recognise the Apartheid Governments homeland or TBVC States.

Compulsory MVA Insurance was introduced in 1942; this insurance was funded by direct payments from the motorist and was underwritten by private insurance companies. The 1942 Act only came into effect in 1946 due to the Second World War. Its legal basis was a modified version of the law of delict. The most important aspect of this compulsory insurance was the cover provided to victims of motor vehicle accidents, via the recovery of damages generated by the guilty motorist.

Revision To The Funding Base

The most significant amendment to the 1942 Act came into effect with the establishment of the MVA Fund in 1965, when certain insurance companies underwriting the compulsory insurance scheme had insufficient income to cover their claims resulting in their liquidation, while other insurance companies had indulged in malpractice to the detriment of the claimants. From this point on the Fund, underwriting of this business was effected by way of 100% reinsurance of a consortium of insurance companies who

were generating this cover. The Fund thus became the effective risk carrier, whilst the consortium played only an administrative role. The 1972 Act essentially re-enacted the 1942 Act with few amendments.

In the period 1982 to 1984 it became apparent that the Fund had significant operating losses of almost R300 million. To address this deficit the premiums would have to have increased to the order of 300%, a reality that the Apartheid Government of the day considered politically unacceptable. The source of income for the Fund was then converted to fuel levies collected as an integrated price item at the point of sale. These changes were brought about by the 1986 Act, which continued to use a consortium of insurance companies to administer the claims underwritten by the Fund.

TBVC States Incorporation

The 1989 Act and the similar legislation in the respective TBVC States, provided for a uniform compensation in all states, via an agreement the Multilateral Motor Vehicle Accident Fund (MMF) was established. This Fund continued to utilise fuel levies as its source of income, as does the current Road Accident Fund (RAF), which was enacted in 1996 to allow for the re-incorporation of the TBVC States.

Aims Of The RAF

The primary objective of the Road Accident Fund Act of 1996 (RAF), "is the payment of compensation in accordance with the applicable statutes for personal loss or damage wrongfully caused by the driving of motor vehicles"[84].

The current RAF provides a compensation system which, indemnifies the driver of a motor vehicle against the liability incurred as a result of loss or damage caused to a third party or victim of the motor vehicle accident.

Legal Framework

Common law principles of delictual liability are incorporated in the act, with the liability being limited to the extent of negligence of the driver. The legal basis for this liability is derived from the Apportionment of Damages Act 34 of 1956 and the Assessment of Damages Act of 1969. While the provisions of the RAF Act of

[84] Road Accident Fund Act 1996

1996 are fundamentally the same as the 1942 Act, the legislation has undergone 20 sets of amendments.

The legal framework in which the RAF operates and its evolution since the original MVA Insurance was introduced, has generated a legal instrument, which is very complex. This complexity is manifest in the rules and exceptions, which require intricate definitions, which in turn generates a complex legal framework for interpretation and rulings. The RAF compensation system indemnifies the driver of a motor vehicle against the liability incurred as a result of the loss or damage caused to a "third party" or victim. The common law principle of delictual liability forms the basis for any claim and this calls for principle liability to be assigned to driver, even in cases where another driver, passenger or pedestrian may have contributed to the accident. The "guilty party" status then precludes them, their families or dependants from accessing compensation, while apportionment is afforded to the other parties.

Legal Status and Administration of the RAF

The current status of the RAF is linked to the Act, which defines the statutory status of the Fund. Its current funding base makes suggests that it should be publicly accountable, as the levies are a form of indirect taxation. Income which is generated from the fuel levies, is directly allocated to the Fund and is not an allocation from the National Ficus.

The Fund is administered by a Board of Directors who are appointed to provide both the broad administration of the Fund, with a Chief Executive Officer and executive management, who deal with the day-to-day operation of the fund, including the processing claims lodged with the fund. The evaluation of these claims still relies heavily on external legal and specialist support, although the Fund has a significant staff component of its own.

With the exception of the Director General of the Department of Transport, there can be no other no direct appointments from the public sector on the Board of Directors and while there is provision for the appointment of "members who command extensive experience" "in matters related to disabled persons", to date there has been no formal representation of the disability sector, which constitutes a large component of the victims that the Fund seeks to serve. In addition to the financial problems first

reported in 1982, the Fund, its Board and its staff have been the subject of a number of commission of enquiry and investigation, reviewing both the overall management of the fund and the internal operations. The current Statutory Commission of Enquiry, headed by Judge Satchwell, has a broad mandate and is reviewing the possibilities for significant transformation of the Fund. This Commission will be submitting its report later this year.

Who May Claim From The RAF

The fund is open to claims from any victim of a motor vehicle accident who has "sustained a bodily injury or suffered loss due to such injury or death of a person"[85]. The claim has to be based on the negligence of a driver who has generated a motor vehicle accident. In circumstances were the claimant may be regarded as legally incompetent a curator, parent or guardian may lodge the claim with the Fund on behalf of the victim.

Who Is Excluded From Claiming From The RAF

The primary negligent party or the person who caused the accident may not claim from the Fund, as well as the person's spouse and any member of the person's household, or anyone receiving maintenance from the person. A paying passenger travelling on a motorcycle is also excluded. In addition to this it is not possible to claim from the fund where the driver or the owner of the vehicle cannot be determined, as is the case in a typical hit and run accident. While these are the express exclusions there are a number of technical and procedural exclusions, which generally require extensive interpretation and often require legal rulings.

Limitations Placed On The Value Of Compensation

In general there is no limitation placed on the value of the claim within the current RAF and combined settlements in excess of R 5.0 million have been awarded. The value of compensation is however limited to R25 000.00 for any victim who was a passenger in a vehicle, which is operated for reward or as a business passenger of the owner of the vehicle or as a member of a lift club. This limitation includes persons travelling within a legal or illegal commuter vehicle, including unregistered mini-bus taxis.

[85] Road Accident Fund Act of 1996

Apportionment of the Claim

The value of the victims claim is apportioned based on the degree of blame afforded to the victim in respect of the motor vehicle accident. This apportionment is based on the merits of the claim.

Process Of Claiming From The Fund

Claims must be lodged with the fund within a period of three years, with the exception that this period of prescription does not apply to a minor, "any person who is detained as a patient in terms of any mental health legislation"[86] or a person under curator ship.

The claim must be submitted on a prescribed form, which captures all the details of the accident, supported by a detailed medical report, plus any supporting documentation to motivate the damages incurred by the victim. Prescribed forms are also used for the medical report and "any form" "which is not completed in all its particulars shall not be acceptable as a claim under this Act".

Each claim has to be assessed in terms of its validity, ensuring that the claim and associated damages are generated as a result of a bona fida motor vehicle accident. This may seem self evident but the implications are that a number of cases never make the courts as there is inadequate evidence to support the claim at this initial process. In addition to this a large number of motor vehicle accident victims are not aware of the existence of the Fund and the potential to lay claim for proven damages.

The second component of the claim requires that the merits of the case be established. This provides a ruling on the degree of negligence or fault of the driver who is deemed to have caused the accident. It also apportions blame on the victim and this can often substantially reduce the value of compensation paid out. The final apportionment of blame is reduced to a percentage, which is the basis for generating the degree of compensation.

