Realising the rights of children growing up in child-headed households

A guide to laws, policies and social advocacy

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Preface

This publication is aimed at presenting, in an accessible form, some of the main legal and policy issues that concern child-headed households. It is aimed at a broad readership, not necessarily only those who are knowledgeable about the law and legal debates.

South Africa is presently on the brink of significant developments in relation to children affected by HIV/Aids, and child-headed households more particularly. This is because a new Social Assistance Bill is at an advanced stage of preparation in Parliament, and is likely to be finalised during the first quarter of 2004. It is also because a new Children's Bill is due to be introduced into Parliment during 2004, possibly only after the term of office of the new Parliament commences. Both laws will contain provisions affecting child-headed households, and they are discussed more fully in Part 4 of this publication.

Civil society also continues to lobby for greater access to grants for poor children, and for elimination of many other barriers that affect the rights of children in child-headed households. This publication aims to highlight some of those barriers and to explain where advocacy can promote a better legal framework.

The Socio-Economic Rights Project would like to express a special word of thanks to former colleague Professor Sandra Liebenberg, who played a critical role in conceptualising this publication. Her incisive contributions and rigorous editing at the earlier stages of the process are much appreciated.

Part 1

Introduction

Introduction

There are now about 840 000 children in South Africa who have lost their mothers, mostly because of HIV/Aids. By 2015, it is expected there will be three million Aids orphans unless comprehensive health interventions[1] make it possible for children's care-givers to live longer.

There are different definitions of what an Aids orphan is. For a while, international policy makers – such as Unicef – described Aids orphans as children aged 15 or younger, who had lost either their mother or both parents because of HIV/Aids. An Aids orphan may be looked after by the wider family structures or by the community, and is not necessarily a member of a child-headed household. Research[2] suggests that most orphaned children are indeed taken in by their family or by community structures. Only where other children are looked after by older siblings, who are still children themselves, can one speak of a child-headed household.

In South Africa child-headed households are generally those where the main care-giver is younger than 18 (rather than 15). This is in line with the Constitution, which defines a child as a person younger than 18 years. In addition, the definition takes account of the fact that children younger than 21 do not have the legal capacity to perform certain key acts.

Some authors[3] distinguish between child-headed households and adolescent-headed households. The reason is that an appropriate response to these children might depend on whether the person heading the household needs more intense support, or less.

There is a growing tendency to include children whose care-giver is terminally ill with HIV/Aids in the category called child-headed households. This is because children become heads of the household when their parents become too sick to do what is necessary to maintain the household. These children are as much affected or vulnerable as those who have already lost their primary care-giver.

Within a child-headed household, some children may be infected by HIV/Aids, although this is not necessarily so. Many recent studies suggest that there may not be as many child-headed households as people feared, despite HIV/Aids being widespread in society as a whole. It seems that, at present, most orphaned children are absorbed into wider family and community networks. However, as HIV/Aids takes its toll among adults, communities will become less able to raise the orphan generation.

Children can be orphaned or left without adult care-givers for a range of reasons, not just because of the HIV/Aids pandemic. For instance, parents may die from other causes, such as motor vehicle accidents. They may migrate, and otherwise abandon their child. No-one knows exactly how many Aids orphans are currently living in child-headed households in South Africa.[4]

Challenges faced by child-headed households

The information that we do have shows that children growing up in child-headed households face many challenges and deprivations. These include:

- difficulty in getting food and shelter;
- serious threats to their education because of poverty;
- a higher risk of being sexually abused by neighbours and relatives;
- more child prostitution and child labour; and
- more likelihood of pursuing life on the street.

Children living in child-headed households may struggle to get births registered, and to get health care treatment, social security and other state mechanisms which can help them. Rules of inheritance in customary law make children vulnerable to being dispossessed of their houses and land. 'Property grabbing' by families and communities, who seize the land, cattle, and other assets when household heads die, is linked to the spread of HIV/Aids across Africa.

Simply trying to survive and raise younger siblings creates very real practical problems for primary care-givers who are themselves still undergoing the transition to adulthood.

But focusing only on the practical issues can sometimes hide the less obvious deprivations and needs of children growing up in child-headed households. These include the psychological trauma of observing a parent's terminal illness, of dealing with death, the absence of adult guidance and mentoring, and the need for love and security. These issues have influenced some of the policy proposals that are now being considered to help meet both the social and physical needs of children living in child-headed households in South Africa. See Part 4 below for more detail.

