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The inadequacy of the Social Grant System available to children in South Africa*

Summary

The purpose of this article is to examine the current social assistance grant system available to children in South Africa and to indicate its major shortcomings. The new Children's Bill and Social Assistance Bill, soon to be enacted, will also be examined to establish whether there are any positive changes with regard to the socio-economic situation of children. Proposals made by the South African Law Commission, South African Human Rights Commission, Committee of Inquiry into a Comprehensive System of Social Security for South Africa, the United Nations Committee on the Rights of the Child and several other interested parties will also be considered to establish whether in fact government is in compliance with its constitutional and international duty towards realising the social security and social assistance rights of children. It is submitted that the exclusion of children of the ages of (currently) 11 to 18 from the child support grant infringes on their constitutional rights to social assistance, human dignity, life and equality. Another problem with the current grants is the unavailability thereof to households where an adult caregiver is absent as well as the complicated means test. The unavailability of these grants to children of refugees is also a cause for concern. Due to the categorical nature of children's social assistance grants, it is submitted that the state is not currently conforming to the standards set by the Bill of Rights and international law.

Die ontoereikendheid van die Sosiale Bystandsisteem beskikbaar vir kinders in Suid-Afrika

Die doel van hierdie artikel is om die huidige sosiale bystandstelsel wat tot kinders in Suid-Afrika se beskikking is, te ondersoek en die tekortkominge te identifiseer. Die nuwe wetsontwerpe op Kinders en Sosiale Bystand wat binnekort inwerking sal tree, sal ook ondersoek word, om vas te stel of daar enige positiewe veranderinge met betrekking tot die sosio-ekonomiese situasie van kinders plaasgevind het. Voorstelle wat gemaak is deur die Suid-Afrikaanse Regskommissie, die Suid-Afrikaanse Menseregtekommissie, die Komitee van Ondersoek na 'n Omvattende Sisteem van Sosiale Sekerheid vir Suid-Afrika, die Verenigde Nasies Komitee op die Regte van die Kind en ander belanghebbende groepe sal ook oorweeg word ten einde vas te stel of die staat voldoen aan sy grondwetlike en internasionale verpligting om die regte van sosiale sekerheid en sosiale

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bystand van kinders te realiseer. Dit word aan die hand gedoen dat die uitsluiting van kinders van die ouderdom (tans) van 11 tot 18 van die kinderondersteuningstoelaag inbreuk maak op die grondwetlike regte van sosiale bystand, menswaardigheid, lewe en gelykheid. 'n Verdere probleem met die huidige toelae is die onbeskikbaarheid daarvan aan huishoudings sonder 'n volwassene versorger sowel as die gekompliseerde middele toets. Die onbeskikbaarheid van hierdie toelae vir kinders van vlugteling is voorts problematies. Weens die kategoriese aard van kinders se sosiale bystandstoelae word aan die hand gedoen dat die staat nie in lyn met die standaard soos in die Handves van Regte en internasionale reg vervat, optree nie.

1. Introduction

Children in South Africa are a particularly vulnerable group. In their most recent report to parliament the South African Human Rights Commission¹ identified the following groups of children as particularly vulnerable and marginalised: all children, regardless of their age, and specifically children infected with HIV/AIDS; child-headed households; children living on streets; and children in extended families due to HIV/AIDS-related deaths.

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 R200 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, and that 14.3 million children are living in poverty on less than R400 per capita per month (R490 in 2002 terms). Child poverty is on the increase. Between 1995 and 1999, the rate of child poverty in South Africa on a poverty line of R400 per capita per month increased from 64.7% to 75.8% and the rate of children in dire poverty calculated on a poverty line of R200 per capita per month increased by 19.2% from 38.9% to 58.1%.²

One of the consequences of the impoverishment of children is that they are forced by circumstances to work.³ According to the Network against Child Labour (NACL) there are more than 3,38-million children between the ages of 5 and 17 working in South Africa. There are at least 250 000 children working in 'exploitative labour' conditions. Exploitative labour, is any work that is hazardous or inappropriate to a child's age. This definition also includes work that affects their physical and moral development, and keeps them out of school.⁴

One way of dealing with this enormous problem of poverty and vulnerability that children are facing is to approach it from a right-based perspective.

The purpose of this article is to examine the current social assistance grant system available to children in South Africa and to indicate its deficiencies and

1 SAHRC 2000-2002:227-229.

2 Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003.

3 Mawson 2004-05-29 *Mail and Guardian*.

4 Mawson 2004-05-29 *Mail and Guardian*.

major shortcomings. The new Children's Bill⁵ and Social Assistance Bill⁶, soon to be enacted, will also be examined to establish whether there are any positive changes with regard to the socio-economic situation of children. Proposals made by the South African Law Commission, South African Human Rights Commission, Committee of Inquiry into a Comprehensive System of Social Security for South Africa, the United Nations Committee on the Rights of the Child and several other interested parties⁷ will also be considered to establish whether in fact government is in compliance with its constitutional and international duty towards realising the social security⁸ and social assistance⁹ rights of children.

2. Constitutional and international obligations

Before commencing with an evaluation of the grant system available to children, it is necessary to emphasise that South Africa has both a constitutional and international obligation to comply with the standards set out in these documents with regard to the social assistance rights of children.

Section 27(1)(c) of the *Constitution of the Republic of South Africa* 108 of 1996¹⁰ states that 'everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.¹¹ Because children are not able to fend for

5 Children's Bill B70 of 2003 as reintroduced in the National Assembly as a section 75 Bill; explanatory summary of Bill published in GG 25346 of 13/08/2003.

6 Social Assistance Bill B 57D-2003 as amended by the Select Committee on Social Services (First introduced in the National Assembly as a section 76 Bill; explanatory summary of Bill published in GG 25340 of 8/08/2003).

7 Alliance for Children's Entitlement to Social Security (ACCESS), Children's Institute (UCT), Black Sash, Gender Advocacy Programme, Socio-Economic Rights Project, Community Law Centre (UWC), Congress of South African Trade Unions (COSATU), National Education, Health and Allied Workers Union (NEHAWU), National Association of Democratic Lawyers (NADEL), Treatment Action Campaign (TAC), Rapcan Southern African Catholic Bishop's Conference, South African Council of Churches, Women's Legal Centre. Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003.

8 According to the Social Welfare White Paper (White Paper for Social Welfare GN 1108 in GG 18166 of 8/08/1997), social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual's earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution (Ch 7 para 1 of the Social Welfare White Paper).

9 Social assistance consists of non-contributory and income-tested benefits provided by the state to groups such as people with disabilities, elderly people and unsupported parents and children who are unable to provide for their own minimum needs. Ch 7 para 2 of the Social Welfare White Paper.