The last component is the assessment of damages, which generates the quantum of the claim. This requires a detailed assessment of the perceived damages, which takes into account

[86] Road Accident Fund Act of 1996

the specific cost already incurred by the victim as well as projected costs, the estimated loss of income, as well as general damages or non financial loss for pain and suffering, disfigurement and loss of amenities of life.

Should the matter not be settled by the Fund within 5 years of the accident the victim is required to start a highly litigious process, which invariably leads to exceedingly high settlement costs. Claims in excess of R 50 000.00 have generally be rejected by the Fund requiring a full process, which includes requiring the engagement of senior council and two sets of specialist advisors, one representing the Fund and the other the victim.

Awards Made by the Fund

In general compensation award can take two forms, the first is in the form of a lump sum payment which can be paid directly to the victim or a curator who will administer the funds on behalf of the victim. The alternative form of award is a certificate, which pays the victim out a lump sum for expenses already incurred and in some cases the general damages, beyond this initial compensation it entitles the victim to claims all proven costs attributed to the accident on an ongoing basis from the fund.

GAPS AND DEFICIEINCIES IN THE ROAD ACCIDENT FUND

Historic Development

The way, in which the RAF has been formulated since the inception of the introduction of the compulsory motor vehicle insurance in 1942, has done little to improve the instrument into an efficient and effective of the method of compensation. In addition to this the primary legal premise that this RAF has been derived from a principle of liability cover for the guilty party. This has created a compensation system, which is out of line with other the compensation instruments such as COIDA, and the UIF.

In general the RAF and the Acts that preceded it have been the subject of extensive criticism, not only related to the alleged misadministration corruption and fraud, but also in response to the complexity and problematic interpretation of the RAF as a legal instrument.

Administration and Policies

The structure of the Fund and the infrastructure which is has developed has done little to improve the efficacy and cost of the process of delivering compensation. The financial management of the fund and the underwriting principles used by the fund, continue to be the subject of debate and criticism. Claiming from the Fund is generally regarded as problematic and it is suggested that the general policy adopted by the Fund is to contest any claim except the lowest levels of compensation.

The focus of the Fund seems to be more akin to insurance practice of minimising the settlement value of a claim, as opposed to providing adequate compensation. This has provided a fertile framework for litigation and protracted legal process, which generally provide settlement years after the date of the accident.

Financing

Unlike other compensation instruments the revenue base for the fund is achieved by levies associated with the consumption of motor vehicle fuel. While in principle it may seem appropriate, comparison with other areas of personal liability, it generates questions related to the equity of this type of taxation.

The large deficits reported by the Fund have generated a great deal of anxiety and confusion regarding the sustainability of the Fund, this has called into question the nature and level of compensation offered by the Fund. The legal fraternity, in representations said to represent the interests of the victims, has rejected continued recommendations that the level of compensation be limited or “capped”.

Legal Basis for Compensation

The common law principle of delictual liability generates a fundamental anomaly that if you are adjudged to be the primary cause of the accident you, your family and dependants cannot claim from the Fund. By contrast the suggested victim can be apportioned up to 49% of the blame and can receive compensation to the value of 51% of their claim. There are other more subtle anomalies in the legal basis for compensation, which cannot be covered by the scope of this summary

The RAF has very significant gaps and anomalies in the scope of cover:

- The victim of a hit and run accident is excluded from accessing the Fund, in a society where public safety is generating an increasingly high level of hit and run accidents, which are tacitly condoned by law enforcement agencies
- Paying passengers on motorcycles are also excluded for reasons which are no longer understood, while paying passengers in a Rickshaw would be covered. This anomaly was very evident in a City such as Durban, where Rickshaws and Tuc-Tuc's operate side by side.
- The fact that the spouse, family and dependants of the deemed guilty party are excluded from access to compensation from the Fund seems to be in direct conflict with the constitutional rights of the individual.

There are a number of less defined forms of exclusion, which are difficult to summarise in a summary of this nature and form the basis of extensive case law.

Limitations

The limitation of R25000.00 placed on victims who were paying passengers in a vehicle used for public transport, lift clubs and passengers in vehicles, as deemed employees, has its basis in expediency related to the level of risk exposure. It offers little equity to these victims, who are often at very high risk in vehicles owned and driven by unscrupulous private transport operators, fly by night businessmen and ruthless farmers. It also impacts on the potential claims from domestic workers

Access to Compensation

The RAF is essentially a system based on a highly legalistic approach to achieving compensation. This makes it inaccessible and beyond the comprehension of most laypersons. The process includes a number of points of exclusion, based purely on not meeting procedural requirements.

The process of claiming has developed a component of the legal fraternity who specialise in processing claims and generate the perception that there is not other viable means of accessing fair compensation from the Fund. This has been reinforced to some extent by the Fund approach and unwritten policy, with respect to

contesting the larger claims. In cases where attorneys have succeeded in securing multi-million rand awards, victims have sacrificed large components of the legal costs to their legal fees.

The perception that the man in the street can only access RAF compensation by engaging legal assistance, saps a large proportion of funds, which should essentially be allocated to compensation. It is currently estimated that on aggregate one third of the compensation is paid in legal costs and administration costs. In certain cases legal professionals are absorbing as much as three quarters of the claim to cover their legal services.

Awards

Once awards have been made the lump sum or certified awards both pose potential problems:

- Lump sum awards are often mismanaged by both the victims or their families who gain access to significant resources, with little understanding of the lifetime expenses of the victim. The result is these resources are depleted within years of the award and the later more problematic years of the victim's life are left unresourced.
- In cases where a curator is appointed to administer lump sum awards, misadministration and fraud are often linked to high administration fees. The inability of victims to generate legal remedies against the curators is exacerbated by their lack of access to their own resources.
- Certified awards generate an onerous obligation on the victim to motivate every component of expenditure in a system that is steeped in bureaucracy. The burden is so severe that most victims give up there right to claim this compensation, as it requires an extensive commitment of time and resources, which are already at a premium.

Overview

Given that the existing RAF is full of anomalies and inconsistencies, linked to mismanagement and the fundamentally unsustainable levels of compensation offered currently. It essential that the primary concept of compensating motor accident victims in a different framework from the main social security system, should not be taken as a given.

In the context of providing a seamless holistic social security frame work, the RAF as an integrated instrument of

compensation generates the fundamental debate, as to why a victim of motor vehicle accident should receive an essentially unlimited level of compensation, while victims of occupational accidents and illness should receive limited levels of compensation and victims of violence receive no compensation at all. In addition to this the basis for compensation is steeped in socio economic stereotypes, where an attorney defending the claim of a daughter of a white affluent family may succeed in persuading a judge that she would have become a famous concert pianist and should be awarded a multi-million rand compensation package. In stark contrast to this a son of a family living on the Cape Flats in an informal settlement, is unlikely to succeed in persuading the legal system that he was destined to become Benny McCarthy and should be compensated accordingly.

b) COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES

(Much of the information presented here come from the Social Secuirty Law Notes, UWC.)