Aims of this publication

This publication reviews the legal rights of children in the context of the emergence of child-headed households in our society. Part 2 reviews international law, which is increasingly beginning to provide a framework for the responsibilities of states facing large-scale ophanhood. The legal rights of vulnerable children are dependent, too, on government's constitutional obligations. This is the subject of Part 3. Part 4 deals with the legislative and policy frameworks that have been established to steer government's responses to child-headed households and the HIV/Aids pandemic. It also reflects on the law reform processes underway that can help vulnerable children gain access to resources, and that can address some of the existing legal gaps. Civil society is actively engaged with these law reform initiatives, and there is still a lot of scope for lobbying to secure a better deal for children. Part 5 tackles specific issues relevant to realising children's socio-economic rights in the context of child-headed households. Finally, Part 6 highlights areas of concern where strategic advocacy can potentially play a role. A key aim of this publication is to stimulate future advocacy initiatives.

Special concern for the rights of the girl child

Girl children are especially vulnerable in the context of HIV/Aids and the emergence of child-headed households. Gender-based discrimination, which often leads to the sexual division of labour, means that girls are more likely than boys to have to care for terminally ill family members. This deprives them of the right to education, and often means they have to do tasks that affect their right not to be subjected to child labour. Orphaned girl children are especially vulnerable to being victims of sexual exploitation and trafficking. Due to cultural attitudes and taboos concerning any sexual activity by girls, they may have little access to preventive measures and other services.

Part 2

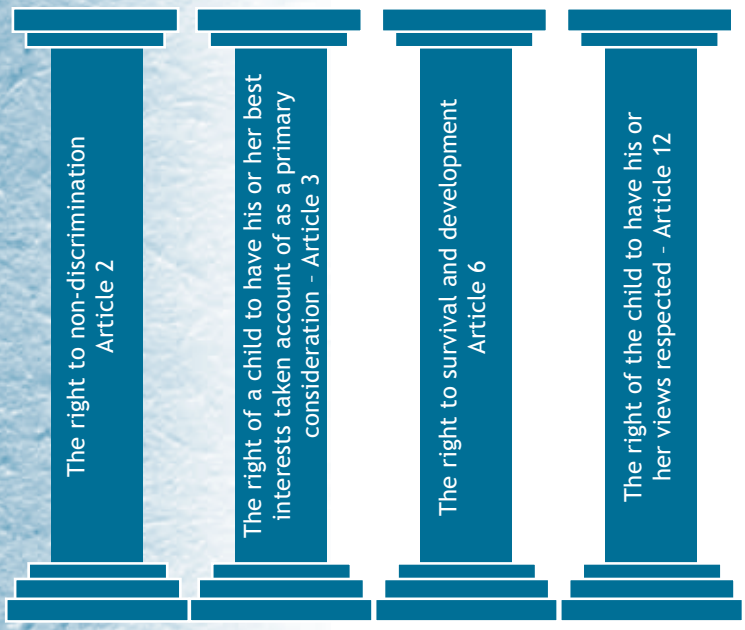
The international legal framework

The UN Convention on the Rights of the Child (the Convention), adopted by the United Nations in 1989, is the most important international treaty dealing with all aspects of children's rights. It provides a useful framework for addressing the rights of children in child-headed households. The document aims to:

- promote the protection of children;
- encourage their participation in society, especially in matters that affect them;
- prevent harm being done to children; and
- provide assistance to ensure children's basic needs are met.

These aims span the entire range of provisions that are included in the Convention, and are commonly called 'the four Ps'.

Four key rights in the Convention's general principles are said to be the 'pillars' of the children's rights framework. Classification of the Convention's rights is usually based on these pillars. See left.



The family's role in making sure children's rights are fulfilled

One of the most important foundations of the Convention is the idea that children are best raised in a family environment. The Convention promotes the family's role in realising the rights of the child, in particular through Articles 5 and 18 (see box).

The idea that it is best for children to grow up within their family is supported by the principle that, wherever possible, children should not be separated from their kin. This principle is found in Article 9. Article 20 says that children who are deprived of their families temporarily or permanently are entitled to special protection and assistance from the state. The Convention makes provision for alternative care where children do not have a family environment, or where they are removed from their families. A wide range of alternative kinds of care is promoted, including:

- foster care;
- *Kafalah* of Islamic law;
- adoption; and
- where necessary, placement in suitable institutions.

However, the best option is continuity in a child's upbringing. Also important are solutions that promote the child's ethnic, religious, cultural and linguistic identity (Article 20(2)).

Article 5 provides as follows:

> States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 18 reads:

> (1) States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents, or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.
>
> (2) For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

The Committee on the Rights of the Child

The Convention provides for a monitoring mechanism through a Committee of Experts, called the Committee on the Rights of the Child (the Committee). The 18 members of the Committee are from member states representing

Ratification refers to the formal process of acceptance of a state party of the terms of an international treaty. South Africa ratified the Convention on the Rights of the Child in 1995.

different regions, legal systems, cultures and religions. The Committee considers reports by states that have ratified the Convention on their efforts towards implementing the rights it contains. The initial report is due within two years of ratification, and after that, a progress report must be given to the Committee every five years.