10 Hereafter referred to as the Constitution.

11 Section 27(1)(c) is textually linked to section 27(2) which limits the obligation of the state to only '... take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'. As discussed in *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC) para 30.

themselves their right to social assistance needs to be protected and special emphasis will be placed on this right. In addition to section 27(1)(c), children are further afforded protection by way of section 28(1) which grants every child the right to social services.¹²

South Africa has ratified the United Nations Convention on the Rights of the Child (CRC).¹³ This Convention contains a set of rights and freedoms to be enjoyed by all children, all over the world. 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 26(1) explicitly states that every child has the right to benefit from social security, including social insurance, and that 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 both the child and those responsible for the maintenance of the child.¹⁴

In terms of its ratification of the CRC, the South African Government has assumed certain international obligations in respect of children,¹⁵ and is placed under an international obligation to comply with the duties placed on member states. One of these duties is to report regularly to the supervising body under the CRC on the compliance with its duties as a member state.

On 25 and 26 January 2000 the United Nations Committee on the Rights of the Child (CRC Committee) considered South Africa's first report and adopted concluding observations on South Africa's compliance with the indicated Convention. The CRC Committee also made several observations regarding socio-economic rights of children and the shortcomings in the current system.¹⁶

The Committee is not satisfied with the current child support grant and recommends that it *must be expanded to include children up to the age of 18 years*, who are still in school. The Committee encourages the South African government to take effective measures to ensure the continuation of support programmes for economically disadvantaged families, and is also concerned about the inadequate monitoring and evaluation of placements in the foster care programme.

The South African Law Commission¹⁷ considered these observations and recommendations and made overall proposals in the drafting of the Children's Bill: While the Commission acknowledged that means testing is not ideal, as the costs involved in conducting the means testing divert funds away from

12 Section 28(1)(c). The rights contained in section 28 of the Constitution are included in chapter 3 clause 11 of the Children's Bill B70 of 2003.

13 G.A. res. 44/25, annex 44 U.N. GAOR Supp. (No 49) at 167, U.N. Doc A/44/49 (1989) entered into force 02-09-1990. Ratified by South Africa on 16 June 1995, without any reservations.

14 Jansen van Rensburg en Olivier 2003:627.

15 Clark 2000:342.

16 Committee on the Rights of the Child 2000: paras 11, 12, 15, 24, 29 & 32.

17 SALC 2002:333-338.

the actual recipients, it was decided to retain means testing for all the grants *except the child grant*. The Commission reasoned that, given resource limitations, all the grants and subsidies should be targeted only at the poorest of the poor to enable those children to survive.

The Commission further observed that a significant problem facing South African children at present concerns the availability of financial support for children orphaned by HIV/AIDS, and especially those living in child-headed households. Unless they are aged under 7,¹⁸ and living with a primary caregiver who can apply for a child support grant, or placed in formal foster care in order for the foster care grant to be payable, there is no monetary support available. Further, children who are HIV positive or have AIDS themselves, are not regarded as able to qualify for the care-dependency grant.

The Commission therefore recommended the introduction of the following social security scheme for children:

- A child grant;
- A foster care and court-ordered kinship care grant;
- An informal kinship care grant;
- An adoption grant;
- An emergency court grant;
- A subsidy to enable children with disabilities to obtain assistive devices;
- Subsidies to NGO's contracted to the State to implement programmes and projects giving effect to this Act;
- Fees to NGO's, FBO's and welfare organisations who carry out services on behalf of the State;
- A subsidy to encourage the provision of early childhood development services.

The Committee of Inquiry into a Comprehensive System of Social Security for South Africa,¹⁹ taking into account the work done by the South African Law Commission, did not propose a comprehensive social security package for children, arguing that the Commission will make provision for that in the Child Care Statute. They did, however, suggest that a comprehensive social protection package, including a basic income grant, income generating opportunities and free basic services to those in need, may address this problem of child poverty more appropriately.²⁰ The Committee proposed a minimum level or

18 Since the report, government has started a 3 year process of extending the grant to children under the age of 14 years. Section 4(1) of the *Social Assistance Act* as amended by the *Welfare Laws Amendment Act*. See R 460 in GG 24630 of 31/03/2003.

19 This Committee was appointed on the basis of a decision by the South African Cabinet and charged with developing recommendations on the establishment of a comprehensive social security system for South Africa (Committee of Inquiry 2002:61).

20 Committee of Inquiry 2002:42-43.

measure of provision made available to everyone. This *inter alia* includes the immediate extension of the child support grant to gradually cover children under the age of 18. The scrapping of the means test across the board was also recommended.²¹

Unfortunately, the proposed social security scheme for children by the Law Commission was not included in the new Children's Bill.²² The exclusion of the chapter on a social security system in the Children's Bill has been criticised by numerous parties.²³ The Department has reported that these provisions are better placed within the Social Assistance Bill. It will be indicated later in the discussion that government also failed to incorporate this scheme in the Social Assistance Bill.

21 Other elements of the package include, amongst others, free health care (the Committee advocates the eventual introduction of a National Health Insurance system), free primary and secondary education, free water and sanitation (up to a certain basic level), free electricity (up to a certain basic level), access to affordable and adequate housing, access to jobs and skills training, and a reformed disability grant, foster care grant and child dependency grant (Committee of Inquiry 2002:42-43).

22 This Bill (the 'reintroduced Bill') contains part of the envisaged *Children's Act*. The Bill which was initially submitted to Parliament ('the consolidated Bill') dealt with the full spectrum of protection of children in both national and provincial spheres and was to be dealt with in terms of section 76 of the Constitution (functional area of concurrent national and provincial legislative competence). It was later found to be a 'mixed' Bill, including elements to be handled in terms of both section 75 (functional area of national legislative competence) and section 76 of the Constitution. Due to its mixed character, the Deputy Speaker of the National Assembly requested the Executive to split the consolidated Bill, which has now been done. The provisions of the consolidated Bill which will apply to the provincial government have been removed and, consequently, the current Bill only contains matters which have to be dealt with in terms of section 75 of the Constitution. As soon as the current Bill is enacted, an amendment Bill containing the matters which apply to the provincial government only ('the amendment Bill') will be introduced. The amendment Bill will have to be dealt with in terms of section 76 of the Constitution. The amendment Bill will complete the current Bill by inserting the provisions which deal with service delivery and further protection of families and children. The amendment Bill will insert the following chapters in the envisaged Act: Chapter 8 introduces a provision on the compulsory reporting by certain persons of children in need of care and protection, addresses the child protection system, the provision of child protection services, the National Child Protection Register and measures relating to the health of children. Chapter 9 makes provision for prevention and early intervention as a first layer of services provided to children and families in need of assistance. Chapter 11 deals with contribution orders. Chapter 13 deals with foster care and care by family members (Explanatory summary of Bill published in GG 25346 of 13/08/2003).

23 See Anon 22/10/2003 *Mail and Guardian*; Wolmarans 23/10/2003 *Mail and Guardian*; Anon 22/10/2003 *Mail and Guardian*.

