



Chapter 7

Protecting the Children



7.1 Introduction

Studies have shown that a strong link exists between adverse circumstances experienced early in life and future success. The nature of this link is of fundamental importance to overall social policy. Understanding and removing adversity for families with children must become the priority of any Government. Some of the main issues highlighted by these studies indicate the following:

- There is a significant relationship between adverse social and economic conditions in childhood and later success in life. Independent impacts are detectable from family structure and income.
- A life of poverty is statistically associated with higher rates of activities detrimental to individuals and society, such as crime, violence, underemployment, unemployment, and isolation from the larger community.
- The chances of unemployment later in life are higher for children who experience periods of poverty than for those that do not.
- Increased incomes for single mothers with children through social transfers have a significant impact on educational performance of children.
- The malnutrition and stunting of young children is unacceptable in a relatively wealthy South African society.

As a result, the Committee is of the view that strategies to address child poverty must be part of the overall strategy to alleviate and reduce poverty. Therefore measures to address child poverty (and the child support grant, in particular) are centrally

embedded in the Committee's recommendations covering "comprehensive and integrated medium- to long-term framework for income support". This chapter, then, deals with important gaps and additional issues regarding child protection.

Finally, the Committee is aware that the South African Law Commission is developing a comprehensive framework for children, and is supportive of that process. As a result, the proposals and recommendations of the Committee within this chapter must be considered with that framework.

7.2 The Constitution

7.2.1 Constitutional obligations

Section 28(1) of the Constitution deals specifically with fundamental rights of children. Unlike other socio-economic fundamental rights that grant a "right of access" to the right, subject to progressive realisation by the state within its available resources, the rights pertaining to children (everyone under the age of 18 years) do not have any such limitations. The special vulnerability of children and their protection is in this way recognised. Section 28 grants children *inter alia* the right to the following core rights to:

- Family care or parental care, or to appropriate alternative care when removed from the family environments
- Basic nutrition, shelter, basic healthcare services and social services
- Be protected from maltreatment, neglect, abuse or degradation
- Be protected from exploitative labour practices.

In all matters concerning children, the child's best interests are of paramount importance. (Section 18(2)) In terms of section 27 of the Constitution everyone has the right to have access to social security, including, if they are unable to provide for themselves and their dependants, appropriate social assistance.

7.2.2 International instruments

Various international law instruments pertaining to the welfare of children also bind South Africa.

7.2.2.1 African Charter on the Rights and Welfare of the Child

South Africa signed this Charter on 10 October 1997 but is not yet under any obligations in terms of the Charter as it has not yet come into operation. State parties are required to take measures to eliminate harmful social and cultural practices. The responsibilities of the child towards his/her family is also stressed.

State parties must see to the provision of necessary medical assistance and healthcare for all children, with particular emphasis on the development of primary healthcare.

7.2.2.2 United Nations Convention on the Rights of the Child

South Africa signed and ratified this Convention in 1995. A child, as defined in this Convention, is any human being under the age of 18, unless a particular nation's laws set an earlier age for the attaining of majority status. Article 6 of the Convention places state parties under an obligation to ensure the survival and development of the child to the maximum extent possible. This provision gives rise to numerous derivative social security rights, such as the right to healthcare necessary for survival and a standard of living that meets the needs for food, clothing, shelter and education. The fact that this Convention has been ratified by South Africa places South African courts and other adjudicating bodies under an international obligation to comply with the duties placed on member states. In terms of one of these duties the state is expected to report regularly to the supervising body under the Convention on the Rights of the Child on the compliance with the duties bestowed on South Africa as a member state.

Amongst the various rights of children listed in the Convention, the most important for the purposes of social protection are:

- Every child has the right to benefit from social security, including social insurance, and the state should take the necessary measures to achieve the full realisation of this right in accordance with national law. Social security benefits should be granted, taking into account the resources and the circumstances of the child and those responsible for the maintenance of the child (Art. 26).
- Linked to the above is the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The state's duty is to (within the means available) assist the parents with this responsibility, by taking measures, which could include material assistance and support programmes, particularly with regard to nutrition, clothing and housing (Art. 27).
- The state must undertake all appropriate measures for the implementation of the rights contained in the Convention on the Rights of the Child. As most of the rights listed above are economic and social rights, the state is only required to undertake such measures to the maximum extent of available resources (Art. 4).

The UN Committee which monitors compliance with this Convention has been fairly critical about South Africa's non-compliance with many provisions of the Convention. Urgent attention needs to be paid to the recommendations of the UN Committee so as to ensure full compliance with the Convention.