Very recently, the Committee began to highlight and explain certain key themes, to elaborate some of the Convention's aims and goals. It has released these explanations as General Comments. Though they do not have the same status as the binding provisions of the Convention, they are authoritative and directive statements to guide state's interpretations of their duties under international law.

The Convention was drafted when widespread orphanhood as a result of HIV/Aids was probably not foreseen. It was finalised in 1989, before the drastic consequences of the deaths of mothers and family members really took hold. The emergence of child-headed households as a national scourge, and the effects of HIV/Aids on children's lives more generally, have recently prompted the Committee to begin further work on this issue.

A General Comment called 'HIV/Aids and the Rights of the Child', General Comment No. 3 (2003), has been prepared.

What is the relevance of international law for South Africa?

When a country ratifies a treaty, it takes on obligations at the international level. Examples are the duty to provide reports to treaty monitoring bodies, as mentioned above, and the duty to refrain from acting in a way that negates the objects and purposes of the treaty. More specifically, our South African constitution is based on human rights values, and it spells out how international Conventions can play a role in interpreting the human rights and freedoms enshrined in our new legal order. Section 39(1)(b) of the Constitution provides, for instance, that "a court or tribunal must consider international law when interpreting the Chapter of the Constitution that constitutes the Bill of Rights". According to section 233 of the Constitution, a court must prefer an interpretation of statutory law that is consistent with international law whenever such an interpretation would be reasonable. The Constitution clearly anticipates that international treaty law will be an important source of assistance to South African courts. Since 1996 the judgments of our courts have, indeed, drawn on a wide range of international legal norms and standards.

General Comment No 3

The General Comment starts by saying that the issue of HIV/Aids and children is often seen as being mainly related to health. It then points out that the impact of HIV/Aids on children's lives is in fact much wider, as it involves threats to their civil and political, social, cultural and economic rights. For this reason, the Committee recommends that measures to address HIV/Aids must be holistic and rights-based. The four rights that are the Convention's 'pillars' must be the guide at all levels, including prevention, treatment, care and support. However, many other rights are affected by HIV/Aids,

including (but not only):

- the right to an adequate standard of living;
- the right to privacy;
- the right to health;
- the right to social security;
- the right to education and leisure;
- the right to be protected from violence;
- the right to be protected from economic and sexual exploitation and child trafficking; and
- the right to be protected from torture or other cruel, inhuman or degrading treatment or punishment.

Discrimination and HIV/Aids

The General Comment points out to States Parties that discrimination makes children more vulnerable to HIV/Aids. For example, children living in remote or rural areas, where health and other services are less accessible, are more vulnerable to infection. There is also a lot of discrimination against infected children, which can lead to them being abandoned by families and communities. States Parties are therefore urged to make sure that laws, policies and practices address all forms of discrimination that increase the burden of HIV/Aids on children.

A continuum of responses to HIV/Aids

As an overall strategy, the General Comment stresses that prevention, care, treatment and support reinforce each other. They provide a continuum within an effective response to HIV/Aids. Education and children's access to information about sexuality and HIV/Aids are seen as crucial. State Parties are encouraged to provide child-friendly health services and to make sure there is access to voluntary counseling and HIV testing. They must also offer knowledge of HIV status to children and adolescents, and provide confidential sexual and reproductive health services (including free or low cost contraception). Finally, they must provide care and treatment, if needed, for HIV-related health problems, such as tuberculosis and opportunistic infections.

A rights-based approach

As it is necessary to protect children's rights, mandatory (compulsory) HIV testing is prohibited in international law. The General Comment requires States Parties to make sure that children are protected against mandatory HIV testing. As the child's capacities evolve, based on factors such as age and maturity, this will determine whether consent to HIV testing should be obtained directly from the child, or from a parent or guardian.

However, in all cases the confidentiality of the results must be protected. Information on the HIV status of children may not be disclosed in health and social welfare settings, or even to parents without the child's consent.

Access to legal, economic and social protection

Concerning policy considerations that are specific to child-headed households, the General Comment underlines the need for legal, economic and social protection for affected children. The focus should be on access to education, access to shelter, access to state benefits such as social grants, and access to health care services, as well as fair inheritance rights. Acquiring proof of identity has very important implications for a child, because it relates to securing his or her recognition as a person before the law. The General Comment draws attention to this. Proof of identity also helps to protect other rights, including inheritance rights and the right to education.