3. The Judicial maintenance system in South Africa available to children

The basic assumption regarding the maintenance of children is that the child's basic financial needs should be met by his or her parents.²⁴ Unfortunately, many parents are, due to various factors, unable to do so.²⁵ It is for this reason that the maintenance system in South Africa rests on two legs.²⁶

The one leg is the judicial maintenance system, which is based on the legal duty to support one's dependants and the other leg is the state maintenance system, which is meant to act as a safeguard by providing support where the procedures of the judicial maintenance system fail to do so.²⁷ When considering maintenance provision in South Africa, it is impossible to separate the two systems. When studying the implementation of the Constitution and international covenants concerning children's rights,²⁸ it is of paramount importance that these two systems be viewed holistically.²⁹

While the primary responsibility to provide for the socio-economic rights of children rests with the children's parents,³⁰ the state is under a duty to intervene or assist when the parents or guardians fail or are unable to provide.³¹ As already indicated, the reality in South Africa is that the majority of children in South Africa live in poverty.³² Children in parental care face the same hardships as those outside of parental care, as parents are unable to provide them with basic

24 Malherbe 2003:391.

25 Poverty and unemployment, for example, make it extremely difficult for parents to provide for their children. In terms of the *Maintenance Act* 99 of 1998, there is a legal obligation on a non-custodial parent to make a fair financial contribution towards the support of his or her children. Regrettably, non-custodial parents often fail to meet this obligation, leaving the custodial parent with the sole financial responsibility of raising the child. See Clark 2000:344-345; Malherbe 2003:391.

26 Clark 2000:345; Malherbe 2003:391.

27 This is also in line with section 27(1)(c) of the Constitution which states that "everyone has the right to have access to social security, including, if they are *unable to support themselves and their dependants*, appropriate social assistance". See Clark 2000: 345; Malherbe 2003:391.

28 For example the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child.

29 Clark 2000:345; Malherbe 2003:391.

30 In terms of *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) para 77. See Bekink and Brand 2000: 183; Malherbe 2003:378; SAHRC 2000-2002:172.

31 Malherbe 2003:378; SAHRC 2000-2002:172. In the *Grootboom* case (para 30), the Constitutional Court recognised that if the state had better social assistance programmes available for the poor, there would be less pressure on the other socio-economic rights. This includes, for example, that the state must, by means of a social assistance programme for children and parents who are unable to provide for themselves, assist them by means of, for example, child support grants (*Grootboom* case para 51).

32 An estimated 60% of South African children live in poor households. See Malherbe 2003:378; SAHRC 2000-2002:173. See section 1 above.

necessities.³³ The state thus has a duty to fulfil these rights in respect of these children. The link between social assistance and the provision of child maintenance by the state is significant.³⁴ In South Africa, benefits made available by the state to families are at present very limited.³⁵ Such benefits are, as a rule, cash benefits with benefits in kind³⁶ being the exception.³⁷

4. Social Grants available to children in South Africa

In the realm of social assistance, the *Social Assistance Act*³⁸ is the most important instrument, regulating the payment of social assistance grants and other relief measures.³⁹ Section 2 of the *Social Assistance Act*⁴⁰ as amended by the *Welfare Laws Amendment Act*⁴¹ provides for the following grants in connection with child support:

- d) a child-support grant to a primary caregiver of a child who is under the age of seven years or such higher age as the Minister may determine by notice in the Gazette;⁴²
- e) a foster child grant to a foster parent;
- f) a care-dependency grant to a parent or foster parent in respect of a care-dependent child.⁴³

The new Social Assistance Bill⁴⁴ is aimed at the consolidation of the legal requirements and provisions for social assistance in the Republic, and the creation of uniform norms and standards, which can apply countrywide.⁴⁵ The

33 For example, unemployed parents and single mothers who struggle to obtain maintenance payments from defaulting fathers. See Malherbe 2003:378; SAHRC 2000-2002:173.

34 Clarck 2000:346.

35 Clark 2000:346. The inadequacy of the current social assistance system was also highlighted by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa that indicated that 60% of the poor do not have access to any form of social security cash grants or benefits (Committee of Inquiry 2002:59).

36 Examples of benefits in kind which have been implemented in South Africa are school feeding schemes and free medical care to children under the age of 6 years (Sloth-Nielsen and Van Heerden 1996:247).

37 Bolani 1999:262; Clarck 2000:346.

38 *Social Assistance Act* 59 of 1992. This Act will be repealed, insofar as it has not been assigned to another sphere of government, by the Social Assistance Bill B 57D-2003, when such Bill comes into operation. Clause 37(1) of the Social Assistance Bill.

39 Olivier and Kalula 2003:143.

40 Act 59 of 1992 (hereafter *Social Assistance Act*).

41 Act 106 of 1997 (hereafter *Welfare Laws Amendment Act*).

42 The age is currently in the process of being extended to 14 years. See R 460 in GG 24630 of 31/03/2003.

43 'Care-dependent child' means a child between the ages of 1 and 18 years who requires and receives permanent home care due to his or her severe mental or physical disability (Section 1 of the *Social Assistance Act* as amended by the *Welfare Laws Amendment Act*).

44 B 57D-2003.

45 Memorandum on the objects of the Social Assistance Bill B 57D-2003.

Bill makes provision for the following categories of grants in respect of children: child support grant,⁴⁶ care-dependency grant⁴⁷ and the foster child grant.⁴⁸ The current system provides for exactly the same grants for children as the old *Social Assistance Act*.⁴⁹ The Department of Social Development in briefing the Portfolio Committee on Social Development indicated that it will not be making any policy shifts in the new Social Assistance Bill and that the Bill is tabled to remove the assignment to the provinces as indicated in the Memorandum.⁵⁰

4.1 Maintenance grant

Before commencing on a discussion of the current social grants available to children, it is necessary to give some background on the old maintenance grant available to children during the apartheid government, and the reasons why this grant had to be phased out within the new South African Constitutional dispensation.

The maintenance grant was paid in respect of the children of parents who were not capable of providing for themselves and their children.⁵¹ It was payable to the legal parent of the child for a child in his or her custody, to a maximum of two children.⁵² These grants did not provide a general system of relief for poor families because in order to receive this grant, the parent had to comply with certain requirements.⁵³ The parent (or his or her spouse) had to pass a means test, the parent could not be in receipt of a social grant, and both the parent and the child involved had to be South African citizens.⁵⁴ An applicant mother had to prove that legal steps had been taken to obtain maintenance payments from the father.⁵⁵ The maintenance grant lapsed when the beneficiary died; the child was no longer in the beneficiary's custody; the child turned 18 (unless the child was still at school and not yet 21); or the child left school.⁵⁶

This system of maintenance grants successfully reached a small proportion of poor mothers in need of support (primarily white, coloured and indian), but not the poorest majority, namely rural African women and children.⁵⁷ While

46 Clauses 4(a) and 6 of the Social Assistance Bill B 57D-2003.

47 Clauses 4(b) and 7 of the Social Assistance Bill B 57D-2003.

48 Clauses 4(c) and 8 of the Social Assistance Bill B 57D-2003.

49 This is disappointing, taking account of the fact that several commissions and committees suggested otherwise.

50 Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003.

