

# **Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill**

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## **1. INTRODUCTION**

This is a joint submission from a collective of organisations as listed above. There will be an overall presentation of the main points of the joint submission and then some of the other members of the collective will elaborate on the areas where more detailed motivation is required. This collective had two meetings with the Department at the beginning of this year to discuss a draft bill<sup>1</sup>. Differences included, but were not limited to, the concept of an inspectorate had not been incorporated, and the provision relating to Social Relief of Distress had not been omitted. After the first meeting we drafted a submission containing the various changes we considered fundamental to the success of the Bill. Many of these changes were taken on board by the department at that stage; however they have been omitted from the tabled bill, forcing us to bring these to the attention of the Committee in its consideration of the bill.

The new Social Assistance Act will have a critical role to play in giving effect to the constitutional right to have access to social assistance in terms of section 27 of the Constitution. It is therefore very important that the affected stakeholders are given the opportunity to provide input into the legislative process. We would therefore like to express our views in relation to the Bill.

However, the short time frames given for making submissions on the bill has not allowed us to fully explore the draft and its implications and to consult adequately with our respective organisations and constituencies. We are also concerned that we have made our comment

without being able to have sight of the draft regulations and the norms and standards document. This is a concern because much of the meat of the bill is being delegated to regulations instead of being fleshed out in the legislation, mainly because clear policy choices have not yet been made. Mention has been made in the briefings to the Committee by the Department of the feasibility of expanding the role of the Agency to administer other forms of social security payments. We note our concern that the Committee is being asked to consider the fundamentals of the Agency without having been adequately briefed about the policy choices being made. Cabinet has advised that they will finalise their deliberations on a comprehensive social security system early in 2004.

Please see our comments below on the tabled Social Assistance Bill. Deletions are indicated with ~~strike through~~ and additions are underlined. Where possible (time allowing) we have given motivations for our suggested re-drafts.

## **2. SOCIO-ECONOMIC BACKGROUND**

The Report of the Committee of Inquiry into a Comprehensive Social Security System (Taylor Committee Report) stated that South Africa's social safety net has its roots in a set of apartheid labour and welfare policies that were racially biased and based on an assumption that everyone is employed or would soon be employed. Furthermore, between 45% and 55% of the population live in poverty. This translates into 20 to 28 million people living in poverty<sup>2</sup>.

In 2002, it was estimated that 11 million children (between the ages of 0-18) are living in dire poverty in South Africa on less than R 200 per capita per month (R245 in 2002 real terms), and therefore living on less than half the minimal R400 per capita per month required to meet their basic needs<sup>3</sup>, and 14.3 million children are living in poverty on less than R400 per capita per month (R490 in 2002 terms).

And child poverty appears to be increasing. The analysis of the October Household Survey data (1995 & 1999) by Ingrid Woolard for IDASA shows that child poverty rates have increased. Between 1995 and 1999 the rate of child poverty in South Africa (on a poverty

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<sup>1</sup> These were informal meetings and have no bearing on the formal processes of consultation required, specifically with Labour, through the NEDLAC Act and the Public Service Act.

<sup>2</sup> Whether it is 20 or 28 million depends on the poverty measure that is used.

<sup>3</sup> IDASA did not attempt to estimate the minimum level of income needed to provide a decent standard of living for children to find the poverty line. The Committee of Inquiry recommended the amount of R400 per capita as a useful poverty line for South Africa (Transforming the Present, Protecting the Future. Report of the Committee of Inquiry into a Comprehensive Social Security (the Taylor Committee), 2002:62. The amount of R200/month per capita was chosen to indicate those children in dire poverty i.e. who are *ultra-poor*.

line of R400.00 / month per capita) increased from 64.7% to 75.8%, and the rate of children in *dire* poverty (calculated on a poverty line of R200.00 / month per capita) increased by 19.2%, from 38.9% to 58.1%.

In 1996, 33% of working age adults were unemployed. The rate by 2001 had risen to 37% and in 2002 to 41.8%.<sup>4</sup> Given the size of the unemployment problem in South Africa full employment or significant improvements to the unemployment rate, and improvements to wage levels of the working poor, are not at all likely to happen in the short to medium term.

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

In October 2002, the Department of Health conducted the 13th national HIV sero-prevalence study among pregnant women in the public sector. This survey demonstrates conclusively that the HIV epidemic remains the most serious health challenge in our country with more than 600 000 new infections in 2002. 16 587 women in 396 public sector facilities across the country participated in this study by the Department of Health. Of all those tested, 4 395 women or 26.5% of all pregnant women tested positive for HIV. The Department of Health says that last year, there were about 600 000 new infections. On average, this means more than 1 500 new infections every day.

**KEY FINDINGS OF THE SURVEY**

Pregnant women tested: 16 587  
Pregnant women positive: 4 395 or 26.5% [2001= 24.8%]

Projected 95% confidence intervals (estimated accuracy) for the entire public sector antenatal population.  
2002: 25.5% to 27.6%  
2001: 23.6% to 26.1%

The following statistics given by the Department of Health are estimated using their demographic modelling utility:  
New infections: 600 000 / +1 500 every day  
People With HIV 5.3 million (2001 = 4.7 million)

<sup>4</sup> Labour Force Survey, 2002.

Women with HIV (15-49)	2.95 million
Men with HIV (15-49)	2.30 million
Estimated MTCT:	91 271 infants

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

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

### **3. A COMPREHENSIVE SOCIAL PROTECTION PACKAGE**

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

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

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

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

The Taylor Committee looked at addressing income poverty - a situation where people have no income or insufficient income to meet their basic needs – and recommended three universal<sup>5</sup> cash grants:

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

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

The Taylor Committee also proposes a package of services to enable everyone to live and function in society.

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

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

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

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

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<sup>5</sup> Universal means that everyone gets the grants, services or benefits. There are a number of ways of recovering grants from people who do not require it progressively through the tax system.

The Taylor Committee Report into a comprehensive social security system was considered in public hearings held by the Portfolio Committee on Social Development held in November 2002 and June 2003 and by Cabinet in July 2003. However, many of the overlapping policy decisions regarding social security broadly, and specifically in relation to children, have not yet been made or properly consulted upon. This is largely due to the fact there has been no clear and transparent policy reform process subsequent to the release of the Taylor Committee Report. The Social Assistance Bill therefore does not make any substantive moves towards the recommendations set out in the Taylor Committee Report.

We submit that the deliberations on the Social Assistance Bill must be seen in the light of the comprehensive approach as recommended by the COI. The Taylor Committee Report took cognisance of the socio-economic realities in South Africa but the Social Assistance Act does not flow from this research and consultation and makes no changes from its pre-new South Africa approach. The future stability and prosperity of our nation depends upon the formulation and implementation of a comprehensive social protection programme that can effectively eradicate extreme poverty, diminish economic inequality and lay the foundations for broad-based development.

Such a package should not be cobbled together in a piecemeal fashion. It requires a systematic approach, beginning with the articulation of a visionary social protection policy that can guide and lend coherence to subsequent legislation. The state has a constitutional obligation to formulate a comprehensive, workable plan that is capable of facilitating the realisation of the right to social security, as required by the Constitutional Court decision in the *Grootboom*<sup>6</sup> and *TAC*<sup>7</sup> cases. (Please see attached submission by the civil society collective to the Cabinet Cluster on concerns about the development of legislation in the absence of overarching policy determination attached hereto).

#### **4. LEGISLATIVE REFORM OF THE SOCIAL SECURITY SYSTEM FOR CHILDREN**

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

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<sup>6</sup> *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC) ('*Grootboom*'); and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) ('*TAC*').

A noble attempt was made in the SALRC<sup>8</sup> Draft Children's Bill to present a variety of provisions to create a basic social security scheme for children, which took cognizance of the dire poverty in South Africa and the needs of the most vulnerable children. The current Draft Children's Bill, however, has had most of these provisions removed from it. The Department has reported that these provisions are better placed within the Social Assistance Act, but the Social Assistance Bill does not incorporate the provisions left out of the Draft Children's Bill.

There are many shortcomings of the social assistance scheme for children in the Social Assistance Bill. For example the limited eligibility of children for the child support grant due to age<sup>9</sup> and caregiver income restrictions and the fact that the care dependency grant is only for those children who suffer from *severe* disabilities and require permanent home-based care.

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

- Poor children between the ages of 9 and 18 years;
- Children whose parents have died and who are being cared for by extended family members;<sup>10</sup>
- Many poor children between the ages of 0 and 18 years whose caregivers do not pass the means test. The means test does not take account of the number of people living off the income or the extra vulnerabilities faced by the family such as HIV/AIDS. Furthermore, the means test threshold has not increased since 1998 despite increases in inflation and the cost of living;
- Children without adult caregivers (children living in child headed households and streetchildren);<sup>11</sup>
- Children with moderate disabilities and chronic illnesses who need assistance;
- Children living with HIV and AIDS.

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

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<sup>8</sup> South African Law Reform Commission.

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

<sup>10</sup> A very small number of relatives caring for orphaned children are accessing the foster child grant or the child support grant, but the majority are not being supported.

<sup>11</sup> See B. Goldblatt And S. Liebenberg, *Giving Money to Children: The Constitutional Obligations to provide Child Support Grants to Child-headed Households* 2003, (unpublished paper); and S. Rosa, *Access to Social Assistance for Children without Adult Primary Caregivers*, August 2003 (unpublished paper), presented at

The Department of Social Development, in a briefing to the Portfolio Committee on Social Development, has indicated that the Social Assistance Bill will not be making any policy shifts but is merely being tabled in order to remove the assignment to the provinces, however, this is an opportune time to improve upon the social security provisions within the current existing system and to take cognizance of and repair some of the shortfalls. As a collective of organizations representing constituencies affected by social assistance, we therefore make recommendations in this submission to improve the current draft of the Social Assistance Bill.