Introduction

While the Occupational Health and Safety Act deals with the prevention of accidents in the workplace, it is acknowledged that there are some types of work which are inherently dangerous. An incident can occur at the workplace that will either constitute a threat to the health of employees, or may endanger their safety. Many countries, including South Africa, have promulgated legislation to protect workers against the risks associated with dangerous work, as well as provide for compensation to workers who are injured at work or contract work-related diseases.

In South Africa, the act that governs compensation for the health risks associated with work is the Compensation for Occupational Injuries and Diseases Act, 30 of 1993.

COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT (COIDA)

COIDA provides for the payment of compensation to employees and their dependants for work-related accidents. COIDA replaced the Workmen's Compensation Act, 30 of 1941 and came into effect on 1 March 1994.

Aim of the Act

- To provide for the compensation of an injured employee or his/her dependants for work-related incidents resulting in injury or death, without having to prove negligence on the part of the employer.

- To provide for compensation to be paid to an employee who contracts an occupational disease.

Effect of COIDA

COIDA has the effect of creating a statutory insurance relationship between an employee and the Compensation Commissioner. The employer is no longer held liable for accidents/injuries/occupational diseases suffered by his/her employees. Rather, the employer's liability is limited to paying contributions (called assessments) to a state fund (the compensation fund). It is from this fund that compensation is paid to injured employees.

Rather than claim from an employer for damages arising from injury or disease in the workplace, an employee can lodge a claim for compensation with the Compensation Commissioner.

Administration of the Act

The Compensation Commissioner receives notices of accidents and occupational diseases, claims for compensation, medical reports and accounts, objections, appeals returns of earnings and payments due to the Compensation Fund. The Commissioner receives money that is payable to the fund, and is also charged with accounting for the receipt and utilisation of such money.

The Director-General:

- inquires into accidents
- adjudicates claims
- issues payments of benefits
- determines degree of disablement
- determines the amount and manner of payment of compensation.

The functions, powers and duties of the Director-General are set out in full in sections 4 – 6A of the Act, and include powers of raising money by way of loans, purchasing and alienating immovable property and subpoenaing any person.

The Compensation Board

The Compensation Board is established in terms of section 10 of

COIDA and is chaired by the Director-General, or a person appointed by him/her to perform this function. The Board consists of a further 15 members which include:
State representatives;
Persons representing the interests of employers;
Persons representing the interests of employees;
Representatives from life assurance companies; and
Representatives from the South African Medical and Dental Council.
There are no disability experts or representatives on the Board.

Who is entitled to compensation?

The following definitions are significant in determining entitlement to compensation under the Act: definition of "employer"; and
Definition of "dependant of employee".

Definitions of "employee"

Section 1 of COIDA states:
"Employee" means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time, or by work done, or is in cash or in kind.

Persons expressly ***excluded*** from the definition:
a person (including a State employee) performing military service or undergoing military training, and who is not a member of the Permanent Force of the SANDF;
a member of the Permanent Force of the SANDF while on "service in defence of the Republic" as defined;
a member of the SAP while in active service
an independent contractor
a domestic employee employed as such in a private household.
(It was not ascertained if all these groups are covered elsewhere – domestic workers are not.)

The Act distinguishes between various groups of **dependants**:
Spouses, Children, A child under the age of 18 years of the employee or of his/her spouse, Other dependants.
The definition of dependant is broad:
In order to qualify as a "dependant" a person must be wholly or partly financially dependant on the employee at the time of the employee's death.

The drafters recognised the "extended family" concept, although the more distant the blood or marriage connection between the employee and the dependant, the greater the discretion of the Director-General.

An **employer** is any person including the State, who employs an employee.

Employers exempt from paying contributions are:
National and provincial spheres of government, including Parliament and the provincial legislatures;
A local authority which has obtained a certificate of exemption under the Workmen's Compensation Act has informed the Director-General in writing within 30 days of the commencement of COIDA that it wishes to continue being exempted;
A municipality as per the Local Government Transition Act.

When does entitlement to compensation arise?

An employee's entitlement to compensation (or that of his/her dependants) arises:

- if an employee meets with an accident which results in his/her disablement or death; or
- if the employee contracts either a listed occupational disease or another disease which has arisen out of and in the course of his/her employment.

What constitutes an accident?

Section 1 of COIDA defines "accident" as an accident arising out of and in the course of an employee's employment and resulting in personal injury, illness or the death of the employee. In other words, only accidents falling within this definition will attract the benefits provided for by the Act.

Point of clarification

If an employee has a weak back and he/she suffers injuries to is/her back when picking up a heavy tool with which he/she is required to work in the course of the working day, this would be regarded as an "accident" for the purposes of the definition. (i.e. it is not necessary that something purely external to the employee should have caused the injury - the unexpected internal, physical displacement of, for eg, vertebrae in the spinal column, may amount to an "accident" if it leads to an injury).

Calculation of compensation & benefits payable

The amount of compensation payable to an employee or his/her dependants is based on two factors:

- the remuneration of the injured or ill employee at the time of the accident or the time when he/she contracted the occupational disease.
- the nature and degree of the disablement. Compensation is calculated on the basis of the temporary or permanent disablement of the employee.

In terms of section 63 of the Act, the Commissioner is directed to calculate an employee's earnings in any manner that he/she considers to be equitable in determining the rate at which an employee was being remunerated at the time of an accident. The value of food and accommodation supplied by the employer; and any overtime payment or other special may be included.

Compensation for temporary disablement

Disablement is of a temporary nature if the disablement will cease after a period of time, and will not permanently affect the employee. The Act distinguishes between two types of temporary disablement: temporary total disablement or temporary partial disablement.

Where disablement amounts to more than 30%, the employee will receive a pension.

Compensation for permanent disablement

Permanent disablement means that an employee never fully recovers from the injury or sickness. Permanent disablement can be either total (an employee is paralysed) or partial (an employee loses a finger).

Compensation for permanent disablement is calculated on the following basis:

- Where the disablement is in excess of 30%, the employee is entitled to receive a pension for the rest of his/her life.
- Where the disablement is 30% or less, the employee receives a lump sum.
- An employee with a permanent disablement of 31 - 100% receives a pension of up to 75% of his/her earnings at the time of the accident.

- The pension received by employees with less severe injuries, is proportionately reduced. For example, an employee with disablement assessed at 100 % will receive a pension of 75%, while an employee with a disablement of 50% will receive a pension equal to 37,5% of his/her earnings.

Point to note
An employee who receives compensation for permanent disablement, but can nonetheless perform some work, is permitted to find employment.

Compensation for dependants
The most significant benefit for dependants is the monthly pension which is paid primarily to widows, widowers and dependant children. The value of the pension for dependants is expressed in Schedule 4 as a proportion of the pension that the deceased employee would have received had he/she been totally permanently disabled. Dependants may not receive pension payments that exceed 75% of the earnings (subject to the relevant minimum or maximum) of the deceased employee. This applies regardless of the number of dependants.

GAPS IN THE PROVISION FOR COMPENSATION OF INJURIES & OCCUPATIONAL DISEASES

Administration
There is no disability expert on the COIDA board who is conversant with the impact of disability and the needs.

A one-year post-humus child with a disability who is waiting for the compensation, cannot in the meantime access a disability grant.