51 Luiz 1995:588.

52 Bolani 1999:262; Clarck 2000:346.

53 Luiz 1995:588.

54 Bolani 1999:262; Clarck 2000:346; Luiz 1995:588.

55 Bolani 1999:262.

56 Bolani 1999:262-263; Clarck 2000:346; Visser 1987:22.

57 Between 1960 and 1990, 50 per every 1 000 coloured, 40 per every 1 000 Indian and 14 per every 1 000 white children received the grant, against between two or three per 1 000 African children. See Clarck 2000:347; Naidoo and Bozalek 1997: 26; Van der Merwe 2000:730.

all South Africans were eligible for the grant, African women were largely excluded from access, as most of the former homelands did not administer it.⁵⁸

The maintenance grant has been phased out and replaced by the child support grant. This phasing out took place over a period of three years, through a reduction in the rate of payment.⁵⁹ The reason for phasing out this grant was the various deficiencies that were highlighted with regard to the grant.⁶⁰ The reasons included, firstly, that in South African families, it is often not the legal parent that has to take care of the child. Consequently, many children in South Africa, did not receive the benefit of this grant. Further, many poor families in South Africa have more than two children. Because this grant was limited to a maximum of two children, additional children in such families did not receive the benefit of this grant.⁶¹ The requirement that the claimant had to prove steps taken by him or her to receive maintenance from the other parent before he or she was eligible for the maintenance grant posed another problem, namely that, due to administrative weaknesses, the maintenance system could not guarantee payment of maintenance.⁶²

4.2 Child support grant

The central aim of the child support grant is to ensure a more equitable distribution among a larger number of children than were reached by the state maintenance grant,⁶³ and to provide financial assistance to children from economically-disadvantaged families.⁶⁴

This grant is currently payable to a primary caregiver of a child under the age of 11 years.⁶⁵ The primary caregiver is the person who has the parent's or parents' permission to care for the child and who is responsible for meeting the daily needs of the child.⁶⁶ Anyone receiving payment for caring for a child or who does not have the consent of the parent or guardian of the child is not regarded to be the primary caregiver for the purposes of this grant.⁶⁷ This grant is payable in respect of an unlimited number of own children of the primary caregiver and in respect of six other children.⁶⁸

58 Naidoo and Bozalek 1997:26.

59 Bolani 1999:263.

60 Bolani 1999:263.

61 Bolani 1999:263.

62 Bolani 1999:263.

63 Clarck 2000:349.

64 Malherbe 2003:381.

65 Section 4(1) of the *Social Assistance Act* as amended by the *Welfare Laws Amendment Act*. See now R460 in GG 24630 of 31/03/2003.

66 In terms section 3 of the *Welfare Laws Amendment Act*.

67 Reg 3(2) GN R418 in GG 18771 of 31/03/1998. See Bolani 1999:264; Malherbe 2003:381.

68 Reg 3(1) GN R418 in GG 18771 of 31/03/1998. See Bolani 1999:264.

Both the primary caregiver and the child must be resident in South Africa at the time of the application for the child support grant and both must be South African citizens⁶⁹ or permanent residents.⁷⁰

The primary caregiver also has to meet certain other conditions, namely that he or she (or any other person) may not already receive a grant for the child and the child must not be in an institution for the care and safety of children.⁷¹

The applicant must undergo a means test, which is linked to his or her personal income.⁷² In this way, the means test aims to ensure that the grants are paid only to families in which a real need has been established.⁷³ The current amount of the child support grant is R170 per child per month.⁷⁴ This amount is much less than the amount of the maintenance grant, the reduction having been based on a policy decision to decrease the amounts payable under the maintenance grant in order to balance out the wider scope of the child support grant.⁷⁵

It has been argued that there are many reasons why the child support grant can be seen as an improvement on the maintenance grant.⁷⁶ While the maintenance grant was only available to a maximum of two children, the child support grant is available to an unlimited number of the caregiver's own children and to six children of another.⁷⁷ The fact that the grant is payable to the primary caregiver can also be seen as an improvement. As already mentioned, the modern reality⁷⁸ is that it is not necessarily a parent who cares for the child. This extension of the scope of the grant is of particular importance in the

69 According to section 4(b) of the *Social Assistance Act*. See Bolani 1999:264; Clark 2000:348; Malherbe 2003:382.

70 *Khosa and Others v Minister of Social Development and Others* CCT 12/03 and *Mahlaule and Others v Minister of Social Development and Others* CCT 13/03. (Hereafter referred to as the *Khosa and Mahlaule* case).

71 GN R813 in GG 20235 of 25/06/1999. In the past the conditions were contained in Reg 3(2) GN R418 in GG 18771 of 31/03/1998. Apart from the two above-mentioned conditions, further conditions applied, namely: the child must be immunised where such a service is available free of charge; the primary caregiver must not, without good reason, refuse employment; he or she must make an effort to secure maintenance for the child from the parent; and he or she must not unreasonably refuse to participate in a development programme aimed at developing his or her income.

72 That is, the income of the primary caregiver and his or her spouse. GN R1233 in GG 22852.

73 A means test involves assessment, by an outsider of an individual or a family's income and assets (Malherbe 2003:383).

74 GN 409 in GG 26197 of 26/03/2004.

75 Malherbe 2003:383.

76 Bolani 1999:265.

77 While family benefits have their origins in the Western-based nuclear family model, consisting of a father, a mother and their children, this grant gives recognition to a peculiar characteristic of African households in particular, namely that the person caring for a young child in an extended family context, is often not the parent of the child. See Malherbe 2003:378; Olivier and Kalula 2003:145.

78 Particularly in the African context.

context of the HIV/AIDS pandemic, where, in many cases, it is non-relatives in the community who are taking day-to-day care of AIDS orphans.⁷⁹

Because this resulted in rising costs, the grant was, until 1 April 2003, only available to children under 7 years.⁸⁰ Government is in the process of extending the child support grant in phases to children under the age of 14 over a period of 3 years. During the first phase, which lasted from the 1 April 2003 to 31 March 2004, primary caregivers of children under the age of 9 could apply for the grant. The second phase, from 1 April 2004 to 31 March 2005, currently allows primary caregivers of children under the age of 11 to apply. The final phase will extend from 1 April 2005 to 31 March 2006. Primary caregivers of children under the age of 14 will be able to apply for the child support grant during this period.⁸¹ There is, however, no indication that government is planning to extend the grant to children older than 14 years.