With regards to children however, we submit that the full social security scheme for children should be set out in the Children's Bill with the administration being left to the Social Assistance Bill. Taking into account the fact that the Children's Bill has not yet been tabled and still requires much deliberation, our comments with regards to matters affecting children are therefore restricted to the social security scheme as it exists now, with a number of minor suggestions as to how to improve the shortfalls in the current system with respect to administrative justice and inclusivity.

## **5. CHAPTER 1 – DEFINITIONS, APPLICATION AND OBJECTS OF ACT**

### **5.1 Definitions**

**Insert new definitions:**

“Appointed” in the context of a procurator means the completion of a power of attorney by the grant beneficiary or appointment before a Commissioner of Oaths which indicates the nominated adult to collect the grant of the beneficiary. In the case of a person with a disability who is unable to complete a power of attorney this means the nomination of an adult by the relatives or primary care giver of the beneficiary to collect the grant on the beneficiary's behalf, provided that the person nominated satisfies the Chief Executive Officer that the beneficiary and the nominee comply with the conditions prescribed in this Act.



**Motivation:** It is currently impossible for a person with a mental disability to appoint an adult to collect his/her grant on his/her behalf. The only alternative is an application to the High Court to appoint a curator bonis who would be allowed to collect the grant. This is costly, raises the dilemma of having access to an attorney and an advocate and is time consuming. The reality is that many of these beneficiaries consequently don't access these grants at all.

**“child-headed household”** means a household where –

- (a) the parent or primary care-giver of the household is terminally ill or has died because of an AIDS related illness or another cause;
- (b) no adult family member lives with and provides care for the children in the household; and
- (c) a child has assumed the role of primary care-giver in respect of a child or children in the household.

**Motivation:** A definition of child headed households is needed for the procedures outline in a new section proposed section aimed at enabling children in child headed households to benefit from social assistance grants. Please see new section on child-headed households below.

**“child support grant”** means a grant awarded to a child in terms of section 6 of this Act, to ensure that their basic needs are met;

**Motivation:** There is no definition of a child support grant, while there is a definition for a care dependency grant. It is unclear as to why grants besides the ‘care dependency grant’ are not defined in the Bill.

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

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

**Motivation:** If children with chronic illnesses are to be considered eligible for the care dependency grant, then the Social Assistance Bill would need to define chronic illness. Please see below for our motivation with regards to the extension of CDG to cover children with chronic illnesses. This definition has been developed by Dr Maylene Shung-King of the Children's Institute who is involved in the Department of Health's development of a National Policy on the Management of Chronic Diseases in Children, in consultation with a reference team.

“disability grant” means a grant awarded to a person with a disability in terms of this Act.

“foster child grant” means a grant awarded to foster parents in terms of this Act, in respect of a child placed in their care;

“grant in aid” means a grant awarded to persons who need personal assistance to perform daily activities, in terms of this Act.

**Motivation:** There are no definitions for “disability grant”, “foster child grant” and “grant in aid” in the body of the Act. Considering that other grants are defined, it is recommended for the sake of consistency that all the grants be defined.

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

**Motivation:** We recommend a definition of mentor in order to comply with the new section 15 below where our motivation for this recommendation is fleshed out. Using the procurator system for children who do not have adult care givers is not appropriate as the procurator is generally someone who simply collects the grant on behalf of the beneficiary and does not necessarily administer and keep the money for the beneficiary (they hand it over to the beneficiary). A mentor on the other hand would be a type of secondary care giver in the child’s life who applies for, collects and administers the grant for the child concerned.<sup>12</sup>

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<sup>12</sup> See South African Law Commission, Discussion Paper on the Review of the Child Care Act, 2001, p.565-566; South African Law Commission, Draft Children’s Bill 2002; and South African Law Commission, Final report on the Review of the Child Care Act 2002, p.169.

“person with a disability” means any person who has attained the prescribed age and who owing to his or her physical or mental or intellectual or sensory disability or chronic illness, is unable to adequately support him or herself and/or his or her dependants”.

**Motivation:** It is recommended that a definition of “person with a disability” be included in the Act for purposes of clarity. The definition proposed is similar to that of child with a disability. However the definition with respect to adults takes into account their ability/inability to adequately provide for themselves or their dependents. We recommend that the focus of the disability grants should be on the needs of disabled adults and children.

“social relief of distress” means the provision of immediate assistance in cash awards to a person who experiences desperate need;

**Motivation:** We recommend its inclusion in the Social Assistance Bill below which will require a definition be inserted in the Bill.

“procurator” means a person appointed by a beneficiary to receive the beneficiary’s grant on his or her behalf”.

**Motivation:** In the existing regulations the term procurator is mentioned in regulation 8(4)a relating to the limit in collecting only money on behalf of 5 people, whilst there is no clear definition of a procurator in the body of the Bill.

We hereby submit that the definition as submitted by us of procurator should not be limited to only include South African citizens, but should also give scope for documented permanent residents to be appointed. As beneficiaries of grants will include people from non-South African communities, procurators therefore should also be able to be appointed from these communities.

“Permanent Resident” means someone who qualifies as a permanent resident in terms of the Immigration Act 13 of 2002<sup>13</sup>.

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<sup>13</sup> S 25(1) of the Immigration Act 13 of 2002 provides that “*The holder of a permanent residence permit has all the rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.*”

**Motivation:** The Constitutional Court is shortly to decide on the constitutionality of the exclusion of non-citizens from accessing social grants. It should be noted that s 27 of the Constitution confers the right to social security on 'everyone'. It is doubtful whether the exclusion of all categories of non-citizens would pass the limitations test in the Constitution. It is accordingly recommended that permanent residents (as a minimum) are included in those eligible for social grants.

In the case of *Mahlaule & others v The Minister of Social Development & Others*, the judge declared Section 4(b)(ii) of the Social Assistance Act, 59 of 1992, unconstitutional, and struck it down. That section says that only South African citizens are entitled to a child support grant. Both the applicant caregiver and the child were required under the Act to be resident in the Republic and citizens of South Africa, but this case says that applicants and children do not have to be South African citizens.

In the case of *Khosa & Others v The Minister of Social Development & Others*, the judge declared Section 3(c) of the Social Assistance Act, 59 of 1992, unconstitutional, and struck it down. In terms of Section 3(c), old age social grants (pensions) may only be paid to South African citizens resident in the Republic, however, the court has said that it is unconstitutional to require applicants to be South African citizens.

The Constitutional Court has yet to confirm both these judgements.

### **Suggested amendments to existing definitions:**

#### **Special Needs Grant ~~Care Dependency Grant~~**

7. A person is, subject to section 5, eligible for a ~~care dependency grant~~ Special Needs Grant to ensure that their special needs are met if –
  - a) he or she is a parent, primary care giver or foster parent of a child who ~~requires and receives permanent care or support services due to his or her~~ has a physical or mental or intellectual or sensory disability or chronic illness;  
and
  - b) the child is not cared for on a 24 hour basis for a period exceeding six months in an institution that is fully funded by the State.

**Motivation:** We recommend that the focus of the Special Needs Grant should be on the needs of disabled children and not on how dependent they are on care. With respect to the removal of the requirement that the child be receiving permanent care or support services, it is submitted that this should not be a pre-condition as many children do not have access to permanent care. This name emanates from the South African Law Reform Commission's research and subsequent draft Children's Bill.

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

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

**~~“care dependent child~~ child with a disability”** means a child who requires ~~and receives permanent care or support services~~ due to his or her temporary or permanent ~~severe~~ physical, or mental, intellectual or sensory disability or chronic illness, including HIV/AIDS;

**Motivation:** The title of the grant goes to the heart of its definition. We recommend below that the focus of the disability grants should be on the needs of disabled adults and children and not on how dependent they are on care, hence the suggested change in the name of the grant.

With respect to the removal of the requirement that the child be receiving permanent care, it is submitted that this should not be a pre-condition as many children do not have access to permanent care. With respect to the disability needing to be severe to create an entitlement to the grant, it is submitted that these requirements preclude children from getting the grant due to problems of definition and measurement of severity. This condition also excludes children with moderate disabilities who may have high needs. Social assistance to children with disabilities should be determined by a needs test, which considers the extra needs and cost incurred by the child due to his or her disability. The HSRC is currently developing a needs-based assessment tool for children and adults with disability for the Department of Social Development. It is therefore critical that the definitions for children and adults with disability should be amended to fit the framework of a needs-based assessment.

**“primary care giver”**, means a person ~~older than 16 years~~, whether or not related to a child, who takes primary responsibility for meeting the daily care needs of that child;

**Motivation:** Currently, many children who are looking after other children in so-called child-headed households, as de facto primary care-givers, are not able to access social assistance due to Departmental policy that only people with ID documents can apply for social assistance on behalf of children in their care. Children can only get ID's from the age of 16, hence the effective exclusion of children under that age from accessing social grants on behalf of children over whom they are the primary care-giver.

This discriminatory practice is arguably unconstitutional and the Minister is thus obliged to provide a mechanism for these particularly vulnerable children (living in child-headed households) to be able to access social assistance for the siblings that they are looking after. One such mechanism, as recommended below, is an adult mentorship model whereby a responsible adult or organization is designated a 'mentor' over these children and is able to obtain the grants on behalf of children in a child-headed household. It is submitted that this scheme should apply where the child head of the household is too young or immature to look after other children without external adult support. An assessment of the situation should be made by a community or state social worker and recommendations made to appoint a mentor.