The philosophy of the Committee is that orphans are best protected and cared for when siblings can stay together, in the care of relatives or family members, or the extended family. If the extended family has been destroyed by HIV/Aids, the state must then provide, as far as possible, family-type alternative care, such as foster care. Institutional care should play only an interim role in caring for children orphaned by HIV/Aids, and only when family or community based care is not available or feasible. The General Comment reminds State Parties that there must be limits on the length of time that children spend in institutions. The main goal must be to eventually reintegrate them into communities.

The General Comment acknowledges formally that child-headed households now exist. States Parties are encouraged to provide financial and other support to them. As a matter of policy, though, the General Comment says that communities are the frontline of the response to HIV/Aids and other related consequences, such as child-headed households. States' strategies must be designed to support them in deciding how they can best provide support to the orphans living in their communities.

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

South Africa has recently ratified the African Charter on the Rights and Welfare of the Child (the Charter). It is an important regional charter for protecting and promoting children's rights. It is largely silent on the specific issue of HIV/Aids and child-headed households, as it was also drafted before the enormity and scale of the pandemic was fully realised. However, the Charter reinforces states' obligation to ensure, to the

maximum extent possible, children's survival, protection and development (Article 5), while recognising that the family is the "natural unit and basis of society" (Article 18). The Charter specifically says that states "shall ensure that any child who is parentless, or who is temporarily or permanently deprived of his or her family environment…shall be provided with alternative family care, which could include, among others, foster placement or placement in suitable institutions for the care of children" (Article 25(2)).

The African Committee of Experts on the Rights of the Child was set up in May 2000. Its work includes monitoring the Charter's implementation, and it has since identified HIV/Aids as a priority area.[5] The Committee's work is just beginning and only limited activities have taken place. A lack of resources and money make it difficult for it to take its mandate forward. Still, the existence of a regional mechanism to promote the rights of African children is seen as an important development, and governments should be urged to support the Committee's work, materially and otherwise. Also, civil society should interact dynamically with the Committee to provide information, assistance and examples of best practice that can be shared throughout the region. There are not yet any formal channels of communication to the Committee. In the mean time, the Committee's postal address is given at the end of this publication.

Part 3

The South African constitutional framework

The South African Constitution contains a dedicated children's rights clause in the Bill of Rights. Several rights contained in this section (s 28) are relevant to children growing up in child-headed households. They determine the state's obligations towards these children. For the purpose of the Constitution, anyone below 18 years is considered to be a child (s 28(3)).

The Constitution says that every child has the right to a *name and nationality* from birth (s 28(1)(a)). This is similar to the Committee on the Rights of the Child's concern about birth registration, which it says is necessary so that a range of other children's rights can be fulfilled. For example, birth registration is important for accessing social grants and getting other material assistance. There is a separate section on birth registration and how to get identity documents in Part 5 below.

Further, the Constitution says that children have the right to *family or parental care* in s 28(1)(b). Where there is no family or parental care, or where a child has been removed from the family environment, s 28(1)(b) says that the child must be given appropriate alternative care.

The Bill of Rights also gives children the right to a range of *socio-economic* rights in s 28(1)(c). They are:

- the right to basic nutrition;

- the right to shelter;
- the right to basic health care services; and
- the right to social services.

Children also have the right to protection from *maltreatment, abuse, neglect or degradation* in s 28(1)(d). They have the right *not to be required or permitted to perform work* or provide services that are inappropriate for a person of that age, or which place at risk the child's well-being, education, physical or mental health, or spiritual, moral or social development (s 28(1)(e). This section prohibits certain forms of child labour.

Finally, a very important constitutional provision is that children's *best interests are the most important consideration* in all matters concerning a child (s 28(2)). This provision has been seen as setting a higher standard than the one established by the Convention on the Rights of the Child. This is because the Constitution of South Africa says that a child's best interests are not just one of many important things to consider, but are the most important factor .

Children must also be seen as beneficiaries of all the other human rights given to South Africans in the Bill of Rights. This means that the right to have access to food, to social security, and the right to have access to adequate housing (which the state is obliged to realise progressively and within available resources), as well as the right to basic education, include children and adults equally.[6] The interplay between these rights, and the rights referred to in the children's rights clause discussed above, were the subject of interpretation by the Constitutional Court in the landmark case *Government of the Republic of South Africa and others v Grootboom and others* (*Grootboom*).[7]

The *Grootboom* Case

This case involved a community of adults and children who had settled on private land and were later evicted from the land during the harsh Cape winter. They brought a case claiming that the state was obliged to provide them with temporary shelter because of their desperate situation.

The Cape High Court agreed, because of the constitutional provision on children's right to shelter. The High Court said further that, due to the policy that it is not advisable to separate children from their parents, care-givers would also qualify for rudimentary protection from the elements through their children.