The fact that the child support grant is payable to a primary caregiver also has disadvantages. Children who do not have such an adult caregiver to apply for the grant on their behalf, for example children living on the streets and in child-headed households are, unfortunately, excluded from receiving the grant.⁸²

A parent could only receive the old maintenance grant if he or she was not receiving any other grant, while the only restriction in the case of the child support grant is that the primary caregiver may not receive another grant for the child.⁸³ To obtain the old maintenance grant, the parent had to prove that legal steps had been taken to secure maintenance. Initially, the child support grant was linked to the private maintenance system, by compelling caregivers to provide proof of their efforts to obtain maintenance for the child from the parent or any person who was legally obliged to take care of the child.⁸⁴ This requirement was criticised as making the grant inaccessible to many poor women who did not have access to the old maintenance system, and was consequently deleted in the amended regulations.⁸⁵

A positive aspect of the child support grant is that the elimination of racial discrepancies in the maintenance system can be seen as a step forward.⁸⁶ Although the new system of the child support grant has levels of benefits substantially lower than other grants, it aims to eventually provide a safety net of minimum assistance to children identified as vulnerable.⁸⁷ It may still, however,

79 Liebenberg 2001:243; Malherbe 2003:382.

80 The grant is related to the age of the child as many mothers of young children are unable to earn an income, and children are most vulnerable when they are at their youngest. See Bolani 1999:265; Malherbe 2003:382.

81 Section 4(1) of the *Social Assistance Act* as amended by the *Welfare Laws Amendment Act*. See R 460 in GG 24630 of 31/03/2003.

82 Malherbe 2003:382.

83 Bolani 1999:265.

84 GN R418 in GG 18771 of 31/03/1998.

85 GN R813 in GG 20235.

86 According to Naidoo and Bozalek 1997:27, for the first time, the poorest will be beneficiaries of maintenance grants. See also Clarck 2000:348.

87 Namely children under the age of 14 years (although the grant is currently only available to children under the age of 11), particularly children in rural areas and

be argued that the poorest of poor children, for example children living on the streets and in child-headed households are excluded from this grant.

Much criticism has been levelled against this grant. The targeting rate does not correspond with prevailing poverty levels among children. A large number of poor children in the eligible age group who are in need of state assistance will be excluded because of the means test.⁸⁸

One of the problems with the child support grant is that it is complicated by a strict means test. A primary caregiver will only pass the means test if the primary caregiver and child live in either a rural area in a formal or informal dwelling or in an urban area in an informal dwelling, and the personal income of the primary caregiver and his or her spouse is below R13 200 per annum, or if they live in an urban area in a formal dwelling and the personal income is below R9 600 per annum. The amount of R9 600 is only applicable to a primary caregiver and child living in an urban area and who occupy a brick/concrete or asbestos house.⁸⁹ The two-tier nature of the means test for determining who is eligible for the grant,⁹⁰ is discriminatory⁹¹ against primary caregivers who live in rural areas. This means the test is unnecessarily complex and could have the result of being to the disadvantage of primary caregivers who live in large and poverty-stricken households.⁹² 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.⁹³

The South African Law Commission,⁹⁴ in drafting the new *Children's Act* suggested that means testing be retained for all grants except the child support grant. The Commission opined that taking limited resources into account, all the grants and subsidies should be targeted *only at the poorest of the poor* to enable those children to survive.⁹⁵

Another cause for concern is the amount of the grant.⁹⁶ According to Malherbe,⁹⁷ the adequacy of the amount of the child support grant should be measured against the needs of the children who are covered as beneficiaries. In this regard, Liebenberg⁹⁸ is of the opinion that the child support grant can

informal settlements. See Clark 2000:348; Naidoo and Bozalek 1997:27; Van der Merwe 2000:732.

88 Clark 2000:349.

89 R 16(2) of GN R418 in GG 18771 of 31/03/1998.

90 See Clark 2000:350; Malherbe 2003:383.

91 And thus in conflict with section 9 of the Constitution.

92 Clark 2000:350.

93 Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003.

94 South African Law Commission 2002:333-338.

95 See section 2 above.

96 As indicated the grant is currently R170 per month (GN 409 in GG 26197 of 26/03/2004).

97 Malherbe 2003:383.

98 Liebenberg 2001:243.

be regarded as adequate only if it enables the primary caregiver to “at least feed, clothe, shelter and acquire basic medicine for the child”. It is highly questionable whether the present value of the grant is able to achieve this.⁹⁹ The small benefit level of the grant does not appear to be linked to the needs of poor children and the costs of their support.¹⁰⁰

One of the conditions with which the primary caregiver has to comply with is that he or she can only qualify for the grant if he or she does not, without good reason, refuse to accept employment or participate in any development programme.¹⁰¹ This condition can be criticised for granting a wide discretion to administrative officials as to the interpretation of reasonableness in respect of a refusal to take up employment or to participate in a development programme.¹⁰²

A dilemma facing many working parents¹⁰³ is that employment could disqualify them from receiving the child support grant.¹⁰⁴ It is unfair to disqualify a family from receiving this benefit if the portion of the income, derived from employment, which disqualifies the family from state grants does not exceed the child care costs.¹⁰⁵ It is therefore imperative that child care costs and facilities be subsidised.¹⁰⁶ Well-subsidised and good quality child care services will enable caregivers to take up employment, which will in turn lead to savings by the social assistance system.¹⁰⁷

The grant is only available to children under the age of 11. “Child” is defined in the Constitution,¹⁰⁸ Social Assistance Legislation¹⁰⁹ and international

99 Malherbe 2003:383.

100 While the grant covers food and clothing for the lowest rung, it does not provide for the cost of living of the caregiver in caring for the child. If the mother stays at home to look after the child, that work is being done at no cost to the state. If the mother cannot survive without work, she will have to put her children in the care of others. If she were to place her children in foster care, the financial burden on the state would be much larger. See Naidoo and Bozalek 1997:28.

101 Reg 3(2)(f) GN R418 in GG 18771 of 31 March 1998.

102 Clark 2000:351 raises the question as to whether the refusal of a primary caregiver to accept employment for the reason that she is the only person who can take care of her young child during the day could be considered reasonable. She goes on to state that such a condition may actually deter primary caregivers from seeking assistance on behalf of children in their care.

103 Especially single parents and female-headed families.

104 Malherbe 2003:390.

105 When a parent is employed, additional expenses in respect of child care for when the parent is at work are incurred. If such employment disqualifies the parent from receiving the CSG, it may not be financially beneficial for the parent to take up the employment.

106 Malherbe 2003:390.

107 This would also lessen the burden placed on NGOs that are currently battling to meet the demand for quality child care. See Malherbe 2003:391.