In circumstances where the child is old enough and sufficiently responsible to continue to play the role of primary care-giver, and where there is no adult mentor

available, these child-heads should be able to access grants directly if they are *de facto* the primary care-givers of other children, irrespective of their age. Thus should be no specified limitation on the age of a primary care-giver.

We submit that both options should co-exist as many child headed households may not have access to an adult, or organization, who can provide mentorship and the law must be flexible enough to ensure that these children can access assistance in these circumstances.<sup>14</sup> Children living in child-headed households are particularly vulnerable and need to be adequately supported with financial assistance from the state, irrespective of whether there is an adult to supervise them or not. The Constitutional Court has said in key decisions that a reasonable plan or programme designed to increase access to socio-economic services requires inbuilt flexibility to ensure responsiveness to differing and changing circumstances and contexts.<sup>15</sup> The Constitutional Court in *Grootboom* has also stated that a programme for the realization of socio-economic rights must:

“be balanced and flexible and make appropriate provision for attention to... crises and to short, medium and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.”<sup>16</sup>

In *Grootboom*, the court also held that:

“[t]o be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realize. 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 achieving realization of the right.”<sup>17</sup>

## 5.2 Application and Implementation of Act

### Suggested amendments:

2. (1) A person who is not a South African citizen has the same rights and obligations in terms of this Act as a South African citizen if an agreement, contemplated in section 231(2) of the Constitution, between the Republic and the country of which that person is a

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<sup>14</sup> See Goldblatt and Liebenberg op cit note 9, and Rosa, op cit note 9.

<sup>15</sup> *Grootboom*, paragraph 41 and *Treatment Action Campaign*, at paragraph 68.

<sup>16</sup> *Treatment Action Campaign*, at paragraph 68 and *Grootboom* paragraph 43.

citizen makes provision for this Act to apply to a citizen of that country who resides in the Republic. Notwithstanding the provisions of any such agreements a person qualifies for social assistance in accordance with the provisions of this Act, if such person is a permanent resident, or has lived for a minimum of five years of his or her adult life as a temporary resident in the Republic of South Africa or if such person is the spouse or life partner or dependant on such qualifying permanent or temporary resident. The same rights shall be enjoyed by the child, spouse or life partner of such permanent or temporary resident.

**Suggested insertions:**

Insert new section 2. (2)(a) and (b)

(2) (a) Notwithstanding the provisions of subsection (1), the provisions of this Act will apply to all refugees in accordance with the provisions of Section 27(c) of the Refugees Act, 130 of 1998 and in further accordance with Article 24(1) of the 1951 United Nations Convention and Protocol relating to the Status of Refugees and Article 22 of the Universal Declaration of Human Rights. The same rights shall be enjoyed by the child, spouse or life partner of such refugee.

(b) In addition to subsection (2)(a), this Act shall further apply to all children who are dependant on refugees and asylum seekers, or who have entered South Africa as undocumented children.

**Motivation:** The Act must be applicable to refugees as well. In recent decisions the Courts have taken the view that, unless the relevant provision indicates that a constitutional right is available only to citizens, it is available to everyone (see *Tetty & Another v Minister of Home Affairs & Another* 1999 (3) SA 715 (D) @ 729 and *Patel & Another v Minister of Home Affairs & Another* 2000 (2) SA 343 (D) @ 349).

In addition, in terms of Article 2 of the Convention on the Rights of the Child (ratified by South Africa in 1995), a state party to the Convention may not discriminate against or deny any of the rights in the Convention (including social security) to a child due to the child's national origin.

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<sup>17</sup> *Treatment Action Campaign*, at paragraph 68 and *Grootboom* paragraph 44.



### 5.3 Objects of Act

Insert new clause (a) in addition to the existing clauses (a) to (e):

3. The objects of this Act are to –

(a) advance the progressive realisation of the right of access to appropriate social assistance for everyone who is unable to support themselves and their dependants.

### 5.4 General Principles of Act

The general principles of the Act are not specified in the Act. If the Bill intends to usher in a new era of social assistance delivery for South Africa, we suggest that the Bill should contain a set of guiding principles to that effect. These principles are also vital to ensuring that minimum norms and standards are maintained in the delivery of social grants, and to facilitate inter-provincial equity in accessing the grants. We therefore suggest the following insertion:

Insert the following general principles after the Objects:

5. The general principles of this Act are the following:

(a) The rendering, suspension or termination of social assistance benefits must take place without any form of unfair discrimination;

(b) All administrative action pertaining to social assistance benefits must be lawful, reasonable and procedurally fair;

(c) All applications for social assistance must be expeditiously processed, and payment made to eligible beneficiaries within a reasonable period of time.

(d) The human dignity of all applicants and beneficiaries of social assistance in terms of this Act must be respected and protected.

(e) Measures must be taken to facilitate consultation of and participation by social assistance beneficiaries and other relevant stakeholders in matters pertaining to the realisation of social assistance rights.

## 4. CHAPTER 2 - SOCIAL ASSISTANCE

## Suggested amendments:

### Financing of social assistance

5. The Minister must with the concurrence of the Minister of Finance, out of moneys appropriated by Parliament for that purpose, make available –
- (a) social grants to older and disabled persons, and to war veterans;
  - (b) a grant-in-aid to or on behalf of any person referred to in paragraph (a) whose physical or mental condition is such that he or she requires regular attendance by any person;
  - (c) a child support grant to a primary care giver of a child;
  - (d) a foster child care grant to a foster parent;
  - (e) a special needs care-dependency grant to a parent, primary care giver or foster parent in respect of a child with a disability or chronic illness care-dependent child;
  - (f) a social relief of distress benefit to persons in desperate need.

### Eligibility for social assistance

5. (1) A person is entitled to the appropriate social assistance grant if he or she —
- (a) is eligible in terms of sections 6, 7, 8, 9, 10, 11 or 12;
  - (b) is resident in the Republic at the time of making the application;
  - (c) is —
    - i. a South African citizen;
    - ii. a permanent resident;
    - iii. a refugee or a child, spouse or life partner of a refugee;
    - iv. a child who is dependant on refugees and asylum seekers;
    - v. an undocumented child, or
    - vi. a member of a group or category of persons prescribed by the Minister, with the concurrence of the Minister of Finance, by notice in the *Gazette*;
  - (d) complies with any additional requirements or conditions prescribed in terms of subsection (2).
- (2) The Minister may prescribe additional requirements or conditions in respect of —

- (a) ~~income thresholds~~ means testing, provided that any means test applied must not set the threshold of eligibility for social assistance at a level below the poverty [datum?] line;
- (b) ~~age limits~~, disabilities and care dependency;
- (c) ...

**MOTIVATION:** The Constitution guarantees everyone in South Africa the right to social security, including appropriate social assistance if they are unable to support themselves and their dependants. The poverty line is commonly understood as the income level below which an individual is unable to meet his or her basic needs. Although there is little agreement on an appropriate method of calculating the poverty line, such a calculation is essential in order for the constitutional right to be meaningfully interpreted. The Department must be required to develop a formula for calculating an appropriate poverty line. Once this is done, the Department should be prohibited from using means testing to exclude anyone living in poverty from accessing any social grant for which he or she is otherwise eligible.

### **Child Support Grant**

Insert new sections after section 6:

- 6. (a) A person is, subject to section 5, eligible for a child support grant if he or she is the primary care giver of that child.
- (b) Every child of 18 years or younger is entitled to a child support grant in order to ensure that his or her daily needs are met.
- (c) The above grant is payable to the primary care-giver of the child concerned or to a mentor appointed in terms of section 15 of this Act

**Motivation:** The Minister of Social Development, Dr Zola Skweyiya announced on 18 July 2003, that 3,4 million children are now registered to receive the Child Support Grant (CSG). According to Skweyiya “this is one of the most significant achievements in the history of the country.”

Despite this positive progress, South Africa has an estimated 11 million children living in dire poverty on an income of less than R200 per capita per month, and 14.3 million

children living on less than R400 per capita per month. This means that only 23% of poor children in South Africa are registered to receive the CSG.

The CSG was extended early in 2003 to all children under 14 years over the next 3 years, but this does not mean that children who are presently below 14 years will get the grant. In fact, all children who are now between 12 and 18 years old will never have access to the CSG under the current policy, no matter how poor or vulnerable they are. These children will fall through the cracks without social assistance from the government. This generation of children is likely to be doomed to lives of poverty through to their adult years.

The lives of poor children between the ages of 12 and 18 years can be changed for the better if the government were to immediately extend the CSG to all children under the age of 18. We believe that all our children deserve equal opportunities to grow and develop.

Furthermore, the incremental aged based approach to the extension is being implemented in such a way that only children aged 0 to 7 can effectively access the grant. Children who are already 8 years old are generally not being processed by officials despite the regulations specifying that children under 9 qualify this year<sup>18</sup>. We can anticipate that the same problems will be experienced next year when children under 11 qualify.

Minister Skweyiya referred to the registration of 3,4 million children as monumental - an achievement which calls for celebration. But we can only celebrate if all our children receive equal opportunities to survive poverty – as is their constitutional right. Section 9 (3) of the Constitution of the Republic of South Africa clearly states, “the state may not unfairly discriminate directly or indirectly on the basis of age”. The government’s policy on the CSG certainly does not cater for all but has rather unreasonably and unfairly only given preference to some of the needy children in our country.