One cannot receive a grant at the same time as receiving payment for COIDA. The delay in payment of COIDA causes suffering in the meantime and the person has no other source of assistance.

Some accidents may fall out of the ambit of what is defined in the Act for example in most cases people with disabilities provide for their own transport to and from work, should they meet with an accident during this process they would automatically not compensated.

Calculation of the Compensation benefits payable, uses a schedule which is inappropriate and punitive to people with disabilities, as it does not consider the following factors when determining the compensation:

- Environmental barriers
- Socio-economic circumstances of the individuals
- The individual's skills base
- The individual's specific support system that might be needed post accident
- Retraining and re-skilling

The composition of the COIDA board is mostly legal and medical, the degree of disability is determined against a financial background without looking at the needs of the person facing that particular disability.

There is also an assumption that people who are permanently disabled will never work again, therefore compensate for the loss. It is not considered what is to happen when the COIDA money runs out, but these people fall back on Social Assistance, and the vicious cycle continues.

Also it is stated that a person has freedom of finding work after receiving compensation, but expected to find work without being re-assessed and retrained to find work, in the other words there is no rehabilitation after compensation.

Claims of the dependants of the deceased employee are calculated on the basis of he/she being permanently disabled (inappropriately determined in the first place), and not from the basis of how the deceased employee would have provided for his or her dependents needs.

Gaps in the Process of Claiming for Compensation

- Notice of the accident must be given within seven days, but the employer in most cases does this at their own discretion (it can sometimes take up to 107 days to report). Who provides for the employee's needs during this time?
- People's right to just administration is often violated because often people do not have access to application forms and the offices are not accessible as they are centralized in Pretoria.

- There are also many disabled people who are injured at work but have never been compensated. Employers are reluctant to report accidents at work due to the levy linked to the number of accidents sustained at work.
- The assessment is solely medical, as the doctor is the only person who can assess the severity of the disability. The outcome of the medical examination is not the only means of assessing the extent of the disability.
- Most people do not have access to appeal hearings due to the fact that the venue, and communication used during the hearing, are not accessible. Therefore this person does not have any recourse when appealing a decision because of the above barriers.

c) UNEMPLOYMENT INSURANCE FUND (UIF)

Introduction

Insurance for unemployment is regulated by the Unemployment Insurance Act[87](currently under revision). Benefits paid out in terms of this Act are designed to cover loss of income and are paid out under one of four categories: unemployment, illness, maternity and adoption. Only lower paid employees qualify for benefits, and a number of categories of employees are excluded from the protection offered by the Act: migrant workers, casual workers, domestic workers and public sector workers. Also excluded are those employed in the informal sector, and those who have never been employed or have been unemployed for long periods of time? The fund is financed by employee and employer contributions, and benefits are paid out for a limited time.

The primary objective of this Act is to provide short-term protection from unemployment. Employees, who have contributed to the Unemployment Insurance Fund, may apply for and receive certain benefits under this Act.

The Act establishes the Unemployment Insurance Fund and sets down the rules for its administration. For this purpose it sets up the Unemployment Insurance Board and insurance benefits committees. In addition to other functions, these bodies have the power to hear and determine appeals against the decisions of claims officers.

[87] 30 of 1966.

Application Of The Act

The Act does not apply to all employees and employers. Employees who do qualify for benefits are referred to as 'contributors'. This includes any person who works under a contract of employment or apprenticeship and has made contributions to the Unemployment of the Fund. The Act applies to all employers who employ contributors. This includes the State and labour brokers.[88]

<u>The following types of workers are not regarded as contributors under s 2 and therefore do not qualify for benefits:</u>

- migrant workers from outside the country who are required to leave once their employment contract has ended;
- anyone earning in excess of R93 288 a year (this amount is altered by the Minister of Labour from time to time);
- casual workers;
- people whose earnings which consist entirely of a share of the takings or who are paid purely on a commission basis;
- people who work on articles or materials provided by an employer but who do not work at a place under the control of the employer;
- part time workers employed for less than full working day or 8 hours in a week;
- domestic servants;
- anyone who works for their spouse;
- seasonal workers who work for less than four months at the same employer;
- public service employees including those employed permanently in national and provincial government;
- employees in Parliament and
- certain workers in the education sector.

Types of Benefits

The following types of benefits may be claimed under the Act:

- Unemployment benefits. This applies to employees who become unemployed.
- Illness benefits.

  This applies to employees who:

  i) become unemployed because of illness,

  ii) receive less than one third of normal weekly earnings on account of an illness; or

[88] A labour broker is a person who employs people to provide certain services to clients. The labour broker is paid by the clients for these services. S/he in turn remunerates his/her employees.

iii) employees who become ill while unemployed.

- Maternity benefits. This is paid to employees who take maternity leave in accordance with the Basic Conditions of Employment Act, a collective agreement or a contract of employment.
- Adoption benefits. This paid to female employees who adopt a child under two years.
- Benefits to dependants of deceased workers.

Payment Of Benefits (S 34)

The amount payable to a contributor is generally calculated at 45% of the normal weekly earnings at which s/he was last employed as a contributor.

An employee is entitled to one week's benefits for every six weeks of employment as a contributor.

Time Periods Affecting An Application For Benefits (S 34)

In order to qualify for benefits, the contributor must have been employed for at least 13 weeks of the 52 weeks prior to the period of unemployment. It is not necessary that this be 13 consecutive weeks.

In addition, you need not have contributing to the Fund during the 13 weeks in order to claim benefits. In other words, even if you have not contributed to the Fund during those 13 weeks, you may still qualify. This is provided that you have previously contributed the Fund and have not exhausted your credit. The claims officer will determine the amount to be paid based on the amount you earned when you last contributed to the Fund.

Application Process

The application for benefits must be made to the claims officer in the area in which the contributor lives. The contributor should also submit the completed record card ('blue card'), which should be obtained from the employer at the termination of employment.

The conditions applied vary between the different categories. This is explained below.

i) Unemployment Benefits (S 35)

A person applying for unemployment benefits must satisfy the claims officer that s/he "is unable to find suitable work although is available and capable of working. The claims officer may also

require the contributor to report and show proof that s/he is actively seeking work.

ii) Illness Benefits (S 36)

A claims officer may authorise another person to make the application on behalf of the contributor who is unable to make the application in person.

The contributor must have been in employment for at least 13 weeks of the 52 weeks immediately preceding the date that unemployment was deemed to have commenced.

iii) Maternity Benefits (S37)

Maternity benefits may be claimed if the contributor was employed for at least 13 weeks of the 52 weeks immediately preceding the expected date of her confinement or date of birth. This benefit is available regardless of whether she is available for and capable of work.

iv) Adoption Benefits (S 37A)

A female contributor who legally adopts a child under the age of two years is entitled to apply for adoption benefits. She must have been in employment for at least 13 of the 52 weeks immediately preceding the date of adoption. This benefit is available regardless of whether she is available for and capable of work.

v) *Benefits for Dependants of a Deceased Contributor (S 38)*

The Act allows dependants to claim the benefits which would have accrued to the deceased contributor had s/he been alive. The benefit allowed is equivalent to the payment that the deceased contributor would have received had s/he been capable and available for work for a period of 26 weeks after the date of death.