When an appeal was taken to the Constitutional Court, a different conclusion was reached. The Constitutional Court said that the right of children to shelter overlapped with the right of everyone to have access to adequate housing, so these rights could not be seen as giving separate entitlements. Also, granting children an immediate and direct claim against the state might destroy the carefully constructed scheme for

progressively realising the socio-economic rights provided for everyone in the Constitution. The Court was evidently concerned that children might be used by their parents as 'stepping stones' to get goods and services, instead of being valued for who they are.

The Constitutional Court in *Grootboom* made some important additional comments about the interpretation of the rights in:

- s 28(1)(b): the right to family or parental care, or to appropriate alternative care when removed from the family environment;
- s 28(1)(c): children's socio-economic rights; and
- s 28(1)(d): children's right to protection from maltreatment and abuse.

> The rights to basic nutrition, shelter, basic health care and social services encapsulate the scope of care that children should receive in our society, but the obligation to provide that care rests primarily on families and parents. However, the state does bear responsibility for the fulfillment of children's socio- economic rights where children lack parental care, such as where they have been orphaned or abandoned. Children's rights to protection from maltreatment and abuse normally entails passing laws and providing mechanisms for the maintenance of children (by their care-givers) and for their protection from abuse, neglect or degradation.[8]

Children's rights advocates generally did not welcome the *Grootboom* judgment. They felt that the Court made it harder to argue that children should be given first priority when it concerns fulfilling their socio-economic needs. In short, the Court's decision removed the value and meaning from the special rights apparently given children in s 28(1)(c). The Court tied the fulfillment of children's socio-economic rights to the progressive realisation of everyone's socio-economic rights. These need only to be achieved progressively (over time) and within the state's available resources.

However, the Constitutional Court did say (see the extract above) that the state would bear responsibility for meeting the needs of children where they lacked adult care-givers, such as children who are orphaned or abandoned. It could therefore be said that the decision confirmed that it is mainly the obligation of the state to fulfill the socio-economic rights of children in child-headed households.

Policies must cater for those in desperate need

Another positive development was the Court's general conclusion about state policy and the implementation of everyone's social and economic rights. The Constitutional Court said that any plan that aimed to help implement socio-economic rights must cater for those in desperate need. The state cannot simply rely on a plan to progressively

realise access to housing, social security etc without having plans for the most vulnerable people in our society. A policy that ignored those in the most desperate circumstances would not meet the standard of *reasonableness*, which the Court said was required by the Constitution.

> *A programme that excludes a significant segment of society cannot be said to be reasonable…A society must seek to ensure that the basic necessities of life are provided to all if it is be a society based on human dignity, equality and freedom. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving the realization of the right.*[9]

It has been said that children in poor communities who do not have adult care-givers or whose care-givers are dying, are extremely vulnerable. This is because they do not have adult protection and support as well as because the communities where they are growing up face extreme poverty. This group of children would therefore meet the Constitutional Court's criterion of being most in need, with the enjoyment of their rights most in peril.

The *TAC* case

The Constitutional Court also considered what children's socio-economic rights mean and how far they extend in another important case, namely *Minister for Health and Others v Treatment Action Campaign and others (TAC)*.[10] The context was the right of HIV-positive mothers and their children to have access to drugs that can prevent the transmission of HIV/Aids during birth. The issue arose in this case because the state provided the anti-retroviral drug, Nevirapine, only at certain pilot sites. Health care workers in other places were not allowed to give the drugs to patients, though these drugs can prevent mothers passing on the HIV/Aids virus to their babies during childbirth. The claim was brought on behalf of the mothers and their unborn babies who were at risk of getting HIV/Aids. As the unborn babies were in their mothers' care, the state could argue (based on the earlier *Grootboom* case) that the babies' mothers must be responsible for providing treatment, not the state.

When it discussed this point, the Court opened, to a limited extent, the door that it had shut in the *Grootboom* judgment. It said that parents did have the primary obligation to fulfill children's socio-economic rights, when they *could* do so. In the *TAC* case, this would mean that parents would have to pay for treatment to prevent mother-to-child transmission of the HIV/Aids virus during birth, if they could afford the drugs . However, the Court recognised that poor parents have to use the public health system when they deliver their babies. They cannot get private medical treatment to protect their unborn

children. This means that the state would then be responsible for making sure the necessary drugs are available in the public health system.

> *…the obligation to ensure that children are accorded the protection contemplated by section 28 arises when the implementation of the rights to parental or family care is lacking. (*TAC *para 79).*

This interpretation is valuable for children whose parents or care-givers are dying of HIV/Aids. Internationally and in South Africa, it has been recognised that children whose parents or care-givers are dying may be as vulnerable as children who are already orphans. They may also be unable to get the basic resources they need for their survival and well-being. The findings in the *TAC* case can be used to argue that where parents and care-givers infected by HIV/Aids or other opportunistic infections have become so ill that they cannot perform their duties as parents (including the duty to maintain their children), the state must become their 'surrogate' parent, even before the children are orphaned.