Furthermore, as recommended by the Taylor Committee, and supported by the South African Law Reform Commission Report on the Children’s Bill, an important aspect of a

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<sup>18</sup> Monitoring of the extension being conducted by the Children’s Institute shows that children aged 8 are being turned away by officials. Reasons often given are that the computer programme cannot accept children who are older than 8 years, or the officials say it is not worth the trouble to register the child if they are going to turn 9 before 1 April 2004, because the system will terminate the grant on their 9<sup>th</sup> birthday.

comprehensive social protection package of cash grants and free and subsidized services, is the eradication of the means test for the CSG in order to overcome barriers for the poor in accessing this package, and in recognition of the fact that the majority of children are living in poverty.

We recommend the immediate and complete abolishment of the means-test for the CSG, due to the fact that the means-test excludes those persons most in need of assistance. Considering that between 60 and 70% of children live in poverty in South Africa, the expenses and administrative burden cannot be justified in targeting only a small percentage of those in need.

### **Special Needs Grant ~~Care Dependency Grant~~**

7. A person is, subject to section 5, eligible for a ~~care dependency grant~~ Special Needs Grant to ensure that their basic needs are met if –

- a) he or she is a parent, primary care giver or foster parent of a child who ~~requires and receives permanent care or support services due to his or her~~ has a temporary or permanent physical or mental or intellectual or sensory disability or chronic illness; and
- b) the child is not cared for on a 24 hour basis for a period exceeding six months in an institution that is fully funded by the State.

### **Disability Grant**

9. A person is, subject to section 5, eligible for a disability grant, if he or she –

- a) has attained the prescribed age; and
- b) is, owing to a temporary or permanent physical or mental or intellectual or sensory disability or chronic illness, unable to adequately support themselves and/or their dependents; Provided that he or she or the person applying on his or her behalf, if he or she is unable to apply, satisfies the conditions in terms of this Act.

### **Older persons grant**

10. An older person is entitled to either a grant for older persons or a war veterans grant if he or she is unable to support himself or herself or dependants: Provided that he or she or the

person applying on his or her behalf, if he or she is unable to apply, satisfies the conditions in terms of this Act.

### **Grant-in-Aid**

11. A person is, subject to section 5, eligible for a grant-in-aid if, the person is in need of personal assistance to perform daily living activities due to a his or her physical, or mental, sensory or intellectual disability or chronic illness.

### **Social Relief of Distress**

12. Any person who experiences desperate need or is living in intolerable conditions is eligible for social relief of distress: Provided that the applicant satisfies the conditions in terms of this Act.

**Motivation:** It is distressing to note that no mention is made in this Act of the important benefit of Social Relief of Distress. The Government is obliged under the Constitution, and as per the principles laid down in *Grootboom*<sup>19</sup>, to ensure that their programmes provide immediate relief for the most vulnerable in society. This is what the Social Relief of Distress benefit was intended for but now it has been removed from the Bill. This is arguably an infringement of the constitutional right to social assistance, particularly the requirement that programmes must provide short-term relief for those in desperate need and living in intolerable conditions.

*“While appropriate provision must be made for short, medium and long-term needs,<sup>20</sup> the needs of the most urgent must not be ignored.”<sup>21</sup>*

*“Any social assistance system must respond to the needs of those who are most desperate,<sup>22</sup> ensuring that it does not exclude a significant segment of society.”<sup>23</sup>*

*“The requirement of progressive realisation requires that, over time, the number of people who are served by the programme increases, as does the quality of the services provided.”<sup>24</sup>*

In practice, this means that the system must urgently assist those persons whose

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<sup>19</sup> *Government of the Republic of South Africa v Grootboom and others* 2000 (11) BCLR 1169 (CC).

<sup>20</sup> *Grootboom*, paragraph 43.

<sup>21</sup> *Grootboom*, paragraph 44 and *Treatment Action Campaign*, paragraph 68.

<sup>22</sup> *Grootboom*, paragraph 44.

<sup>23</sup> *Grootboom*, paragraph 43 and *Treatment Action Campaign*, paragraph 68.

<sup>24</sup> *Grootboom*, paragraph 45.

need is most pressing.

The determination of “desperate need” must be determined by policy, accordingly we submit that this must urgently be determined by the Minister and defined in the Act. It is not appropriate to leave such a fundamental policy decision to the discretion of officials.

In addition, this benefit must be available and granted immediately, without all the bureaucratic hindrances attached to the other grants, as it is aimed at people in ‘desperate need’.

We bring to the attention of the Committee an application that has just been launched by the Legal Resources Centre on behalf of destitute people living in North west Province who have been unable to access Social Relief of Distress. A copy of the Notice of Motion is attached to this submission. The application calls specifically of the National Minister and the MEC to devise and implement a programme for the provision of social relief of distress as envisaged by the Social Assistance Act that will enable them to:

- *receive and process applications for social relief of distress on the same day of receipt of the application,*
- *identify those applicants, in addition to the categories referred to in regulation 26(1), who qualify for the exceptional relief referred to in regulation 26(3) of the regulations under the Social Assistance Act,*
- *dispense with social worker reports in cases for first-time applicants falling under regulation 26(1)(a), (b) and (h) of the regulations under the Social Assistance Act and*
- *pay or otherwise provide the first instalment of social relief of distress on the date of application to persons who qualify for social relief of distress.*

The removal of the right to apply for the financial award of social relief of distress is extremely problematic. For thousands of people living in distress it provides a lifeline, albeit very limited. To dismiss the grant as a provincial function will be to condemn many people to the non-uniform vagaries of certain provinces. There are differences in approaches to eligibility for the grant and budgeting in each province. In some

provinces, officials regularly deny the existence of the benefit and informed caregivers who approach the officials of the National Department's official publications which refer to the grant, are informed that it is not available. Removing the grant from the Social Assistance Act and relegating it to the provincial sphere of government will mean that there will be no uniform application of policy and little monitoring of the grant or development of eligibility for it. Some provinces may even decide not to have it at all. We annexe hereto a breakdown of provincial budgets and actual expenditure of Social Relief of Distress for the years 2000/1 to 2002/3 which substantiates this fear. This could be a remarkably regressive step for which no real explanation has been given as is required where people's rights are regressively limited. According to the Constitutional Court, retrogressive measures are prima facie in violation of the duty of progressive realisation<sup>25</sup>. Although the social relief of distress grant was never a social assistance grant in classification, it is statutorily created in the current Social Assistance Act and through practice has become a social assistance grant. It would certainly constitute a 'measure' in terms of s 27(2) of the Constitution for progressively implementing the right to social assistance in s 27(1)(c).

In addition, in order for the 'social relief of distress' benefit to fulfil its intended purpose in providing relief to people in desperate need, it needs to be immediately available upon request. We have received information that people are waiting for months for social relief of distress and that is completely counter to the intended purpose of this benefit.

## **6. CHAPTER 3 – ADMINISTRATION OF SOCIAL ASSISTANCE**

### **Application for Social Assistance**

**14.** (1) Any person who wishes to apply for social assistance contemplated in sections 6 to 12 must do so in the prescribed manner.

(2) In considering an application made in terms of sub-section (1), the administrator may conduct an investigation and request such additional information, as is reasonably necessary to consider the application].

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<sup>25</sup> *Grootboom*, paragraph 45.



**Motivation:** Many applicants for social assistance are sent backwards and forwards from social services offices to produce various documents required for their application. Sometimes these documents are not those specifically listed and this is confusing for applicants. Thus the requests for additional information for the purposes of assessing potential beneficiaries should be limited by allowing only those documents that are 'reasonably necessary' in order for the administrator to consider an application. This will prevent the many cases of applicants being sent back and forth unreasonably, to produce various documents.

- (3) (a) If the applicant qualifies for social assistance in terms of this Act, the administrator must authorise the rendering of the relevant social assistance.
- (b) If the applicant does not qualify for social assistance in terms of this Act, the Agency must in writing at the applicant's address or other point of contact stated in the application inform the applicant thereof as well as of his or her right of appeal contemplated in section 18 and of the mechanism and procedure to invoke that right –
- (i) that he or she does not qualify for social assistance in terms of this Act;
  - (ii) the reasons why he or she does not so qualify; and
  - (iii) as of his or her right of appeal contemplated in section 18 and of the mechanism and procedure to invoke that right.

**Motivation:** In terms of the principles of administrative justice, applicants for social assistance are entitled to reasons in writing for their failure to apply for social assistance successfully as well as the relevant appeal mechanisms. In our experience we have found that many people are turned away from social services offices and have their applications turned down without so much as an explanation as to why their application has been unsuccessful, nor are they told of the appeal mechanisms which they are entitled to make use of.

**Insert new Section after Section 14**

**Application for social assistance for a child-headed household**

(1) The provincial Department of Social Development, Child and Family Court or a non governmental organisation designated by the provincial department, may appoint mentors to apply, collect and administer social assistance on behalf of children living in child headed households.

(2) The procedure for appointment and ensuring accountability of mentors must be prescribed.

(3) The mentor referred to in subsection (1) –

(a) may apply, collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled; and

(b) is accountable to the child and family court, or the provincial department of social development, or to another organ of state or a non-governmental organisation designated by the provincial head of social development, for the administration of any money received on behalf of the household in the prescribed manner.