7.3 Evaluation of current policies towards children

Based on numerous submissions and documents made available to the Committee of Inquiry, substantial problems exist with the present system of protection for children in South Africa. The inadequacy of the current policy framework appears a valid conclusion based on reviews of the socio-economic indicators above.

7.3.1 Social assistance

7.3.1.1 Foster care grant

The foster grant is payable to a foster parent in respect of a foster child who has been legally placed

in their custody in terms of the Child Care Act.

In order to qualify for a foster grant:

- The child must have been legally placed in the care of the foster parent(s)
- The income of the foster child must not exceed twice the annual amount of the foster child grant
- The applicant and foster child must be resident in South Africa at the time of application.

Submissions to the Committee report that accessing the grant is problematic for the following reasons:

- To qualify for a foster grant, the child has to be placed in the care of foster parents through the children's court. The court process is lengthy and inappropriate for many families who are content with caring for children who are not their own, but require some form of support.
- Problems exist with accessing foster grants for non-South African children because of the paperwork required.

Information was also provided to the Committee suggesting that there are abuses of the system. Many parents who would otherwise be able to care for their own children are abandoning their children with relatives so that these relatives can access the foster grant.

Foster care is intended as a specialised service for children who have been removed from their families with the intent of returning them after a period of no more than two years. However, one of the reasons why foster placements are renewed repeatedly is the lack of financial support for adoption.

7.3.1.2 Care Dependency Grant (CDG)

A care-dependent child is a child between the ages of one and 18 years who requires and receives permanent home care due to his or her severe mental or physical disability. The purpose behind this grant is to enable parents or foster parents to care for children with physical or mental disabilities in their homes.

The child must not be permanently cared for in a Government institution. The grants are awarded until the child is 18 years of age, or until the child is no longer cared for by his/her parents.

The following is a review of problems with the current grant:

- The current purpose of the CDG to enable permanent home care, only for permanently disabled children, is limiting and inadequate, and open to different interpretations.
- There is a lack of clear definitions (disability, severe/moderate, and permanent home care) in the current legislation. This has serious implications for inclusion/exclusion criteria and makes targeting extremely difficult.
- Currently the CDG benefits only severely disabled children permanently at home, and does not cater for the many others with milder disabilities or those in daycare facilities.
- While means-testing enables targeting of the poorest quintiles, in practice it is rarely used correctly, is administratively demanding and has been reported as demeaning.
- The assessment test can be highly subjective and open to the personal interpretation of the medical officer.

The recommendations regarding the CDG are dealt with in the main disability section (see chapter 10).

7.3.1.3 Maintenance Act

The Maintenance Act No. 99 of 1998 makes provision for the payment of maintenance by any person who has the legal obligation to support a child or children. There is also the obligation on the part of employers to co-operate with the maintenance court orders in effecting deductions through salaries.

The parental maintenance system in South Africa appears to be in disarray. There is a widespread lack of responsibility shown by many liable parents in terms of their obligations to support their dependants, especially where children are brought up in single parent households. There is perception among some non-custodial parents that custodial parents "abuse" the money they receive and spend it on themselves rather than their children.

There is shortage of financial resources allocated to the maintenance system and lack of personnel to deal with the vast number of maintenance cases and the lengthy delays. Due to these restraints the Family Court Pilot Projects, which were established by the Department of Justice in 1998, are not able to do much.

Other problems relate to the actual amount of maintenance to be paid by non-custodial parents. There is low and inadequate level of awards in parental maintenance. Great variations exist between courts as to the monthly amount, which is awarded.

There is also lack of proper tracing agents to trace liable persons and obtain accurate information about their income and means. Furthermore, the Maintenance Act does not address the problem of those who are self-employed or in informal sector, and whose financial state is often difficult to ascertain.

Despite being plagued by problems, however, the private maintenance system, is an important system and as a result it should not be discarded. There is a legal and moral duty on the part of both parents to provide for their child(ren). This duty operates irrespective of whether the relationship between the parents is still in existence or not. The state's duty to provide enters the picture only when parents are unable to provide – not because they do not want to.

7.3.1.4 Adoption

Section 28(1)(b) of the Constitution guarantees every child the right to family or parental care or to appropriate alternative care when removed from the family environment. This is supported by section 28(2), which states that the child's best interests are of paramount importance in every matter concerning children. Article 20 of the Convention on the Rights of the Child states that a child in need of care shall be entitled to special protection from the state. Such protection could include foster placement or adoption. Despite the recent adoption law reforms, introduced by the Child Care Amendment Act 96 of 1996 and the Adoption Matters Amendment Act 56 of 1998, certain key areas of adoption law still need reform.