There are other constitutional rights that can be looked at in the context of orphans, children who have been made vulnerable by HIV/Aids, and children living in child-headed households. The most important of these is one of the foundational rights of our democracy: the right not to be unfairly discriminated against by reason of one's birth, race, creed, gender or age. These are only some of the grounds included in s 9 of the Constitution.

Steps towards addressing discrimination against children living in child-headed households

Support for eliminating discrimination in our society has been taken a step further with the passing of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*.[11] This law does not contain a prohibition against discrimination on the basis of HIV/Aids. It does say that an Equality Review Committee must meet within a year to investigate whether the Act should also prohibit unfair discrimination because of HIV status and Aids. It must make recommendations to the Minister of Justice on this issue. There are many experiences[12] of discrimination against children affected by HIV/Aids. Prohibiting this kind of discrimination may benefit children experiencing orphanhood due to Aids, or children whose family members (care-givers) are terminally ill and who face extreme vulnerability and discrimination.

The Act also says that after consideration the Equality Review Committee and the Minister of Justice may add a prohibition on discrimination on the basis of *socio-economic status* and *family status* to the listed grounds of prohibited discrimination . These grounds

could help children in child-headed households who face particular challenges and exclusion. The first ground (socio-economic status) might involve showing that child-headed households are most common and vulnerable in the poorest communities. These communities are themselves already badly affected by HIV/Aids and they are unable to support and look after parentless children of the neighbourhood. The second ground (family status) would say that a 'family' should be widely defined. The focus should be on what the 'family' does instead of on the strict legal definitions of 'families', which only give standard nuclear families protection from discrimination. Child-headed households in which there is no effective adult care-giver generally do the same as families: work to support siblings, get food, clothing and shelter, and deal with the emotional well-being of their members. Our courts have in other contexts already recognised new family forms in a number of important cases, on issues such as gay and lesbian relationships. Proposals for law reform (Part 4 below) also begin to reflect the reality that child-headed households should have legal recognition as distinct family units in our present society.

part 4

Government's legislative and policy responses to the emergence of child-headed households

Legislation and law reform

Children who face orphanhood experience many challenges. They face difficulties in getting schooling and in obtaining social grants, as well as in benefiting from the alternative care system (foster care, children's homes etc). Their rights can be greatly improved by laws to make sure that barriers are overcome, and that their special vulnerability is taken seriously.

At present, many of the problems these children face are regulated in several laws, such as the Schools Act 1996, the Social Assistance Act 1992 (as amended), and the Child Care Act 74 of 1983. The Child Care Act provides for a system of alternative care through court-sanctioned adoption, which means a child is permanently placed with new parents or guardians; and foster care, which must be renewed after two years, after reports have been completed.

The Child Care Act (as amended) also says that a Children's Court can remove a child if a variety of circumstances leads a commissioner of child welfare to believe the child is in need of care, as defined by the Act. An example is when a child has been abandoned or does not have parents or adult care-givers. The present Act has detailed provisions and regulations about institutions for children, including places of care,

places of safety, children's homes and shelters. It also says that a Children's Court can make orders for adoption and foster care. Every magistrate is a commissioner of child welfare for the purpose of making orders under the Child Care Act, and every magistrate's court can function as a Children's Court for the purpose of the Child Care Act.

The Child Care Act 74 of 1983

Shortcomings of the Child Care Act

The Child Care Act does not at present make provision for other ways of caring for orphans, such as informal care by relatives or by community groups. It only deals with adoption, formal court-ordered foster care and placement in institutions. The Act defines a child as a person under the age of 18 but it does not recognise households where the eldest responsible person may be a child. Also, there is no comprehensive child protection system for children who are in especially difficult circumstances, such as street children and children growing up in child-headed households. Finally, the Act does not have a rights-based approach, and it deals with issues affecting children in a very piecemeal way. There is a need to take account of children's best interests in every matter to do with their well-being, as provided for in s 28(2) of the Constitution. However, this is not included as a principle informing how the Act is applied.

Towards a new Children's Bill?

For these and many other reasons, the South African Law Reform Commission (the Law Commission) undertook review of the Child Care Act. This culminated in a Report and Draft Bill in December 2002, called the Children's Bill. Far-reaching changes were proposed about the specific situation of child-headed households. After the Department of Social Development (DSD) reworked the Bill, a different version, dated August 2003, was released for public comment. This Bill was certified by the State Law Adviser on 24 October 2003 and will be introduced to Parliament in two stages. Some parts of the Bill affect only the *national* government and these will be dealt with first. Other parts, that will affect both *provincial and national* Departments, will be dealt with in a second Bill at a later date.