(c) may not take any decisions concerning such household and the children in the household or child without consulting –

i. the child at the head of the household; and

ii. given the age, maturity and stage of development of the other children, also those other children;

**Motivation:** By December 2002, roughly 900 000 children under the age of 18 in South Africa were estimated to have lost a mother, the majority of these to HIV/AIDS, and that figure is expected to rise to roughly 3 million by the year 2015, in the absence of major health interventions<sup>26</sup>.

The majority of children whose biological parent(s) have died are cared for by relatives<sup>27</sup>, primarily in informal care arrangements though a small proportion have thus far been placed in formal foster care through the courts. In a press briefing by the Minister of Social Development, Zola Skweyiya, on 14 September 2001, he highlighted the following statistics: 35 % of orphaned children have foster parents; 0,1

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<sup>26</sup> Dorrington, R., Bradshaw, D., & Budlender, D. *HIV/AIDS Profile in the Provinces of South Africa: Indicators for 2002*, Cape Town: Centre for Actuarial Research, University of Cape Town, 2002.

<sup>27</sup> Giese & Meintjes et al 'Health and Social Services to Address the Needs of Orphans and other Vulnerable Children in the context of HIV/AIDS'; Children's Institute, University of Cape Town, 2003.

% are adopted; and 0,25 % are in residential care. This leaves 65 % remaining in family or community care or living in so called 'child-headed households'.

There is no comprehensive national data on the prevalence of child-headed households at this point in time.<sup>28</sup> On the basis of their national household survey on HIV/AIDS, the Human Sciences Research Council (HSRC) argues that:

'Many community-based assistance programmes report an increase in households headed by children, or consisting only of children, i.e. orphans or children without resident adult guardians. However, no national data on child-headed households has yet been reported. In this survey, just 3% of households were reported as being headed by a person between the ages of 12 and 18 years of age, and could thus be called a child-headed household (Gow & Desmond 2002). The percentage observed was 3.1% in urban formal areas, 4.2% in informal urban areas, 2.8% in tribal areas and 1.9% in farms.'<sup>29</sup> Other studies provide anecdotal data of the existence of child headed households in South Africa.<sup>30</sup>

The lack of statistical evidence and probable low incidence of child-headed households<sup>31</sup> should not, however, detract from the fact that child-headed households exist. Furthermore, in the context of increasing numbers of orphans as the HIV/AIDS pandemic progresses, it is likely that South Africa will face increasing numbers of children living without adult caregivers. This recognition is important in order to guide equitable, appropriate and effective responses of support.

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

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<sup>28</sup> Nelson Mandela's Children's Fund, *A Study into the Situation and Special Needs of Children in Child-headed households*, 2001. <http://www.mandela-children.com/english/worddoc/Report.doc>, p. 4. Gow, Jeff & Desmond, Chris, *The Current and Future Impact of the HIV/ AIDS Epidemic on South Africa's Children*, in Cornia, Giovanni Andrea, *AIDS, Public Policy and Child-Well-Being*, 2002, at p.19 <http://www.unicef-icdc.org> also remark on the lack of statistical information available on child-headed households.

<sup>29</sup> *Human Sciences research council (HSRC) study on HIV/AIDS, Household Survey 2002*, p. 68.

<sup>30</sup> Giese, Meintjes et al, p. 43. The Report notes that this data should not be taken to provide statistically relevant information that could be extrapolated beyond the research.

<sup>31</sup> As Giese, Meintjes et al, p.44 point out "systematic investigation in several countries (including in some of those in which the HIV/AIDS pandemic is more advanced than in South Africa) have confirmed that 'child headed households' are rare (Ainsworth, Ghosh & Semali,1995; Gilborn et al, 2001).

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

- In practice, only children living with an **adult primary care-giver** can apply for a Child Support Grant (CSG);
- Children must be placed in **formal foster care** in order for the Foster Care Grant (FCG) to be payable; and
- Formal placement options for children in need of care and protection are inadequate, and not always appropriate, to cater for orphaned children.

Under the Constitution, the State is obliged to provide social security to everyone, including social assistance if they are unable to support themselves and their dependants. In addition, the State has a responsibility to children who are orphaned and have no parental care. The Government thus has an obligation to provide social assistance to these children, via a mechanism that is practical, reasonable and appropriate.

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

## **Appeal**

- (1) If an applicant disagrees with a decision made by an administrator in respect of a matter regulated by this Act, that person or a person acting on his or her behalf may, within 90 days of his or her gaining knowledge of that decision, lodge a

written appeal with the Minister against that decision, setting out the reasons why the Minister should vary or set aside that decision.

- (2) The Minister may, after considering the appeal and the administrator's reasons for the decision -
  - (a) confirm, vary or set aside that decision; or
  - (b) appoint an independent tribunal to consider the appeal in accordance with the prescribed conditions, and that tribunal may, after consideration of the matter, confirm, vary or set aside that decision or make any other decision which is just.
- (3) Any decision taken by the Minister or an independent tribunal must be communicated to the applicant or beneficiary, as the case may be, in writing, together with adequate reasons in writing.

**Misuse of Grounds for suspension or redirection of social assistance or foster care allowance**

19. If a ~~beneficiary, a procurator, mentor or primary care giver or an applicant~~ person who receives social assistance in terms of sections 6, 7 or 8 misuses a grant, —
- i. is convicted of abuse or neglect of the child on whose behalf she or he receives a grant; or
  - ii. is found by the Inspectorate for Social Assistance to be incapable of using a grant for the benefit of the child on whose behalf she or he received it;
- an administrator may —
- (a) appoint a person to receive the grant on behalf of the beneficiary and to apply it for the benefit of that beneficiary, subject to any condition the administrator may prescribe; or
  - (b) if no suitable alternative recipient can be found in terms of subsection (a), suspend payment of the grant in question; or

**Motivation:** We are concerned that the original language, which would enable an administrator to suspend or redirect any grant the administrator considers to be “misused”, is extremely vague and open to abuse. We recognise that, particularly

where an applicant receives a grant to be used for the benefit of a child, there may be situations where the interests of the child are not being upheld. In such instances, it may be desirable to suspend or redirect the grant. However, the relevant situations must be clearly defined in terms of objective criteria. Furthermore, to the extent that interpretation of the criteria is required, this should not be left to the administrator alone, but should be based on evidence compiled by the Inspectorate.

We welcome the provision whereby a person may be appointed to receive the grant on behalf of a beneficiary, such as a child, but recommend that this be done before such grant is suspended. If this procedure is not followed, the child ends up being disadvantaged due to an adult's "transgressions".

The Department should **not** be authorised to second-guess the appropriateness of decisions made by adult beneficiaries with respect to their use of social assistance.

Suspension is an administrative action that would materially and adversely affect the recipient's rights. According to the provisions of the Promotion of Administrative Justice Act 3 of 2000<sup>32</sup>, such a step would have to be preceded by adequate notice to the person of the nature and purpose of the proposed administrative action, as well as a reasonable opportunity to make representations. Once the decision has been taken, the recipient must be given a clear statement of the administrative action; adequate notice of any right of review or internal appeal (where the latter is applicable) and adequate notice of the right to request reasons<sup>33</sup>. The further assistance provided for in subsection 3 must also be considered by the Department<sup>34</sup>. Should the Bill make provisions for the suspension of any grant, we recommend that an appropriate definition of suspension needs to be included in the Bill to ensure that the requirements of administrative justice as provided for in the Constitution and the Promotion of Administrative Justice Act be met.

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<sup>32</sup> Sections 3(2) and (3)

<sup>33</sup> Section 3(2)(b) (a) to (e)

<sup>34</sup> Section 3(3) In order to give effect to the right to procedurally fair administrative action, an administrator may, in his or her discretion, also give a person referred to in subsection (1) an opportunity to –

(a) obtain assistance and, in serious or complex cases, legal representation;  
(b) present and dispute information and arguments, and  
(c) appear in person.

## **Restrictions on the transfer of the rights and payments of social assistance**

20. (1) A person entitled to receive social assistance in terms of this Act or anyone acting on his or her behalf may not transfer, cede or pledge or in any other way encumber or dispose of such right.
- (a) In the case of the death of a primary care giver, receiving a grant on behalf of a child, an administrator must appoint a person to receive the grant on behalf of the child and to apply it for the benefit of that child, without suspending the grant, subject to any condition the administrator may prescribe.
- (2) Any action in contravention of subsection (1) is void and if the Minister becomes aware of any such act he or she may order that payment of the grant in question must be withheld, suspended or terminated.
- (3) A beneficiary must receive the full amount of a grant before an administrator may make deductions in respect of that amount.
- (4) An amount that accrues or has accrued to a beneficiary in terms of this Act may not be attached or subjected to any form of execution under a judgment or order of a court or by law, or form part of his or her insolvent estate.

**Motivation:** When the primary care giver of a child dies, the grant is terminated, and the child, already traumatized by the death of his or her caregiver, is further traumatized when his or her basic needs are not met due to the stoppage of the grant. The new adult care giver has to reapply for a new grant and the child loses the benefit of social assistance during this period. The Act needs to provide a procedure for insuring that child beneficiaries are not disadvantaged through stoppage of their grants when the adult receiving the grant on their behalf dies. This is a major problem for the many children losing their parents and care givers to AIDS related illnesses, violence and the other leading causes of death in South Africa.

## **CHAPTER 5 – INSPECTORATE FOR SOCIAL ASSISTANCE**

We support the setting up of an independent body to monitor and deal with problems arising from the administration and delivery of social assistance. In addition, the model of the Inspectorate as proposed by the Bill needs to be much more carefully considered in order to find the most appropriate mechanism. A system that is adopted whole-scale from the model in the Police Services Act, is not necessarily appropriate to the quite different nature of social

assistance administration and delivery. Hence the wide powers of search and seizure seem particularly inappropriate in this Bill. Other models should be looked at in other countries.