Administration Of The Act

The Act makes provision for various structures and officials in order to ensure enforcement of the Act. These include the Unemployment Insurance Board, insurance benefit committees, claims officers and inspectors appointed by the Minister of Labour.

There are too many structures in the adminsitration process, making the system cumbersome and expensive.

GAPS IN THE PROVISIONING OF UNEMPLOYMENT INSURANCE

- Most people with disabilities are in the informal sector either self-employed or working in protective or sheltered workshops

or else work on casual basis due to lack of skills, and they are they are excluded from this form of social insurance.

- The small percentage of people with disabilities that are able to access unemployment insurance are faced with negative attitudes from administrative officials who are implementing the act due to the lack of disability knowledge,
- If a migrant worker is faced with disability, he is not covered by the act, and they also cannot apply for a disability grant. Migrant workers have no support system.
- People with intellectual disabilities may only able to concentrate for a limited time period due to the nature of the disability. They therefore often hold part-time positions, and are denied access to this benefit as part-time work is excluded.
- It is not clear how illness is defined in terms of benefits and therefore if the same person develops a disability resulting from this illness. At present they would only be able to access illness benefits but not social assistance.
- A pregnant disabled women, who exhausts her maternity benefits would not able to access a disability grant.
- On the Insurance Board there is no disability sector nor any other NGO representation.
- The unemployment insurance fund is administrated by a number of structures, which may not be cost effective and efficient.

5. PRIVATE INSURANCE SCHEMES, PENSIONS, PROVIDENT FUNDS

There are many private insurance companies who offer individuals a wide range of insurances to cover for social risks, including disability, illness, retrenchment and death.

The different options are not presented here. However it is important to stress that a very small percentage of persons with disabilities can afford to access these schemes. In addition, they are penalised for their disability by higher premiums, even when the disability type does not incur any extra costs itself.

There are many cases of discrimination and unfair treatment of persons with disabilities in the private insurance arena. However these have not been well documented. The Human Rights

Commission[89] has indicated that it would be willing to undertake data collection regarding this issue, in order to access the actual situation. This would be useful to the process of the Committee of Inquiry.

The middle-income persons with disabilities are also particulary discrimianted against. They do not qualify for the Disability Grant, due to their income, yet they also cannot afford private medical coverage and the higher premiums due to their disability. They cannot access free assistanve devices and so have to pay all their medical and devices expenses themselves. Often, in order to maintain their positions, they must have the latest technology, which is extremely expensive. The maintenance and up-keep costs of this equipment is also high. They in essence have no form of assistance or support available to them.

6. OVERALL SUMMARY OF SYSTEM

The current social security system of social assistance grants, social insurances and private insurances is non-comprehensive and fragmented, with large groups of people not accessing any coverage at all. The provision of indirect social security through services is equally fragmented with poor delivery and accessibility.

Tilley (2000[90]) states that the current system makes rigid distinctions between social insurance and social assistance. It lets those who are, or have been, in formal employment benefit from a fairly well developed social insurance system (for example, unemployment insurance and workers' compensation), while social assistance, in particular the grant system, remains restricted in coverage. This is because it is mainly based on a categorical, means tested approach, which provides meagre protection against the occurrence of a limited number of social risks.

Specifically, the social assistance provisioning caters for a small percentage of persons with disabilities; only about 65% of those in the lowest quintile (poorest 30%). The available disability and illness social insurances only cover those formally employed and contributing to those systems. In reality, less than 1% of persons with disabilities are in the formal labour market, with the majority

[89] Consultative SAFCD workshop. 20 Feb 2001.
[90] Tilley. Social Security Notes. UWC. 2000.

unemployed or in the informal sector, without any form of coverage. The private schemes only cover those who can afford to buy them.

Thus many groups of persons with disabilities are excluded for any form of social security coverage. In addition, access to the different schemes is also dependent on the cause of the disability, and not on the severity of need resulting from the disability, thus also causing certain persons to be excluded. For example, if a teenager sustains a spinal cord injury from a rugby match and becomes a paraplegic, he will be dependant on social assistance for the rest of his life. However, should an adult man sustains a spinal cord injury from a fall at work, this man has access to social insurance. Thus while both have similar needs and expenses due to the disability, their access and benefits are determined by the narrow definitions and resultant inclusion criteria of each system.

The various pieces of legislation regarding social security are non-coherent and non-complimentary. They do not have a coherent concept of social security running throughout, with their relevant variations of purpose and eligibility. They take vastly different approaches to the definition of disability.

For example, the Social Assistance Act concentrates on the medical diagnosis when determining the degree of disability and you are seen as permanently disabled if the assessment shows 50% or more disablement based on your diagnosis. COIDA, however, gives a percentage based on the number of limbs lost as a result of the injury (refer to Appendix 2: COIDA Schedule). Thus the more serious the disability, the higher percentage e.g. the maximum injury is called a 100% disability (e.g. total paralysis). The smallest injury is called a 1% disability (e.g. loss of a toe).

The social assistance and social insurance schemes focus on cash payments, with inadequate attention to re-training, rehabilitation and development programmes. Thus for example COIDA does not allow for the re-training as is stipulated in the Skills Development Act. This results in many employees who are disabled at work becoming unemployable due to lack of new skills and thus eventually become dependent on social assistance.

The fact that a person cannot benefit from both a social grant as well as a social insurance payout creates problems where the individual has no source of income during the protracted waiting period for

claims payouts. The problem of delays in payment (5 to 10 years!) must be addressed urgently.

Administrative problems common throughout the schemes include bureaucracy, inefficiency, inaccessibility, corruption, budget deficits, and demeaning to applicants. There is a lack of disability representation on the assessment structures of all the schemes, these being dominated by the medical and/or legal profession. This focus on a medical diagnosis for eligibility fails to examine the many other relevant factors, such as the social and environmental situation, neither gives attention to the applicant's abilities and potential for training and rehabilitation.

7. Conclusions

In light of the discrepancies, anomalies and exclusions in the current system, Tilley[91] states that indeed there is little solidarity in the current social assistance system, apart from State funding through taxation. The lack of solidarity is made worse by the fact that those in formal employment are usually in a financial position to "top-up" social insurance protection by occupational-based and/or private coverage against risks such as sickness (in the form of medical aid schemes), health, disability and old age.

The monetary value of social assistance, paltry though it is, plays a significant role in alleviating poverty in many areas. It is estimated that about 7 out of every 100 South Africans are in receipt of government social assistance in one or other form. It is apparent from these statistics, and then, that social assistance in this country cannot be regarded simply as a "safety net" to catch that small percentage of people that fall through the cracks of social insurance schemes and private insurance. It is the very means of existence for many South Africans whose social conditions are such that they have little hope of being able to participate in formal sector employment in South Africa.

While budgetary allocations for social assistance expenditure have risen significantly over the last eleven years, the overwhelming need for social assistance grows at an even greater rate; particularly as racial parity in payments and the new constitutional requirements for

[91] Tilley. Social Security Notes. UWC. 2000.

equity have increased demands on the welfare budget. There is increasing pressure on Government to make provision for improved welfare and social security services. A response of Government to this demand is included in the White Paper: “Government will not be able to address the needs of the most disadvantaged sectors of the population by itself. It is crucial to establish a partnership with organisations in civil society. Also legislative and tax reforms to access financial resources and to maximise the contribution of each of the parties will have to be created”.