108 Section 28(3).

109 Section 1 of the *Social Assistance Act* as amended by the *Welfare Laws Amendment Act* as well as clause 1 of the Social Assistance Bill, also define a child as under the age of 18, yet do not make the child support grant available to them. In terms of clause 1 of the Children’s Bill, a child is also defined as under the age of 18.

documents¹¹⁰ to mean a person under the age of 18. This could give rise to the question of the constitutionality of access to the child support grant. No provision is made to assist parents to care for children of 11 years and older.¹¹¹ Olivier and Kalula¹¹² argue that, as children within this age bracket should be attending school, with all its resulting expenses, there is a sufficient need for providing the grant to such children. More recently, in May 2004, in a statement released to coincide with Child Protection Week, two children's rights organisations¹¹³ called on the government to extend the child support grant to all children under the age of 18 arguing that the exclusion of children from 11 to 18 years is unconstitutional.¹¹⁴ It is submitted that such exclusion infringes on their right to equality, access to social security and social assistance and children's rights to social services.¹¹⁵

The Committee on the Rights of the Child has, in its consideration of South Africa's first report¹¹⁶ expressed concern as to the then age limitation of 6 years.¹¹⁷ The Committee recommends that government expand the child support grant programme or develop alternative programmes to include support to children up to the age of 18, who are still in school.¹¹⁸ An alternative recommendation is that a universal child support grant, for all children under the age of 18 be introduced.¹¹⁹ The South African Human Rights Commission is of the opinion that, by limiting the age of eligible children to below 7,¹²⁰ the state has neither promoted nor fulfilled the right of all children to social security.¹²¹ By failing to include those in desperate need, the child support grant cannot be said to pass the test of reasonableness as outlined in the *Grootboom*¹²² and the

110 A child, as defined in this Convention, is any human being under the age of 18.

111 Other than children who qualify for the care-dependency grant (Clarck 2000: 349). The grant is, however in the process of being extended to children up to the age of 14.

112 Olivier and Kalula 2003:44.

113 Alliance for Children's Entitlement to Social Security (ACESS) and the Network against Child Labour (NACL).

114 Mawson 2004-05-29 *Mail and Guardian*.

115 Compare *Khosa and Mahlaule* cases paras 1, 38 and 39.

116 Committee on the Rights of the Child Concluding Observations 2000 CRC/C/15/Add.122.

117 The gap is currently in respect of children aged 11 to 18, as discussed above.

118 According to the SAHRC, the scope of coverage of the grant should further be extended to cater for the special needs of children. A child infected with HIV/AIDS, for example, needs constant medical care and should thus be provided with more than the R170 grant. Malherbe 2003:382; SAHRC 2000-2002:228.

119 Malherbe 2003:382.

120 The age limit of eligible children has, since the report, been increased to under 11.

121 SAHRC 2000-2002:215.

122 *Government of the Republic of South Africa v Grootboom* para 42-44. "A programme that excludes a significant segment of society cannot be said to be reasonable." (Para 43). The Court further stated: "A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most

*Khosa*¹²³ cases.¹²⁴ Furthermore, with reference to the *Khosa* case¹²⁵ it can be argued that the current differentiation between children from the age from infancy up to 10¹²⁶ and 11 to 18 amounts to unfair discrimination.

Another problem with the child support grant¹²⁷ is that it is not being accessed by those who are entitled to it. During the period of April 2001 to March 2002, 3 308 467 children were eligible for the child support grant, while 1 574 927 were receiving it.¹²⁸ One of the reasons for this is that eligible beneficiaries find the grant difficult to access due to the documentation requirements.¹²⁹ Rural villages are at a distinct disadvantage in respect of access to social welfare services and children in child-headed households¹³⁰ and living on the street are generally not in a position to apply for grants as they do not have the assistance of an adult.¹³¹

Other obstacles in the obtaining of the child support grant include lack of awareness of eligibility for the grant, illiteracy,¹³² poor infrastructure at pay-points, long delays and back-logs in the processing of grant applications and the inability to provide documentary proof of all efforts to secure maintenance for the child concerned, from the parents of that child.¹³³ Various administrative obstacles, such as welfare officials not being able to understand and apply the relevant regulations, delays in obtaining necessary documents from other government departments and an inability to afford transport to the relevant government offices, have also been identified.¹³⁴

in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.” (Para 44).

123 *Khosa* and *Mahlaule* cases. The Court came to the conclusion that to exclude permanent residents from the social assistance scheme because of the fact that they lack the citizenship requirement is not reasonable as set out in section 27(2) of the Constitution (para 83). The exclusion of permanent residents limits their rights and fundamentally affects their dignity and equality (para 84).

124 See also SAHRC 2000-2002:215.

125 *Khosa* and *Mahlaule* cases paras 44 and 68.

126 A child must be under 11 years of age to qualify for the grant.

127 As well as the foster child grant and the care-dependency grant.

128 Similarly, of the 319 354 eligible children, 90 680 were receiving the foster child grant, and of the 276 776 children eligible for the care-dependency grant, only 42 474 were receiving it (SAHRC 2000-2002:203).

129 Such as identity documents and birth certificates (SAHRC 2000-2002:216).

130 Which are becoming increasingly more prevalent due to the AIDS pandemic.

131 SAHRC 2000-2002:216.

132 Illiteracy causes pay-out dates to be missed and prevents the checking of the accuracy of grants and benefits.

133 The last requirement has been deleted in the amendments to the regulations found in GN R813 in GG 20235. See Malherbe 2003:384 and 389.

134 Malherbe 2003:389.

While section 28 of the Constitution guarantees the rights contained in it to 'every child', and section 27(1)(c) guarantees the right to social security and social assistance to 'everyone', the child support grant is only available to children who are, and whose primary caregivers are, resident in South Africa and are South African citizens. A recent decision delivered by the Constitutional Court changed these criteria. In *Khosa and Others v Minister of Social Development and Others* and *Mahlaule and Others v Minister of Social Development and Others* the court addressed the constitutionality of some of the provisions in the *Social Assistance Act*.¹³⁵

The applicants in both cases were permanent residents. In the *Mahlaule* case section 4(b)(ii) and 4(B)(ii) of the *Social Assistance Act* was challenged because it only reserves child support grants and care-dependency grants for South African citizens excluding permanent residents.¹³⁶ The Constitutional Court found these provisions to be unconstitutional emphasising the fact that permanent residents are a vulnerable group and they need special constitutional protection. Because of the urgency of the matter the Court decided that the most appropriate order to make was the 'reading-in' of words 'permanent resident' in the challenged legislation.¹³⁷ While the old age grant, child support grant and care-dependency grant were in issue in the *Khosa* and *Mahlaule* case, a consequence of the reading-in of the words 'permanent residents' in these sections of the *Social Assistance Act* is that the Court has granted access to any social grant in South Africa to permanent residents.