**We therefore recommend the whole-sale removal of sections 30 to 32.**

In addition, there is potential ambivalence between the stated independence of the Inspectorate from the Department as provided for in clause 25(1) and the provisions for final responsibility over the Inspectorate to be exercised by the Minister in clause 25(4). The extent of the Minister's control over the Inspectorate should be clarified in the Bill and we submit that the Committee clarify whether the Minister should have the power to direct the Inspectorate to terminate any particular investigation.

## **CHAPTER 6 – GENERAL PROVISIONS**

### **Regulations Section 36**

**36.** (1) The Minister ~~may~~ must subject to subsection (2), make regulations regarding -

#### **Motivation:**

It is vital to amend this provision to state that the Minister "must (as opposed to 'may') *enact regulations...*", particularly in relation to uniform norms and standards for service delivery, but also matters that must be prescribed in terms of the Act. In other words this provision should be peremptory as opposed to permissive.

Although the Social Assistance Bill in clause 33 (1)(a) prohibits a delegation by the Minister of the power to make regulations, we believe it possible that in the absence of regulations refining the eligibility criteria and necessary forms and procedures, the *lacunae* will be filled by *ad hoc* policy-making of the Agency, diluting transparency and ministerial responsibility for the administration of social assistance. The Bills, in order to constitute a 'reasonable' legislative framework should accordingly define minimum standards and norms as far as possible and require peremptory policy-making by the Minister in this regard by regulation in respect of aspects which cannot be canvassed in legislation. We believe that further consideration must as a matter of urgency be given to satisfy the Committee regarding what issues should be incorporated in the legislation, and what can reasonably be regulated upon.



If the Committee decides that certain conditions of eligibility can be determined by regulation, we recommend that Clause 5(2) also be amended to require that the Minister must, rather than may make regulations.

**Insertion:**

(3) Any condition, eligibility criteria, restriction or prohibition contained in a regulation must -

- (a) be in keeping with the general principles laid down in the Act and the specific enabling provision of the Act
- (a) be proportionate to the objective pursued by that regulation;
- (b) limit the rights of persons as little as is reasonably possible

**Motivation:**

Regulations must reflect the above guiding principles in order to reflect Constitutional imperatives.

**Insertion:**

(4) The Minister must, before making regulations under this Act -

- (a) publish the draft regulations in the Gazette for public comment;
- (b) send copies of the draft regulations and invite comment from -
  - (i) the provincial MEC's and Departments of Social Development
  - (ii) any other government department or body affected by the regulations;
- (c) allow a period of at least one month from the date of the notice for interested parties to comment on the draft regulations;
- (d) consider the contents of all comments, consultations and discussions before finalising the regulations; and
- (e) if a comment was not taken into account, provide reasons therefore if requested to do so

(5) Subsection (1) does not apply if:

- (a) the amendment to the regulations is merely aimed at correcting a textual error;
- or
- (b) the public interest requires the regulations to be made without delay and the regulations do not adversely affect anyone's constitutional rights to social security

(6) The Minister must table the draft regulations in Parliament for consideration by the Portfolio Committee on Social Development in terms of section (44).

- 37.** (1) In considering a draft regulation tabled in Parliament, the Portfolio Committee on Social Development must consider whether the regulation -
- (a) is consistent with the objectives of this Act;
  - (b) is within the powers conferred by this Act; and
  - (c) is consistent with the Constitution; or
  - (d) requires clarification
- (2) Parliament may, within 30 days after the draft regulation has been tabled, or within 30 days after the commencement of the first sitting after the tabling of a regulation, reject the regulation in whole or part.
- (3) If Parliament rejects a regulation, it must state its reasons.
- (4) The Minister must, within 30 days after being informed in writing that Parliament has rejected a regulation, withdraw the draft regulation or repeal the regulation if it has already been promulgated, and timeously make a new regulation in accordance with Parliament's instructions

**Motivation:**

Although the Social Assistance Bill in clause 33 (1)(a) prohibits a delegation by the Minister of the power to make regulations, we believe it possible that in the absence of regulations refining the eligibility criteria and necessary forms and procedures, the *lacunae* will be filled by *ad hoc* policy-making of the Agency, diluting transparency and ministerial responsibility for the administration of social assistance. The Bills, in order to constitute a 'reasonable' legislative framework should accordingly define minimum standards and norms as far as possible and require peremptory policy-making by the Minister in this regard by regulation in respect of aspects which cannot be canvassed in legislation. We believe that further consideration must as a matter of urgency be given to satisfy the Committee regarding what issues should be incorporated in the legislation, and what can reasonably be regulated upon. If the Committee decides that certain conditions of eligibility can be determined by regulation, we recommend that Clause 5(2) also be amended to require that the Minister must, rather than may make regulations.

It is a fundamental principle of good legislation that where substantive rights are awarded (i.e. the enactment of policy) this should be provided for in original legislation, and not in delegated legislation which is what regulations are. Where this is unavoidable, some laws have provided that the regulations have to go before the portfolio committee to remedy this legislative weakness. Examples of such laws include the Water Services Act 108 of 1997 [Sections 71 and 75], Non-profit Organisations Act 71 of 1997 [Section 27 and 28], Promotion

of Access to Information Act 2 of 2000 [Section 92(2)] , Promotion of Administrative Justice Act 3 of 2000 [Section 10(4)] , the Domestic Violence Act 116 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 [section 30].

We have constructed a provision appropriate to the Social Assistance Bill after looking at the various provisions in the above Acts. If much of the eligibility criteria will be in the regulations, we believe that it is very important that the regulation drafting and decision making process ensures maximum consultation, public participation and the active involvement of the legislature.

### **Repeal of Legislation**

We have concerns regarding the viability of a state where certain parts of the old law will be repealed by provinces and other sections will continue to regulate the provinces. This seems to be inviting confusion and lack of uniformity. We submit that the existing laws should be repealed in their entirety. The drafters of this Bill need to advise if any provisions, apart from the right to Social Relief of Distress (which we have above motivated should be in the national Social Assistance Bill) would then fail to be included in any legislation, and provinces would then have to pass provincial legislation to accommodate such provisions.

Furthermore, the Bills do not disclose a coherent approach to the transition from provincial to Agency-controlled administration of delivery. The Portfolio Committee has proposed, as is evident from the Second Draft Discussion Document of the Social Security Agency Bill, the inclusion of a provision requiring the Minister to endeavour to enter into “memoranda of understanding” with the relevant provincial MEC’s to ensure that payment of social assistance grants is in the future performed by the Agency. Clauses 37 (1) and 37 (3) (as added) of the Social Assistance Bill appear to contemplate repeal by the provinces of the Social Assistance Act of 1992.

The approach appears to envisage persuasion of the provinces to repeal the existing Social Assistance Act. This approach clearly carries the risk that, if any province does not agree, the objective of enforcing uniform national standards simultaneously across all provinces will be compromised.

We suggest that the Committee needs to be briefed on whether such agreements in principle have yet been obtained by all provinces, prior to passage of this Bill. It would appear that

consultation with the National Council of Provinces Select Committee on Social Services would also be appropriate on this point.

## **FINAL RECOMMENDATIONS TO THE COMMITTEE**

We recommend that the Portfolio Committee reject the Social Assistance and the South African Social Security Agency Bills and we call on the Committee to encourage the Executive to engage with the Taylor Committee Report in order to formulate a Comprehensive Social Security Policy where after the drafting of comprehensive social protection legislation will be appropriate.

However, if the Bills are passed, we request that our comments, based on our experience of the administration of social assistance on the ground, are taken into consideration in order that the shortfalls in current social assistance may be effectively addressed.

IN THE HIGH COURT OF SOUTH AFRICA  
BOPHUTHATSWANA GENERAL DIVISION

CASE NUMBER:

In the application between:

**ABBEY KUTUMELA**

First applicant

**MELITA MAGUBUDELA**

Second applicant

**TSATSAWANE CHAUKE**

Third applicant

and

**THE MEMBER OF THE EXECUTIVE COMMITTEE FOR SOCIAL SERVICES, CULTURE, ARTS AND  
SPORT IN THE NORTH WEST PROVINCE**

First respondent

**THE MINISTER OF SOCIAL DEVELOPMENT**

Second respondent

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**NOTICE OF MOTION**

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TAKE NOTICE THAT application will be made to the court for an order in the following terms:

1 Permitting this application to be heard as one of urgency, and dispensing with the forms and rules of court as provided for in rule 6(12)(a).