CHAPTER FIVE
POSSIBILITIES FOR AN INTEGRATED COMPPREHENSIVE SOCIAL SECURITY SYSTEM FOR PEOPLE WITH DISABILITIES

1. Introduction

The South African Constitution and the International Instruments underline the right of persons to social security and social assistance, in particular of vulnerable groups, such as adults and children with disabilities. It is therefore an obligation of the State to make provision, if only through progressive realisation, for these rights. It may also be argued that it is for society to contribute resources to this provisioning, for purposes of solidarity and for ultimate societal stability and economic well-being.

Thorough assessment of the current system has indicated the gaps and limitations in the provisioning, and has identified possible courses of action for the transformation of the system. The White Paper (chapter 7, item 26) suggests that the transformed system be "built on two pillars": the first pillar makes provision for comprehensive social assistance for those without other means to support themselves, such as a general means tested social assistance scheme. The second pillar involves the restructuring of social insurance, including the retirement industry, unemployment insurance and health insurance. There is indeed scope for less fragmentation and improved efficiency in the social insurance system.

The following notes indicate some of the debates and discussions surrounding the provisioning of social security system for persons with disabilities. This chapter attempts to put forward a conceptual framework for this provisioning, indicating the areas which require further research and consultation within the Disability Sector.

It is recognised that the transformation of the social security system is a long-term process. However, there are also short-term measures which can be achieved, through the Amendments to the Social Assistance Act and Regulations. Suggestions are made below that should compliment the coherency of the longer-term transformation ideals.

2. Fundamental Principles

The experience of disability cuts across all spheres of life and throughout the course of human development. There are no absolute measures of protection against disablement. It is a risk that threatens all of society and it is therefore the responsibility of the state to protect itself and its individual members against the contingencies and disadvantages resulting from impairment. Social assistance programmes should be seen as society's and the state's solidarity attempts to soften and smooth their impact.

It must be recognised that people with disabilities are not a homogenous group, but have a wide range of needs and circumstances that contribute to their well-being and opportunities in life. Even persons with similar disability types have completely different social, financial and physical environments that directly impinge on their capacity to function at their maximum potential. This must be recognised when designing a sensitive and holistic social security system that attempts to meet the needs of this group.

3. Legislative Framework

Currently the different pieces of legislation regarding the various schemes of social security are fragmented, sometimes contradictory, and make for gaps in provisioning. Hence the attempt to arrive at a comprehensive system might necessitate one overriding piece of legislation, such as a "Social Security Act", which would incorporate the concept of social security, its aims and objectives, as well as highlighting the purposes and eligibility criteria of each scheme, including the social assistance programmes.

There may still be need for separate legislation and regulations to guide each of these schemes, but these must be consistent with the fundamental principles embodied in the Act. There needs to be some 'linking' and cohesiveness between the different social insurances and the legislation. For example, at present the Employment Equity Act calls for the employment of persons with disabilities, while re-integration into the labour market is not a goal of COIDA. This mix of policy and legislation should ensure that the guidelines set out in the various policies are achieved and enforced through the necessary legislation and regulations.

Particular attention should be paid to clear definitions in the Act/s that can be operationalised in the regulations, with accompanying guidelines for their implementation.

With regard legislation for children, both the Child Care Act and the Social Assistance Act should provide for social secuirty for children with disabilities. A combined approach, with the Child Care Act determining the rights and the package of benefits, while the Social Assistance Act incorporates the finer practical details and regulations, might be useful and ensure a comprehensive approach, but may be cumbersome for implementation.

4. Concept of Social Security

Social security systems should be seen not merely as safety nets and poverty alleviating measures, but also as measures to promote self-sufficiency and independence. The Disability Sector wish to stress that social grants should not be viewed as creating dependency, but rather as enabling development by overcoming many of the barriers faced by persons with disabilities, and thus equalising opportunities. It should be *not* seen as 'social protection' but rather as 'social support', encompassing a wide range of transfers, services, and subsidies.

It is suggested that a uniform concept of social security, in particular for persons with disabilities, be developed that undermines all the social assistance programmes and all the social and private insurance schemes. This would highlight the ultimate objectives of 'social security'. Each scheme would then use this in designing their particular purpose, definitions, coverage and inclusion criteria.

Social Security should protect societal members from and compensate for, the financial consequences of a number of social contingencies or risks, including those preventative and rehabilitative measures. It should be a poverty alleviating measure, a mechanism of active redistribution of resources, and it should ultimately aim at societal solidarity, and at the full development, equality and participation of persons with disabilities (UN Committee on Economic and Social Rights - General Comment No. 3. Para 11.)

5. Definition of Disability

In light of the differing definitions and measurements of disability used in the various pieces of legislation regarding social security, it is suggested that a broad concept of disability be used. This could be adapted for more specific definitions in each scheme, dependent upon the purpose and coverage of each. Obviously the definitions must be 'operationalised' in the Assessment tools, which must accurately translate the concepts within the purpose into simple and measurable criteria.

The broad definition of disability should be developed by the Disability Sector themselves, and thus a consultative process to enable this should be embarked upon by the Committee of Inquiry.

It must also be stressed that the system should not define beneficiaries according to the disability, but should rather determine provisioning in response to need. Thus an accurate and sensitive measurement of need is essential, irrespective of the disability type or severity. It is acknowledged that it is difficult to describe many disabilities without using the traditional medical terms of diagnosis, which automatically imply various other concepts, such as degree of functioning, and the necessary medical interventions required. A medical diagnosis would still be useful in this regard. However, emphasis should be on defining and measuring the situation and needs of the person concerned, highlighting those which are a consequence of the disability.

6. Purposes

Within the broad concept of social security mentioned above, there could be specific purposes of each of the social security measures.

For example, it is suggested that the purpose of social assistance for persons with disabilities be as a poverty alleviating measure to meet their basic needs (for those unable to provide these for themselves), as well as to provide for their extra needs due to the disability, in order to ensure an adequate standard of living that enables their development and integration.

Regarding social assistance for children, the purpose should be to meet the basic needs, and those additional needs of the child that are due to the health condition, to enable the child to lead a full and dignified life, to promote their development and participation, to improve their quality of life and to realise their full potential[92].

The purpose of COIDA could be:
To provide for the compensation of an injured person or his/her dependants for work-related incidents resulting in injury, death, or an occupation disease, in order to enable their full rehabilitation, retraining and re-integration into the labour market.

7. Eligibility Criteria

Persons with disabilities, physical, sensory, mental and intellectual, who cannot provide for their basic needs, should be eligible for the Disability Grant. In addition, it is suggested that persons with chronic illnesses, including HIV/AIDS, should also qualify for the grant.

Eligibility should not be based on the person's 'incapacity' to work, as often their lack of work is due to the poor economic climate and prejudice in the work place, as opposed to their physical or mental inability to perform the job.

Regarding children, all children with moderate and severe disabilities, and chronic health conditions, including HIV/AIDS, should be eligible for the Care Dependency Grant. Children in special schools and day care centres should also benefit. Eligibility should not be based on 'permanent home care'.