While children of permanent residents are now entitled to the grant,¹³⁸ refugee children, because of the fact that they do not have the necessary documentation, are not eligible for the child support grant,¹³⁹ despite the fact that, according to the *Refugee Act*,¹⁴⁰ refugees enjoy full legal protection, which includes the enjoyment of the fundamental rights set out in the Bill of Rights.¹⁴¹ As refugee children constitute a particularly vulnerable group, the fact that the grant is not available to them should fail *Grootboom's* test of reasonableness.¹⁴² The South African Human Rights Commission is of the opinion that the state is not complying with its constitutional obligation¹⁴³ and that the child support grant should also be made accessible to refugee children.¹⁴⁴

135 As amended in some instances by the *Welfare Laws Amendment Act*.

136 *Khosa* and *Mahlaule* case para 3.

137 *Khosa* and *Mahlaule* case paras 92 and 95.

138 *Khosa* and *Mahlaule* case as discussed above.

139 SAHRC 2000-2002:216.

140 *Refugee Act* 130 of 1998.

141 Section 27(b) of the *Refugee Act* 130 of 1998.

142 In terms of which programmes and policies implemented by the state need to be reasonable in both their conception and their implementation. See *Grootboom* case para 42.

143 It can also be argued that the state is not complying with its international obligations, having ratified the CRC and the United Nations Convention Relating to the Status of Refugees of 1951, which specifically obliges state parties to grant refugees either the same treatment accorded to nationals of the state or, as a minimum, 'the most favourable treatment accorded to nationals of a foreign country in the same circumstances'. See Olivier and Kalula 2003:99.

144 SAHRC 2000-2002:230. See also Olivier and Kalula 2003:136.

4.3 Foster child grant

Although it is ideal for children to grow up in a home with their parents, it is sometimes unavoidable that children are removed from their families and placed in the care of other persons.¹⁴⁵ Such placement, referred to as foster child placement, aims to provide care for abandoned and neglected children. It is of a temporary nature as it terminates upon family reunification or adoption.¹⁴⁶

The foster child grant is payable to a person in whose custody a foster child has been placed in terms of the *Child Care Act*¹⁴⁷ or the *Criminal Procedure Act*¹⁴⁸ or who is a tutor in terms of the *Administration of Estates Act*.¹⁴⁹ In order to qualify for this grant, both the foster parent and child must be resident in South Africa at the time of application¹⁵⁰ and they must comply with prescribed conditions.¹⁵¹ Since foster parents perform a public service, their material need is not a principal criterion.¹⁵² There is a means test to determine eligibility for the foster child grant, but it only considers the means of the foster child and not the means of the foster parent as well.¹⁵³

The foster child grant lapses when the foster child dies, the foster child is no longer in the custody of the foster parent, the foster child turns 18,¹⁵⁴ the foster child leaves school, or the last living foster parent dies.¹⁵⁵

The aim of the foster child grant was to provide some monetary assistance to persons other than biological parents who care for a child while state and private welfare institutions search for a more permanent placement, either with the biological family¹⁵⁶ or in an adoptive environment.¹⁵⁷ In reality, however, given the limited number of adoption and institutional opportunities, many foster parents are permanent rather than temporary.¹⁵⁸ Although the shift from 'biological parent' in respect of state maintenance grants to 'primary caregiver' in respect of child support grants is to be welcomed, the foster child grant has become the preferable grant.¹⁵⁹ This is the case for a number of reasons, including the

145 Malherbe 2003:384.

146 Malherbe 2003:384.

147 Chapters III and VI of the *Child Care Act* 74 of 1983.

148 Section 290 of the *Criminal Procedure Act* 51 of 1977.

149 *Administration of Estates Act* 66 of 1965.

150 Section 4A(b) of the *Social Assistance Act*. The foster child grant thus differs from the child support grant in that there is no requirement that the foster parent and the child must be South African citizens or permanent residents of South Africa. This makes it possible for children from other countries to become foster children in the Republic of South Africa. See Malherbe 2003:384.

151 Bolani 1999:267.

152 Luiz 1995:589.

153 In order to qualify for the grant, the foster child's income may not exceed twice the annual amount of the grant. Reg 4 GN R418 in GG 18771 of 31/03/1998.

154 Unless the child is still at school and under the age of 21.

155 Reg 24(3) GN R418 in GG 18771 of 31/03/1998.

156 After regulation of the problems leading to statutory intervention.

157 Clarck 2000:351.

158 Clarck 2000:351.

159 Clarck 2000:351-352.

higher amount of the foster child grant,¹⁶⁰ the fact that it is paid until the child is 18 years old¹⁶¹ as well as the fact that the foster care grant is subject to a lower means test, which examines only the child's personal income.¹⁶²

From 1996, an increase in the number of foster care applications have been reported by welfare agencies.¹⁶³ While it is suggested that this is due to an increase in the number of orphaned children, particularly as a result of AIDS, it is also suspected that some parents deliberately leave their children with other caregivers who will be eligible for the higher foster care grant, which is available for a longer period, rather than the child support grant.¹⁶⁴ While foster care is supposed to be a temporary arrangement, as opposed to adoption, which is focused on permanent care, the fact that there is no social assistance available to adoptive parents¹⁶⁵ may act as a deterrent to foster parents who are considering the adoption of children in their care.¹⁶⁶ For this reason, a measure which will ensure a greater sense of security in respect of children in foster care,¹⁶⁷ such as some form of means-tested social assistance to adoptive parents, should be considered.¹⁶⁸

4.4 Care-dependency grant

The ideal situation for severely disabled children is for them to be cared for at home, in a nurturing environment.¹⁶⁹ Unfortunately, according to the White Paper on Social Welfare,¹⁷⁰ there are inadequate support facilities available in order to assist families in keeping disabled children in the home environment for as long as possible. In such cases, social assistance from the state is limited to payment of the care-dependency grant.

The care-dependency grant is payable to the legal parent, custodian, guardian or foster parent of a child (between 1 and 18 years), that is so because the severely mentally or physically disabled must receive permanent home care.¹⁷¹ The parents of such a child must be South African citizens or

160 The value of the child support grant is currently R170, while the value of the foster child grant currently amounts to R530. GN 409 in GG 26197 of 26/03/2004.

161 While the child support grant is only payable until the child turns 11.

162 As opposed to the child support grant which considers the full household income (Clarck 2000:352).

163 Clarck 2000:352.

164 While the child support grant is much smaller than the foster child grant. See Clarck 2000:352; Malherbe 2003:385.

165 The *Unemployment Insurance Act* 61 of 2001 does, however, provide for social insurance adoption benefits to employees that adopt children.

166 Malherbe 2003:385.

167 Adoption should be recognised as beneficial to the child as it provides a more secure situation of permanent care. See Malherbe 2003:385.