2 Declaring that the respondents'

2.1 failure to provide social relief of distress and

2.2 programme to provide social assistance

in the North Western province is in breach of section 27(1)(c) of the Republic of South Africa Constitution Act, 1996 in that:

2.3 it does not make short-term provision, or any provision, for people who are in a crisis or desperate situation;

- 2.4 it does not provide any relief, or effective relief, for people who are in a crisis or desperate situation;
  - 2.5 it fails to respond adequately or at all to the needs of those people who are most desperate;
  - 2.6 it is not implemented reasonably;
  - 2.7 it is not effectively made known to officials and to persons in need who may be able to obtain a benefit through it.
- 3 Directing the first respondent to provide social relief of distress to the applicants within 3 days.
- 4 Directing the respondents to provide social assistance in the form of social relief of distress for the people referred to in regulations 26(1)(a) to (f), 26(1)(h) and 26(3) of the regulations promulgated as R 418 of 31 March 1998, as amended, under the Social Assistance Act, 1992.
- 5 Directing the respondents to take immediate steps to devise a programme to provide social relief of distress as envisaged by the regulations promulgated further to the Social Assistance Act, that will enable them to:
- 5.1 receive and process applications for social relief of distress on the same day of receipt of the application,
  - 5.2 identify those applicants, in addition to the categories referred to in regulation 26(1), who qualify for the exceptional relief referred to in regulation 26(3) of the regulations under the Social Assistance Act,

- 5.3 dispense with social worker reports in cases for first-time applicants falling under regulation 26(1)(a), (b) and (h) of the regulations under the Social Assistance Act and
  - 5.4 pay or otherwise provide the first instalment of social relief of distress on the date of application to persons who qualify for social relief of distress.
- 6 Directing the respondents to implement a programme to provide social relief of distress as envisaged in the previous paragraph, commencing on a date within 3 months of this order of court ("the implementation date"), including a programme to:
- 6.1 train the attesting officers and social workers in their employ, as well as any other staff members who advise or guide members of the public, of the circumstances in which people qualify for social relief of distress and the manner of claiming it,
  - 6.2 instruct the attesting officers and social workers in their employ, as well as any other staff members who advise or guide members of the public, to advise members of the public who approach their offices for relief applicants for social grants or social welfare of their right to apply for social relief of distress in appropriate circumstances,
  - 6.3 produce such manuals, forms and guidelines as are necessary to give effect to social relief of distress.
- 7 Directing the first respondent to advertise the availability of social relief of distress amongst the residents of the North Western province by:
- 7.1 placing notices in the English and Tswana languages in all the offices under the control of the first respondent in which applications for social assistance are received, and doing so within 1 month of the implementation date, and

- 7.2 broadcasting a news release on the regional radio network, Radio Motswiding, on two successive days within 2 weeks of the implementation date;
- 7.3 and which notices and broadcasts shall advise the members of the public of:
- 7.3.1 the criteria for qualification for social relief of distress in terms of section 26(1) of the regulations under the Social Assistance Act and
- 7.3.2 the criteria for qualification for the exceptional relief envisaged by regulation 26(3) and
- 7.3.3 the steps necessary to claim social relief of distress.
- 8 Directing the first and second respondents to report to the court on oath within one month of the implementation date on:
- 8.1 what he and the first respondent have done to comply with the provision of this order and the regulations under the Social Assistance Act;
- 8.2 what further steps they will take in order to so comply; and
- 8.3 when they will take each of those steps.
- 9 Directing the respondents to pay the costs of this application, jointly and severally.
- 10 Granting such further or alternative relief as the court may deem fit.

TAKE NOTICE FURTHER that, if any respondent intends to oppose the application, he is required:



- (a) to notify the applicants, in writing, within 2 days of the service of this notice of motion whether he intends to oppose this application and indicating what relief is opposed; and
- (b) in such notice, appoint an address within 8 kilometres of the office of the Registrar at which he will accept notice and service of all process in these proceedings; and
- (c) if the opposition is to the relief sought in prayers 1, 3 and 10, within 2 days of so noting an intention to oppose, to deliver any affidavit that he may desire in answer to the allegations made by the applicants and
- (d) if the opposition is to the relief sought in prayers 1, 2, 4, 5, 6, 7, 8, 9 and 10, within 15 days of so noting an intention to oppose, to deliver any affidavit that he may desire in answer to the allegations made by the applicants.

TAKE NOTICE FURTHER that, if no such notice of intention to oppose the application is given, the application will be set down for hearing on Thursday 25 September 2003 at 10 a.m. or so soon thereafter as counsel may be heard.

TAKE NOTICE FURTHER that the accompanying affidavits of the applicants and the annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER that the applicant has appointed the undersigned as their attorney and will accept service of all documents in these proceedings at the address set out below.

DATED at PRETORIA on this        DAY of

Applicants' attorney  
LEGAL RESOURCES CENTRE  
5th floor, Centenary Building  
PRETORIA  
Tel: 012-323-7673  
Ref: N de Villiers

c/o NIENABER AND WISSING  
Shop 6 B Dada Complex  
Aerodrome Crescent  
MAFIKENG

TO: The Registrar of the abovenamed court

AND TO: The first respondent  
care of the State Attorney  
MMABATHO

Received a copy hereof  
on this day of

for: 1st respondent

AND TO: The second respondent  
2nd floor, HSRC Building  
Pretorius street, PRETORIA

Received a copy hereof  
on this day of

for: 2nd respondent

**JOINT SUBMISSION TO**  
**THE INTERDEPARTMENTAL TASK TEAM**  
**FOR THE CABINET CLUSTER**

**ON THE CURRENT LEGISLATIVE PROCESSES**  
**OF THE DEPARTMENT OF SOCIAL DEVELOPMENT**

**BLACK SASH**

**ALLIANCE FOR CHILDREN'S ENTITLEMENT TO SOCIAL SECURITY**  
**(ACCESS)**

**CONGRESS OF SOUTH AFRICAN TRADE UNIONS (COSATU)**

**NATIONAL EDUCATION HEALTH & ALLIED WORKERS UNION**  
**(NEHAWU)**

**SOCIO-ECONOMIC RIGHTS PROJECT – COMMUNITY LAW CENTRE**  
**(UWC)**

**CHILDREN'S INSTITUTE**

**SOUTH AFRICAN CATHOLIC BISHOPS CONFERENCE (SACBC)**  
**PARLIAMENTARY LIASION OFFICE**

**July 2003**

## Introduction

The development and prosperity of our nation requires the formulation and implementation of a comprehensive social protection programme that can effectively eradicate extreme poverty, diminish economic inequality and lay the foundations for broad-based development.

Such a package should not be cobbled together in a piecemeal fashion. It requires a systematic approach, beginning with the articulation of a visionary social protection policy that can guide and lend coherence to subsequent legislation.

Given that Government is currently involved with deliberations regarding the components of a comprehensive social security programme, we note with concern the Department of Social Development's intention to pass five important pieces of legislation before the end of the year<sup>35</sup>. If the components of the policy are still being finalised, it would be unfortunate to allocate time and resources on the passage of legislation that may well have to be reconsidered once the final policy is developed. The policy finalisation should take precedence over the adoption of apparently piece-meal legislative initiatives that are currently about to be tabled before the legislature.

## Constitutional requirement for coherent policy

Implicit in the obligations on the state to realise progressively the right to socio-economic rights within its available resources, is the need to develop coherent and reasonable policy by which to achieve these obligations. The Constitutional Court judgement in the Grootboom matter set out coherent principles with which such policy needs to comply, which included the duty to formulate a co-ordinated, comprehensive programme.<sup>36</sup>

The duty on the state to formulate a transparent national plan of action for the realisation of socio-economic rights **promotes public accountability and participation in the realisation of socio-economic rights**. It also lays the foundation for targeted, purposeful action by the state towards the realisation of these rights.

## Development of Comprehensive Social Security Policy

We are aware that Cabinet is seized with the finalisation of the components of a comprehensive social security that should be finalised by early 2004.

This is part of a process articulated in the Department's seminal 1997 Social Welfare White Paper. The Paper states inter alia that *"(T)here 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."*<sup>37</sup>

The appointment by the Minister of Social Development of the Committee of Inquiry into a Comprehensive Social Security in 2000 (the Taylor Committee) indicated the need within the

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<sup>35</sup> Briefing by Department of Social Development to Portfolio Committee on Social Development, 25 June 2003. These are the Children's Bill, the Social Assistance Bill, the National Social Agency Bill, the Social Relief Fund Bill and the Older Person's Bill.

<sup>36</sup> *Grootboom* paras 39 – 41:

'The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to housing within the State's available means. The programme must be capable of facilitating the realisation of the right.' (para 41).

<sup>37</sup> Chapter 7, Paragraph 27 of the White Paper for Social Welfare, 1997.

Department for further investigation into the principles and components of an affordable comprehensive social security which would complement the stated commitment of Government to address the effects of poverty, and to address the causes of poverty in a sustainable and developmental manner. The Taylor committee spent two years completing its investigation, and released its recommendations in a report which was forwarded to Cabinet in February 2002. The recommendations of the Committee were seen as being central to the policy deliberations that would need to follow. According to President Mbeki, the policy formulation process *“will be informed by the report and recommendations of the Commission (sic), which was set up by the Department of Social Development. A team of Ministers is processing the report, and consultations will be held during the course of the year with various stakeholders, before final recommendations are presented to Cabinet.”*<sup>38 39</sup>

Civil Society welcomed both the completion of the work of the Committee, and the release of the report for public comment by the Minister in May 2002. The latter initiative was seen as indicative of an appreciation within government of the benefit attendant on involving stakeholders in the process involved in the formulation of the crucial policy around the various choices inherent in the realization of the right to access social security and social assistance.

At the June 2003 Parliamentary public hearings into the recommendations of the Taylor Report held by the portfolio committee on Social Development, many participants raised their concerns about a perceived lack of transparent engagement by the executive with the recommendations of the Taylor Committee in an holistic fashion. There is also uncertainty about the anticipated role of a comprehensive social protection package within the state’s poverty alleviation programmes.

Mindful of the commitment by government to involve public participation in the drafting of the 1997 White Paper, calls were made by stakeholders at the hearings for the executive to be guided by the Taylor recommendations in a fashion similar to a green paper, and to fashion in a broadly consultative manner a Social Protection white paper setting out specifically the department’s policy on comprehensive social security in line with its progressive constitutional obligations.