Concerns about the proposed Children's Bill

Both the version of the Children's Bill drafted by the DSD, and the later (partial) Bill approved by the State Law Adviser, are different in some important ways from the more comprehensive strategy suggested by the Law Commission. The Bill that will come before Parliament first has almost no provisions on the delivery of welfare services, or on vulnerable groups such as children living in child-headed households.[13] The

second Bill is likely to be much more important in fleshing out the socio-economic rights of children in child-headed households, as it will hopefully include the broad area of child protection. As the Bills have not yet been tabled and finalised in Parliament, there is still a chance that they will more closely reflect the original intentions.

The Law Commission proposed that Children's Courts should be able to impose a much wider range of placement orders. They said this would greatly assist the state to respond in a variety of different ways to orphaned and vulnerable children, and in ways that are appropriate to their situation. For some children – especially infants and toddlers – kinship care, temporary foster care before adoption, or adoption itself, might be appropriate when there are no families or communities willing and able to care for them. Specifically, the Law Commission provided for placement of a child under supervision in a child-headed household. It also provided for legal recognition that child-headed households are a type of family unit in our society.

Section 234 of the Children's Bill drafted by the Law Commission provided that:

(1) A provincial head of social development may recognise a household as a child-headed household if:

(a) the parent of primary care-giver of the household is terminally ill or has died because of Aids or another cause;
(b) no adult family member is available to provide care for the children in the household;
(c) a child has assumed the role of primary care-giver in respect of a child or children in the household.

(2) A child-headed household must function under the general supervision of an adult designated by:

(a) a child and family court; or
(b) an organ of state or non governmental organisation determined by the provincial head of social development.

(3) The adult person referred to in subsection (2):

(a) may collect and administer for the child-headed household any social security grant or other grant or assistance to which the household is entitled; and
(b) is accountable to the child and family court, or the provincial department of social development, or to another organ of state or a non-governmental organization, for the administration of any money received on behalf of the household.

(4) The adult person referred to in subsection (2) may not take any decisions concerning such household and the children in the household without consulting:

(a) the child at the head of the household; and
(b) given the age, maturity and stage of development of the other children, also those other children.

(5) The child heading the household may, subject to the supervision and advice of the adult person referred to in subsection (2), take all day-to-day decisions relating to the household and the children in the household as if that child was an adult primary care-giver.

(6) A child-headed household may not be excluded from any aid, relief or other programme for poor households provided by an organ of state in the national, provincial or local sphere of government by reason of the fact that the household is headed by a child.

It can be seen from this proposal that the Law Commission intended to address legal recognition of child-headed households, adult supervision, access to social grants, and the elimination of discrimination against child-headed households.

This was not the only attempt to specifically deal with the difficulties experienced by child-headed households in a comprehensive way. An important aspect of the Children's Bill drafted by the Law Commission was that it included a range of provisions on social security. They were described as creating a new welfare package for children. New possibilities included:

- an adoption grant;
- kinship grants for children being cared for by family members, including those who have not received the children by way of a court order;
- a supplementary special needs grant for children who need additional care, such as children with chronic illnesses and children with HIV/Aids;
- emergency court-ordered grants where no other grants are being received; and
- extension of the existing child support grant to be payable until a child reaches 18.

The Social Assistance Bill 57 of 2003

The latest draft of the Children's Bill, as amended by the DSD, has no provisions on social security. Instead, a new Social Assistance Bill (57 of 2003) has recently been debated by Parliament. It seeks to give effect to the right of everyone to have access to social assistance in terms of section 27 of the Constitution. Initially, the DSD said that it was intended that aspects of children's entitlements to social security would now fall under social assistance legislation. However, the Social Assistance Bill as it was originally tabled, did not include any of the provisions specific to child-headed households that were dropped from the Children's Bill.

Various organisations suggested changes to the tabled version of the Social Assistance Bill. This was to make sure that provisions that were similar to those proposed by the Law

Commission, which affect child-headed households and access to grants and other forms of aid, were properly catered for. These lobbying efforts were partially successful. The latest version of the Social Assistance Bill contains two relevant clauses on child-headed households.

First, the definitions clause (section 1) now includes a definition of a child-headed household. It is defined, through a cross reference, as a household contemplated in the definition thereof in the Children's Act 2003 (but the Children's Bill was not passed in 2003). The body of the Social Assistance Bill does not say anything more about the special rights of child-headed households, and it is unclear whether the inclusion of the definition makes any practical difference.