168 Malherbe 2003:385.

169 Malherbe 2003:385.

170 White Paper on Social Welfare Chapter 8 para 26.

171 Sections 1 and 2(f) of the *Social Assistance Act*. See Bolani 1999:268; Clarck 2000: 351 and 356; Malherbe 2003:385.

permanent residents,¹⁷² and the parents as well as the care-dependent child must be resident in South Africa at the time of the application.¹⁷³ In order to receive this grant the parent or foster parent must provide proof that the child is in fact disabled¹⁷⁴ and that the combined annual income of the family does not exceed R48 000 and the child's income does not exceed twice the annual amount of the grant.¹⁷⁵ The amount of the grant is R740 per month per child.¹⁷⁶

The care-dependency grant lapses when the beneficiary dies, the care-dependent child dies or turns 18¹⁷⁷ or if the child is admitted into a psychiatric institution or care and rehabilitation centre.¹⁷⁸ The beneficiary's entitlement to the grant is lost if the child is not properly cared for, the child is no longer in his or her custody, the child has not been evaluated at the age of 6 to determine its suitability for a specialised education, a state official is denied reasonable access to the care-dependent child, the child is permanently cared for in a state-run institution or the child does not receive the prescribed medical or other treatment, where such treatment is available and affordable.¹⁷⁹

The care-dependency grant is poorly accessed¹⁸⁰ and is not available to children on the basis of HIV/AIDS.¹⁸¹ It is further denied to children with minor disabilities.¹⁸² While it provides for certain contingencies such as severe disability, it fails to provide for childhood chronic illnesses.¹⁸³ Such children and their families, while not qualifying for the grant, have to incur extra costs due to the health condition, which greatly reduces their chances of development and equal opportunities in life.¹⁸⁴ In order to comply with its constitutional obligation, the

172 See *Khosa and Mahlaule* case paras 92 and 95.

173 *Klinck* 2003:333; *Malherbe* 2003:385.

174 In the form of a report from a medical officer or from an assessment panel, an assessment panel being defined as a group of individuals, appointed by the Director-General of Social Development, who have the relevant experience and expertise to assess disability and care dependency, confirming that the child is in fact a care-dependent child. R1233 in GG 22852.

175 In other words, the grant is based upon a means test. Reg 5(1) GN R418 in GG 18771 of 31/03/1998.

176 GN 409 in GG 26197 of 26/03/2004.

177 From the age of 18, the disabled person is entitled to his or her own social grant, based on his or her disability. See *Malherbe* 2003:386.

178 Reg 24(4) GN R418 in GG 18771 of 31/03/1998. See also *Bolani* 1999:268; *Malherbe* 2003:386.

179 Reg 22 GN R418 in GG 18771 of 31/03/1998. See also *Bolani* 1999:268; *Malherbe* 2003:386.

180 According to the SAHRC, during the period April 2001 to March 2002, 276 776 children were eligible for the care-dependency grant, while only 42 474 were receiving it. SAHRC 2000-2002:203.

181 This cause for concern is expressly mentioned by the South African Law Commission SALC 2002:333-338. See *Clarck* 2000:356; *Klinck* 2003:333. It is, however, available to adults in the form of the disability grant.

182 *Klinck* 2003:333; SAHRC 2000-2002:217.

183 Despite the fact that such children's needs are equal to, or even greater than, those of many qualifying disabled children. See *Klinck* 2003:333; SAHRC 2000-2002:217.

184 SAHRC 2000-2002:217. See also *Klinck* 2003:333-334.

state should, according to the South African Human Rights Commission,¹⁸⁵ extend the care-dependency grant to children with minor disabilities as well as children with chronic illnesses. A further recommendation is that foster parents be provided with incentives to take in HIV-positive children or children with disabilities, for example the incentive of receiving both a foster child grant and a care-dependency grant.¹⁸⁶

The fact that, in order to qualify for the care-dependency grant, both parent and child have to be South African citizens or permanent residents and resident in the Republic,¹⁸⁷ fails to take into account the reality of children in Southern Africa, many of whom live on or near the border of South Africa, with a parent resident in a neighbouring country.¹⁸⁸

5. Conclusion

From the discussion above, it is evident that South Africa is far from complying with its constitutional and international obligations in respect of children's rights to social assistance. The failure of government to recognise the deficiencies in the current system and to address them in the new Social Assistance or Children's Bills is even more problematic due to the fact that government was well aware of the fact that better policy measures have been developed and carefully thought through by *inter alia* the Law Commission and the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. This implies that government is ignoring the most basic needs of the most vulnerable people in South African society, namely the children.

It is submitted that the exclusion of children from the ages of (currently) 11 to 18 from the child support grant infringes their constitutional rights to social assistance, human dignity, life and equality. As in the case of permanent residents,¹⁸⁹ children are part of a vulnerable group in society and are worthy of constitutional protection. Furthermore, the denial of children above a certain age from the child support grant 'is total, and for as long as it endures'.¹⁹⁰ This is worsened by the fact that children are 'unable to sustain themselves or to secure meaningful support from other sources'. This has the effect that these children are 'relegated to the margins of society and deprived of what may be essential to enable them to enjoy other rights vested in them under the Constitution'.¹⁹³

185 SAHRC 2000-2002:230.

186 Klinck 2003:334.

187 Klinck 2003:333; Malherbe 2003:385. In this regard see the *Khosa* and *Mahlaule* cases as discussed in section 4.2 above.

188 Such as Lesotho or Zimbabwe. See Klinck 2003:333.

189 *Khosa* and *Mahlaule* cases para 74.

190 *Khosa* and *Mahlaule* cases para 77.

191 *Khosa* and *Mahlaule* cases para 77.

192 Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003. See SALC 2002:333-338.

193 Section 27(b) of the *Refugee Act* 130 of 1998.

Another major problem with the child support grant and the care-dependency grant is the unavailability thereof to child-headed households, children whose parents have died and who are being cared for by extended family members, children without adult caregivers, children with moderate disabilities and chronic illnesses who need assistance, children living with HIV/AIDS¹⁹² and children of refugees.¹⁹³

The means tests can also be criticised for a number of reasons. It 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.¹⁹⁴ Furthermore, the means test threshold has not increased since 1998 despite increases in inflation and the cost of living.¹⁹⁵ The necessity of a means test at all should be given attention, especially with regard to the child support grant.¹⁹⁶

Due to the categorical nature of children's social assistance grants, it is submitted that the state is not currently conforming to the standards in the Bill of Rights and international law. Social assistance grants in South Africa in respect of children only cover children from infancy to 11 years,¹⁹⁷ children in foster care¹⁹⁸ and children with disabilities.¹⁹⁹ No provision is made by way of the social assistance grant process for children without disabilities from the age of 11²⁰⁰ to 18. This implies that a large number of children are still excluded from the social security programme which serves as the main safety net for children in South Africa. In other words, because of their age, lack of parent or caregiver and degree of disability, many children lack their most basic needs. In effect their human dignity and equality are being infringed.

194 Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003.

195 Joint Submission to the Portfolio Committee on Social Development on the Social Assistance Bill 2003.

196 As recommended by the Committee of Inquiry 2002:42-43 and the SALC 2002: 333-338.

197 Child support grant.

198 Foster child grant.

199 Care-dependency grant.

200 Although this age limit is in the process of being increased to 14.

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