The provision of the grant to non-symptomatic HIV positive children would improve their nutritional status and well-being and thus prevent the progression of the illness, also reducing medical costs to the state. The costs of providing AZT to pregnant mothers would reduce the rates of infection of the babies by over 50%. These costs would be far less than the resultant costs in caring for sick children.

<u>Eligibility should be determined by a Needs-based Assessment. This should replace the current Means-testing.</u>

[92] Report on National Workshop: Social Assistance Policy for Children with Disabilities and Chronic Illnesses. CHPI.2000.

8. Assessment Procedures

The Assessment procedure should encompass a 'Needs-Assessment' which considers not only the type and severity of disability or illness, but other social, economic, physical and environmental factors. Persons with the same disability can have very different needs, depending on all these factors and on the support structures and resources available to them.

The Assessment should also focus on the applicant's capabilities, rather than only on the degree of disability, as well as their potential for re-training and re-employment. Relevant training and reintegration measures should also form part of the package of social security.

The ICIDH-2, which is currently being developed by the World Health Organisation, may be useful in indicating the main categories and indices for measurement.

Obviously a sliding scale of benefits would have to be established to cater appropriately for the range of needs presenting.

The Assessment form must include all the disability categories, i.e. physical, mental, sensory and intellectual (currently it only includes physical and mental).

The Assessment should ideally be done by a multi-disciplinary team, including: nurses/ health workers, social workers, and a representative of the disability sector. Alternatively, there should be at least one community-based worker trained in the health and social fields. Assessment must be of the holistic needs of the child, not limited to purely medical aspects.

Administering Officers would obviously require extensive training in the use of the Tool. There must be consistency and clear eligibility criteria in assessment, with adequate guidelines and training for assessors.

An appeal mechanism (such as a Review Tribunal) is necessary for those rejected applications, and must consist of relevant intersectoral representatives.

9. Targeting

The issue of means-testing versus universal provisioning is complex and represents the contradiction, or struggle, between the fundamental rights to social security and the available resources.

Obviously resources are not infinite and personal or company income tax systems are exhaustible as sources of financing for social security systems. Thus efficient allocation of resources to suit the presenting needs of the population is required. In the face of limited resources, some form of targeting measure, to identify the most in need, is essential. However, this must be viewed within the rights-based framework as stipulated by the South African Constitution and the various international instruments, which stress the basic rights of persons with disabilities to social security and social assistance, with progressive realisation and within the constraints of available resources.

It is suggested that a thorough system of 'needs-assessment' as described above, would include analysis of a person's financial situation and their need. Some threshold level of income, in relation to need, would have to be determined. It is suggested that the Disability Sector and economists undertake this.

It is important that the tools of targeting be sensitive and accurate in determining 'need' versus purely a medical diagnosis emphasising categories of disability.

This Assessment should be undertaken at regular intervals, so as to re-assess the level of need and to adjust the benefits accordingly. Sudden termination of grants is strongly discouraged. There should be adequate warning of the gradual 'phasing' out of payments.

10. Benefits

A system making use of a needs-based assessment as described above, would then provide a sliding scale of benefits, to suit the range of presenting needs. This should incorporate cash transfers and other indirect forms of social security.

It is accepted that the provision of cash transfers is an essential means to alleviate poverty, to smooth the income cycle, to meet

those special needs due to the disability, and to overcome barriers that many persons with disabilities face in maximising their development and potential.

For these reasons the Disability Grant and the Care Dependency Grant must be maintained and kept at their current level, if not increased.

The notion of a Basic Income Grant needs further examination and discussion with the Disability Sector. In theory it is accepted as necessary to provide for the basic needs of all persons. However, in view of the discrimination that people with disabilities continue to face and the extra expenses due to their disability, it is felt that they should continue to receive the disability grant, as an additional amount to a basic income grant. This aspect requires further consultation within the Sector.

It is suggested that the Grant-in-Aid be re-examined and its usefulness and relevance determined. In addition, a brief analysis of the Department's provisioning of 'personal assistants' should be undertaken. Some scope of choice in personnel by the beneficiary would be advised.

Indirect Social Services

As the Report has indicated, provision of social services is poor, fragmented and sporadic, depending on geographical location. Persons do not have equal access to services of equal standard. It is strongly recommended that free and subsidised services be provided to persons with disabilities, such as health services, including primary and tertiary services, assistive devices, education, housing, and transport. They could have automatic access to these through a card system.

People with disabilities should also be specifically targeted in development projects and public work programmes. It must be stressed that mainstream services are the preferred option over specialized services for people with disabilities. Sheltered workshops and employment are rejected as being opposed to their full integration. Food and clothing vouchers for children would be beneficial.

Intersectoral collaboration is essential to enable the provisioning of a range of services to ensure holistic coverage that is broader than

purely cash transfers. It may be necessary to re-define the role of the Department of Social Development in providing social security, with more emphasis on the roles and responsibilities of other departments, with their concomitant allocation of resources, personnel and other infrastructure to enable the delivery of relevant services.

However, it must be stressed that indirect social services should be provided *concurrently* with cash transfers. Indirect social security measures should not replace nor reduce the grant amounts, as the infrastructure and intersectoral collaboration is inadequately developed to deliver these at the moment.

With regard to social insurances, attention must be paid to the categories of persons who cannot access the schemes, for whatever reason, and these must be addressed. Eligibility based on need would be an effective measure which would reduce these gaps. Persons, irrespective of their disability type, would be assessed to be in need and thus receive the appropriate benefits. Attention must also be paid to devising schemes to which the informally employed and self-employed can belong.

The Social Security System should provide a comprehensive 'package' of social support for persons with disabilities.
Service delivery should be guided by the fundamental principles of human dignity and rights.

11. Financing

COSATU[93] suggests increasing the progressive taxes, in particular the personal income tax, as well as increasing government's borrowing, moderately. Reallocation of resources from other departments' budgets is encouraged, such as from Defence's. Further macro-economic analyses muct be conducted by the Department of Social Development and appropriate economic institutions.

[93] COSATU. Submission on Comprehensive Social Security. Dec 2000.

12. Short-term Measures

Suggested immediate Amendments to the Social Assistance Act and Regulations and to the Department's Administrative Structures:

- Extend coverage of the Disability Grant and the Care Dependency Grant to persons with chronic illnesses, including HIV/AIDS.
- Remove the clause of 'permanent home care' for eligibility of the Care Dependency Grant.
- Extend the CDG to children with moderate disabilities and those in special schools or day-centres.
- Revamp the current Medical and Assessment forms. Include sensory and intellectual disabilities. The Disability Sector could assist with this process.
- Utilise a multi-disciplinary panel for assessments.
- A Disability representative should be present on all the boards examining claims for insurances.
- Develop clear eligibility criteria and guidelines for Assessors.
- Remove the criteria of spouse's income in the means-test. Only the income of the person with the disability should be measured, not the 'household' income.
- Provide free health services to persons with disabilities.
- Establish a review process for cases at regular intervals.
- Establish an Appeal mechanism.
- Increase the back-pay to 6 months.
- Speed up the time of processing claims for grants and insurances.
- Educate the public on the social security available to them.