Current South African adoption law is contained in Chapter 4 of the Child Care Act, 74 of 1983. The standard of adoption is still the best interest of the child. Some of the problem areas that can be highlighted in this regard are (this section is based on submissions made by the South African Law Commission "Project 110: Review of the Child Care Act – Adoption as Substitute Family Care"):

- Section 10 of the Child Care Act does not keep track of the child-rearing practices

especially in black communities where informal fostering is prevalent. Section 10 prohibits anyone from receiving a child and caring for him/her for longer than 14 days. This section does not have a penalty for the contravention but it remains a good ground for removal of a child.

- Transracial adoptions are allowed in terms of the current Child Care Act. The right to equality is subject to reasonable limitations as can be justified in an open and democratic society. The best interests of the child would be considered a reasonable limit that might justify a race-sensitive custody decision. In South Africa, because of the tradition and socio-economic realities, relatively few black families adopt children. This results in "a-one-way-traffic-of-black-children-into-white-families". An important consideration is whether a child growing up in an adoptive family of persons who are different from them, in cultural background and physical appearance, will still be able to develop a positive self-identity.
- Inter-country adoptions are still a problematic issue in South Africa. South Africa has not yet signed the Hague Convention on Inter-country Adoption. Law reform measures promoting inter-country adoption should recognise adoption orders made in other countries and encourage open adoption, making it possible for a South African child adopted in another country to maintain links with the extended family members and with his/her cultural roots.
- Adoption is a private arrangement in customary law in terms whereof two families make an arrangement in order to ensure an heir for a family head who has no male progeny. Payment is sometimes made to compensate the natural parents for rearing the child. This raises the question if customary adoption infringes common law prohibition on trafficking in children and if it should take place under auspices of common law. This is arguable in light of the constitutional recognition of customary law as a system of law and there is no reason why recognition should not be given to an adoption under customary law.

7.4 Policy recommendations to address problems, gaps and inconsistencies of the current social security paradigm for children

7.4.1 Dealing with the special needs of children

7.4.1.1 Recommendations pertaining to foster care grants

The foster care grants provide an important support mechanism for children in compromised family environments. However the following issues need to be addressed:

- The process of foster care allocation should be simplified. This will entail that the present children's court procedure be amended in order to shorten the process. It must, however, be kept in mind that the procedure is extensive in order to allow for proper investigation by social workers to serve the best interests of the child. Provision should also be made for financial support (interim foster care payments while the court process is pending).
- Non-South African children should be allowed to access these grants. This means that the Department of Home Affairs should ensure that all resident children are speedily issued with appropriate documents.
- Provinces should have a uniform approach in granting this (and other) grant(s), especially as far as the eligibility of children in daycare centres or LSEN schools for the CDG are concerned.
- Programmes should be run and services be made available at schools and hospitals that have frequent contact with candidates eligible for these grants.

7.4.1.2 Recommendations pertaining to orphans and child-headed households

There is no social assistance specifically intended for orphans. In the past, orphans that have not benefited from social or private insurance payouts

have been cared for by other members of their families, foster parents or orphanages normally run by NGOs. The enormous increase in the number of orphans as a result of adult AIDS deaths is going to place overwhelming pressure on these institutions.

Child-headed households are a rapidly emerging phenomenon in Africa (partly due to the HIV/AIDS pandemic). The extended family as social support mechanism is eroded by factors, such as poverty, HIV/AIDS, urbanisation and over-stretched resources. These eroded family structures are resulting in a shifted burden of care for children orphaned by AIDS. The burden falls on the elderly or on other children, both who are ill equipped to carry this responsibility, financially and emotionally.

If possible, child-headed households should be incorporated into other households, or even adult supervised institutions. The needs of the children, material and otherwise, should be paramount. Siblings should be allowed to live together. At the very least, the Department of Social Development must allocate responsibility for the households to some adult in the community.

The Department of Social Development must, as a matter of urgency, make provision to support the growing number of orphans, especially those left in child-headed households. Short-term measures include the following:

- Extension of the CSG to all children 0-18 years.
- Simplify access to this grant. In order to assist child-headed households, children should be assisted by community-based organisations (CBOs) and NGOs in order to allow for adult supervision in application and spending of the grant.
- Develop skills and vocational training for these children or participation in development projects, e.g. gardening project, small business management etc.

Long-term measures would include:

- Projects aimed at prevention and integration of these children into society
- Encourage of home- or community-based care
- Simplify foster and adoption process, where a mechanism is developed for "informal carers" of children to access foster child grants

- Involve CBOs and NGOs in the identification, assessment and care of vulnerable children.