### **Concerns about current legislative initiatives**

Cogniscent of government’s process of investigating the components of a comprehensive social security with the aforementioned concerns in mind, it is of some concern that in advance of the transparent development and adoption of a comprehensive policy, there are at least five pieces of legislation that the Department of Social Development has indicated to the portfolio committee that it wishes to table in the current parliamentary session. These pieces of legislation intersect with and incorporate in various ways critical aspects of a comprehensive social security system. They include:

- **Children’s Bill**
- **National Social Security Agency Bill**
- **Social Assistance Bill**
- **Social Relief Fund Bill**
- **Older Persons’ Bill.**

Notwithstanding the above legislative initiatives, the department has at the same time committed itself to the finalisation of the following policies :

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<sup>38</sup> Press release issued by Joel Netshitenzhe through the Government Communications on 15 February 2002

<sup>39</sup> Around the time of this speech, the Taylor Report was handed over to a Cabinet cluster to consider the report and to prepare initial recommendations to present to the full Cabinet in the July 2002 Lekgotla.

<b>Proposed Policy</b>	<b>Planned completion date</b>
Draft policy on social benefits to children and families	December 2003
Policy on social benefits to the disabled and elderly	November 2003
Anti-poverty strategy	March 2004
Integrated Strategy on AIDS	December 2003
Policy on the protection of orphans and vulnerable children affected by HIV/AIDS	End of 2003
Policy on Social Relief of Distress	December 2003
Strategy for the delivery of social welfare services to the disabled	March 2004
Disability Assessment Tool	Ongoing

The development of these policies clearly are integral components of the broader comprehensive social security policy being developed by the executive. Given the centrality of most of these policies to the above draft bills, it would seem premature to proceed with the legislation prior to the completion of the executive's policy processes.

The Children's Bill process<sup>40</sup> with its comprehensive approach to social protection for children, could serve as a starting point for looking at a package of social security grants and benefits that could be delivered to all South Africans. There is general agreement amongst policy makers tasked with child protection and leading child sector organisations, that it is essential for a comprehensive social security system for children to be a cornerstone of the new Children's Bill in order to reduce the unacceptably high levels of child vulnerability, abuse and neglect in South Africa.

We have recently learnt that the Social Security Chapter of the Children's Bill has been removed in the latest Departmental Draft of the Bill. The right to social security previously contained in the Bill has also been removed. There are contradictory messages coming from the Department of Social Development with respect to exactly where the social security rights and needs of children will be legislated for, and when the necessary policy choices will be made in order to facilitate the legislating of the scheme. Children's social security needs have been moved between a number of policy and law reform processes over the past three years and finally found a home in the Children's Bill process. The latest decision to remove the scheme from the Children's Bill process again places children's social security needs outside of a clear and defined policy and law reform process and we fear that this will result in them being neglected and sidelined again.

We therefore request a clear policy process for decisions with regards to social security reform for South Africa to be made by the end of 2003. The conclusion of such a process should ensure that the legislative initiatives such as the Children's Bill and the Older Persons Bill are not further delayed due to uncertainty over policy priorities and choices.

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<sup>40</sup> The Children's Bill Review by the South African Law Commission involved 5 years of research by child rights experts and government officials involved in child protection, and extensive consultation with the children's sector. One of the key findings of the process was a recommendation for a comprehensive social security scheme for children and a proposal as to how such a scheme would be constituted. Considerable research and consultation went into this proposed scheme and there is broad based support for the scheme by all the leading child sector umbrella organisations.

The lack of the formal conclusion of the national policy process also affects the terms in which the draft National Social Security Agency Bill has been drafted. The seeds of the idea of a national agency were set out in the Taylor report. The recommendations were however fundamentally informed by the other recommendations of the Committee regarding comprehensive social protection, and the Agency was seen as having a role to play in the administration and implementation of this. The draft bill of the Department is not able to reflect this vision in the absence of clear policy regarding the broader components of a comprehensive social security. A number of civil society organisations have noted their concerns about the vision of the current proposed agency<sup>41</sup>.

### **Involvement of broader stakeholders in policy development**

The Taylor Committee recommended the establishment of a Social Protection Commission, representing key stakeholders, to monitor and review issues relevant to social protection (see p. 123 of the report). We strongly support the establishment of this commission.

As the function of the Commission would be to monitor social protection issues, it would be desirable if the Commission were established before the finalisation of the current policy development, to enable it to have input into this process. Should this not be feasible within the current time frames, we encourage government to engage in further broad consultation on the policy process, and include the establishment of the Commission in the ultimate policy.

We also urge government to expand and extend the national debate on comprehensive social protection by preparing a draft White Paper for public comment and facilitate broad participation in that debate by convening public hearings on the draft White Paper. This would provide a forum for further consultation with stakeholders in line with the President's statement.

With regard to timeframes we believe it is both possible and essential that a draft white paper on comprehensive social protection be completed by November this year and that the final white paper be completed by March 2004. If dedicated effort is concentrated on finalising the broader policy statement then these timeframes can be achieved. Having a comprehensive social protection policy document in place will make the process of adopting new legislation considerably easier as the framework will provide the necessary guidelines for debate and decision-making.

### **Conclusion**

Accordingly we call on the Department of Social Development, as the lead government department, together with the other responsible functionaries of the executive, to articulate the need for a broad and coherent statement of social protection policy prior to the tabling of legislation intended to give effect to that policy to facilitate the realisation of the right to social assistance in a manner that is transparent and encourages dialogue and engagement with civil society stakeholders.

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<sup>41</sup> A copy of this written submission is available from the Nehawu Parliamentary office or the Black Sash national office.

## **Current provincial budgets and expenditure of Social Relief of Distress.**

**Table 1: Social Relief of Distress budget allocations – 2000/01-2003/04 (Rands)**

<u>Province</u>	<u>2000/01</u>	<u>2001/02</u>	<u>2002/03</u>	<u>2003/04</u>
<u>Gauteng</u>	<b><u>5,000,000</u></b>	<b><u>3,808,000</u></b>	<b><u>3,000,000</u></b>	<b><u>3,000,000</u></b>
<u>Free State</u>	<b><u>5,200,000</u></b>	<b><u>5,200,000</u></b>	<b><u>5,200,000</u></b>	<b><u>5,200,000</u></b>
<u>Western Cape</u>	<b><u>3,465,000</u></b>	<b><u>3,715,000</u></b>	<b><u>6,361,000</u></b>	<b><u>3,864,000</u></b>
<u>Mpumalanga</u>	<b><u>1,800,000</u></b>	<b><u>0</u></b>	<b><u>1,000,000</u></b>	<b><u>0</u></b>
<u>Limpopo</u>	<b><u>6,240,000</u></b>	<b><u>7,529,000</u></b>	<b><u>5,034,000</u></b>	<b><u>7,220,000</u></b>
<u>Northern Cape</u>	<b><u>1,000,000</u></b>	<b><u>1,300,000</u></b>	<b><u>3,023,000</u></b>	<b><u>3,000,000</u></b>
<u>North West</u>	<b><u>0</u></b>	<b><u>0</u></b>	<b><u>0</u></b>	<b><u>?</u></b>
<u>KwaZulu-Natal</u>	<b><u>5,862,000</u></b>	<b><u>8,749,000</u></b>	<b><u>6,510,000</u></b>	<b><u>6,510,000</u></b>
<u>Eastern Cape</u>	<b><u>2,006,000</u></b>	<b><u>2,517,000</u></b>	<b><u>6,860,000</u></b>	<b><u>6,898,000</u></b>
<u>Total</u>	<b><u>30,573,000</u></b>	<b><u>34,618,000</u></b>	<b><u>36,988,000</u></b>	

*Source: Draft Policy Document on Social Relief of Distress for 2000/01-2002/03 and Provincial Estimates of Expenditure for 2003/04.*

**Table 2 Social Relief of Distress Actual Expenditure – 2000/01-2003/03 (Rands)**

<u>Province</u>	<u>2000/01</u>	<u>2001/02</u>	<u>2002/03</u>
<u>Gauteng</u>	<b><u>896,000</u></b>	<b><u>897,000</u></b>	<b><u>1,115,000</u></b>
<u>Free State</u>	<b><u>543,843</u></b>	<b><u>658,723</u></b>	<b><u>936,745</u></b>
<u>Western Cape</u>	<b><u>2,345,000</u></b>	<b><u>1,739,000</u></b>	<b><u>2,804,857</u></b>
<u>Mpumalanga</u>	<b><u>86,345</u></b>	<b><u>75,690</u></b>	<b><u>37,709</u></b>
<u>Limpopo</u>	<b><u>726,286</u></b>	<b><u>1,302,129</u></b>	<b><u>3,825,000</u></b>
<u>Northern Cape</u>	<b><u>711,577</u></b>	<b><u>953,157</u></b>	<b><u>3,825,803</u></b>
<u>North West</u>	<b><u>0</u></b>	<b><u>0</u></b>	<b><u>0</u></b>
<u>KwaZulu-Natal</u>	<b><u>3,858,000</u></b>	<b><u>3,092,000</u></b>	<b><u>3,672,000</u></b>
<u>Eastern Cape</u>	<b><u>459,528</u></b>	<b><u>755,782</u></b>	<b><u>3,016,457</u></b>
<u>Total</u>	<b><u>9,626,579</u></b>	<b><u>9,473,481</u></b>	<b><u>19,233,571</u></b>

*Source: Draft Policy Document on Social Relief of Distress*