13. Administration

There needs to be some form of central, inter-departmental structure to monitor the implementation of the social security system, with adequate power and commitment to ensure the attainment of the above principles and objectives. The IDCC structure, initiated by the OSDP, might be useful.

There must be effective inter-sectoral collaboration, with the burden of providing the social security system shared among other departments, such as Health, Education, Housing and Transport.

Greater attention must be paid to decentralizing the system and making it more accessible to persons with disabilities, especially to children.

Bureaucracy must be minimised where possible, and general administration procedures improved. The delays in all the systems must be addressed urgently, with systems for monitoring developed.

14. The role of NGOs

Grass-roots organisations and community structures could be responsible for identifying adults and children in need, in assisting with the assessment and application processes. These structures could also assist in the pay-out of grants, particularly for those children with no adult supervision or care.

Partnerships between government and the Disability Sector would be extremely useful. Obviously training and the necessary structures to enable this efficiently would need to be devised. But these would greatly enhance the Department of Social Development's current administrative procedures.

15. Conclusion

This Chapter has attempted to highlight some of the issues and concerns regarding the transformation of the Social Security System. These all require further research and consultation with the Disability Sector before their implementation.

CHAPTER SIX
OTHER AREAS REQUIRING RESEARCH & CONSULTATION

- Accurate prevalence data of disabilities and chronic illnesses in children and adults.
- Evaluation of the effectiveness of the current DG and CDG - its targeting, administrative efficiency and impact on the lives of the recipients.
- Full economic analysis of costs involved in the proposed extension of the DG and CDG to adults & children infected by HIV/AIDS.
- Economic analysis of not providing social assistance to persons with chronic illnesses & HIV/AIDS, e.g. Hospitalisation costs.
- Exploration of options for fast-tracking applications for persons with severe illnesses, with HIV/AIDS.
- A needs analysis of people with the various chronic illnesses, and the costs incurred.
- Feasibility analysis of providing a basic grant, with an additional amount (or vouchers/ subsidies) for extra costs incurred for the person's needs.
- Development of a Needs-Based Assessment Tool. The appropriateness of the ICIDH-2 should be examined.
- Examination of the possibility of developing a single means-test for all the grants, which must also be adapted according to the number of dependants a household may have.
- Explore and develop minimum standards and norms for social security for persons with disabilities.

Further Consultation with the Disability Sector is required on all the options for developing a comprehensive social security system. In particular, discussions must be held on:

- The definition of disability (broad, general and acceptable to under pin all the social security schemes and legislation)
- The Needs-based Assessment tool
- The Means-Test in the interim period
- The Basic Income Grant

CHAPTER SEVEN CONCLUSION

This research project has attempted to collect and collate information regarding the current situation of persons with disabilities, the relevant international instruments pertaining to social security, the current South African legislative framework, international social security, and the existing South African social security system, including social assistance, social insurance and private insurance schemes.

Despite the difficulties experienced by the Research Team due to the limited time-frame and the problems in obtaining information, this Report nevertheless represents a substantial body of evidence regarding current social security provisioning for people with disabilities in South Africa. In addition, it presents some of the conceptual issues upon which the Disability Sector have reached some consensus.

The Report does not claim to have been a consultative process, but within the short-time frame, certain NGO representatives were engaged to advise the process. There is need therefore for further extensive consultation with the Disability Sector, particularly in the aspects relating to the translation of the conceptual options presented here into structures and processes that can be implemented.

The Child Health Policy Institute and the South African Federal Council on Disability wish to thank the Committee of Inquiry for this opportunity to make submission to the valuable process of transforming our social security system. We trust that these findings shall inform and be included in your deliberations.

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APPENDICES

Provincial Welfare and Social Security Expenditure on Disability and Care Dependency Grants 1999/2000 - 2000/2001
Complied by Mastoera Sadan, IDASA.

Eastern Cape Province

	1999/2000	2000/2001
Total Budget	**15946198**	**17924252**
Welfare Budget	3676418	3950911
Social Security Allocation	3444526	3672389
Disability Grant and CDG Allocation	***824044***	***835849***
Care Dependency Grant Allocation		
NB the EC does not disaggregate the DG and CDG		

KwaZuluNatal Province

	1999/2000	2000/2001
Total Budget	18804214	21672177
Welfare Budget	3796905	4064420
Social Security Allocation	3571990	3787478
Disability Grant CDG and grants in aid Allocation	***774619***	***689658***
Disability Grant Allocation	722569	652667
Care Dependency Grant Allocation	51775	36702
Grants in aid	275	289

Northern Cape Province

	1999/2000	2000/2001
Total Budget	**2249930**	**2512535**
Welfare Budget	601708	634270

Disability Grants as a % of the Provincial Social Security budget, 1999/2000 - 200/2001

Provinces	**1999/2000**	**2000/2001**
Eastern Cape	23.92	22.76
KwaZulu/Natal	21.69	18.21
Northern Cape	24.07	25.48
Mpumalanga	0.20	0.63
Gauteng	19.53	19.90
Free State	23.06	22.41
Western Cape	31.45	32.45
North West Province	22.39	21.24

Social Security Allocation	538200	563444
Disability Grant and CDG Allocation	***129567***	***143584***
Disability Grant Allocation	129299	140397
Care Dependency Grant Allocation	268	3187

Mpumalanga Province

	1999/2000	**2000/2001**
Total Budget	5992272	6933892
Welfare Budget	1061417	1212729
Social Security Allocation	976215	1117468
Disability Grant CDG Allocation	***1917***	***7063***
Care Dependency Grant Allocation		

Gauteng Province

	1999/2000	**2000/2001**
Total Budget	16225000	18181000
Welfare Budget	2286521	2630038
Social Security Allocation	2027183	2108798
Disability Grant and CDG Allocation	***395910***	***419717***
Care Dependency Grant Allocation		

Free State Province

	1999/2000	**2000/2001**
Total Budget	6662255	7496673
Welfare Budget	1222181	1260238
Social Security Allocation	1087935	1118497
Disability Grant CDG and grant in aid Allocation	***250914***	***250607***
Disability Grant Allocation	247708	245254
Care Dependency Grant Allocation	3156	5279
Grant in Aid	50	74

NB Care Dependency Grant is called the special care grant in the Free State

Western Cape Province

	1999/2000	**2000/2001**
Total Budget	10533700	11288000
Welfare Budget	2213011	2266381
Social Security Allocation	1844919	1879387
Disability Grant CDG grant in Aid Allocation	***580302***	***609875***
Disability Grant Allocation	561762	597521
Care Dependency Grant Allocation	18540	11000
Grant in aid	0	1354

Northern Province

	1999/2000	**2000/2001**
Total Budget	12677494	13871406
Welfare Budget	2355716	2550337
Social Security Allocation	2249673	2420188
Disability Grant Allocation		
Care Dependency Grant Allocation		

NB The Northern Province does not disaggregate the social security information

North West Province

	1999/2000	**2000/2001**
Total Budget	7838581	9002179
Welfare Budget	1387709	1446480
Social Security Allocation	1293880	1345177
Disability Grant and CDG Allocation	***289653***	***285777***
Care Dependency Grant Allocation		