Set up of childcare centres to increase these children’s learning opportunities and psychological skills.

7.4.1.3 Recommendations pertaining to children living with HIV/AIDS

One of the tragic effects of HIV/AIDS is the vast number of children infected and affected by the disease

These children currently fall outside of the social safety net. They would seldom qualify for a CDG (unless in cases of terminal stages of the disease where they might require permanent home care), and if they are older than 7 years they would no longer be covered under the Child Support Grant. As HIV/AIDS orphans are often cared for by family on an informal basis, they do not apply for foster care and do not make use of the foster child grants.

Submissions to the Committee suggested that the situation be addressed in the following manner:²⁴

- Extension of the CSG to all children 0-18 years
- Allow for free health services for all children
- Projects aimed at AIDS awareness and prevention should continue and be expanded
- Simplify foster process, where a mechanism is developed for “informal carers” of children to access foster child grants.

7.4.1.4 Recommendations pertaining to the Maintenance Act

Parents who shy away from their duty to maintain their children, as required by law, place a heavy burden on the state’s social services. When parents take responsibility and provide maintenance for their children, the burden on the state is eased. It therefore follows that to ensure that state resources are directed to those children who are vulnerable, not because somebody is not taking responsibility, but who are in need (for example, because their father passed away), the private maintenance system is very crucial.

The following suggestions by Law, Race and Gender Research Unit (UCT) to the Committee

of Inquiry are supported by the Committee:

- Increased personnel are indeed required to deal with the vast number of maintenance cases and lengthy delays. It is a known fact that many private maintenance claimants or would be claimants have lost faith in the system. In addition many elect to stop trying to claim maintenance due to lack of taxi fares to frequent the magistrate’s courts.
- Specialised tracers be employed to trace liable persons. The suggestion of setting specialised tracers on liable persons has already been raised by the Lund Committee. Using tracers to track down those liable parents who are avoiding responsibility is to be welcomed.
- The maintenance division of the family court could be required to take direct action on arrears without waiting for charges to be filed by the complainant and make it mandatory, unless good reason is given, for arrears to be recovered with interest.
- Summons and subpoenas used to order respondents to come to court should be standardised. This is more than necessary in the light of the level of illiteracy in South Africa.
- A campaign modelled along the Masakhane Campaign lines to instil a culture of responsibility towards their children in the general population, proposed by the Lund Committee, should be supported.
- There is a need for clear policy guidelines for those involved in the handling of maintenance claims. One issue, which can benefit from the proposed policy guidelines, is the question of second families and multiple parenting. The issue of second families has raised a variety of questions of both legal and moral nature. Should, for example, courts take the non-custodial parent’s new obligations to a newly established family into consideration when dealing with a maintenance claim?

7.4.1.5 Recommendations pertaining to adoption

A means test is applied in terms of s17 of the Child Care Act, in terms whereof adoption will be allowed if the adoptive parents possess adequate

means to maintain and educate the child. This means test bears potential prejudice towards poorer applicants for adoption. It should be noted that this means test serves a different purpose than the normal means test. A means test is normally instituted to protect the interests of the state. In the case of adoptions, the means test is applied in order to serve the best interests of the child. Also of relevance here is the fact that foster parents who are financially needy can receive a state foster care grant, but adoptive parents who have the same financial difficulties are not eligible for any grants. This may prevent foster parents from adopting a child in their care and this impacts negatively on permanency planning for the child.

In order to overcome these problems, the Law Commission proposed that the possibility of an adoption subsidy should be made available. The purpose thereof is to enable poor people to adopt children. The relevance of such a subsidy becomes less apparent in the case of a universal child grant, (i.e. until the age of 18 years).

Subsidised adoption may have certain negative implications:

- Parents might tend to adopt children for the wrong reasons
- Adoptive parents would then be treated differently from biological parents
- One would have to bear in mind that disallowing poor parents to adopt children is in order to serve the best interests of the child.

7.4.1.6. Measures to enhance the CSG

There was argument in the Committee that the effectiveness of the CSG is undermined by a lack of nutrition information and inappropriate nutrition education. The Committee therefore recommends that the CSG be supplemented by an appropriate nutrition and child care support programme. In this regard, caregivers of HIV positive children will need particular help.

7.5 Conclusion

It is the constitutional and international obligation of the state to provide social security to children. Through providing social assistance, and with the concurrent development of services and development programmes, the state can and must attempt to improve the standard of living of children.

This chapter, however, does not purport to provide a comprehensive package of social security for children. It is envisaged that the SA Law Commission in its proposed Comprehensive Child Care Statute will make provision for that.