Another positive is that section 1 refers to a primary care-giver as a person older than 16 who takes the main responsibility for meeting the daily care needs of a child, whether or not the person is related to the child. This at least means that persons of 16 and 17 years who are heading households can collect social grants. Previously unofficial policy restricted payment of grants to persons of 18 years or older in some places. Officially, the regulations to the Social Assistance Act said that an applicant needed a bar-coded identification document (ID) in order to apply for social grants. An ID can only be issued to a person 16 years or older. Nevertheless, there were many reports of people who were over 16 and eligible for ID books being excluded.

Although the new legislation will be clear about the eligibility of persons aged 16 or older to receive a social grant, the problem remains that households headed by children younger than 16 years will not qualify to receive grants directly. This excludes some of the most vulnerable people in our society from access to available social security.

Mentors

The Law Commission had envisaged that mentors would do a number of things for child-headed households, without taking formal responsibility for the day-to-day functioning of the family unit. So, mentors could provide emotional and psychological support, assist the children to access education and overcome any barriers, ensure that they get birth registration documentation, provide advice and counseling, as well as formally receiving grants which children themselves are unable to receive.

One submission[14] on the Social Assistance Bill suggested including a definition of a child-headed household together with a link to a new definition of a mentor:

> *A mentor means an individual or organisation who has been appointed by the relevant provincial Department of Social Development, a designated non-governmental organization, or the children's court, to apply for, collect and administer a grant on behalf of…children living in a child-headed household.*

However, Parliament has not accepted any provisions on household mentors so far, despite strenuous efforts by civil society to motivate for this.[15] Instead, in section 15 the Social Assistance Bill says that a 'procurator' can be appointed. This is an adult person who is nominated to receive a grant on behalf of another person, through a power of attorney. This provision is really meant for people who are too ill or old to collect a grant themselves. It does not meet the needs of children in child-headed households, for several reasons. First, for practical reasons it would be unrealistic to expect children to appoint a procurator through a power of attorney. Second, children are not legally able to appoint such a person as they do not have contractual status. The idea of a procurator can therefore not overcome the gap created by eliminating in law the concept of a mentor.

Civil society has continued to lobby the DSD to rethink its decision to remove all references to social security from the Children's Bill, and to include direct provisions in the legislation for child-headed households and children left vulnerable by HIV/Aids. Indeed, the draft Children's Bill prepared by the DSD continues to include the provision[16] suggested by the Law Commission, as discussed on page 18. However, it is not clear how this will mesh with the provisions of the Social Assistance Bill, on which Parliament has nearly finished deliberating. It seems, though, that while the door may still be open to make changes to the Children's Bill that can address some of the existing gaps, the door is now virtually closed to amendments on access to social security by children younger than 16 who are heading households.

Liebenberg and Goldblatt challenge the constitutionality of excluding vulnerable children from accessing available grants for child support, as follows:

> *The exclusion of children living in child-headed households from the child support grant programme constitutes a violation of the Constitution. In particular, the rights to equality, social security and children's socio-economic rights are being breached…[I]t is arguable based on the* Grootboom *reasoning, that the State incurs a direct obligation to provide for the basic material needs of children living without adult care-givers. This duty arises because children are deprived of their primary sources of support and care. The child support grant is a critical mechanism for meeting the state's obligations towards poor children…a blanket exclusion of children living without adult support from the child support grant would not pass the test laid down in* Grootboom.

Government policy on child-headed households

The most important instrument that details the government's policy framework for helping children infected and affected by the HIV/Aids crisis is the National Integrated Plan for Children Infected and Affected by HIV/Aids (NIP). This strategy was approved

by Cabinet in 2000. It is an inter-sectoral plan, led by the Departments of Health, Education and Social Development. The projected expenditure for 2004–2005 is R332 million, to be spent on three main programmes. These are:

- life skills education for children in primary and secondary schools. This is a preventive programme aimed at highlighting the risks of unprotected sexual activity;
- voluntary counseling and HIV/Aids testing; and
- the home- and community-based care and support programme (HCBCS) for citizens affected by HIV/Aids, including those orphaned by the pandemic.[17]

The HCBCS programme is not only aimed at children, or even at child-headed-households, but also at addressing the needs of all citizens affected by HIV/Aids. Government has emphasised that to put this programme into effect, service delivery must be done in an integrated way. This is because the programme combines home based *health* care functions with community-based *support*, which reflects the social development aspect.[18] HCBCS funding is also not only for spending by the DSD, as a large amount is also given to health departments for spending on medical treatment and care.

Within the three programmes described above, the larger part of the initial funding was allocated to life skills education for school children. Revised budgetary allocations mean the HCBCS programme has become more prominent in the available resource allocation.

The community- and home-based care strategy fits in with the policy position in General Comment no 3, as discussed above. There is some concern, though, that the strategy relies on community goodwill and volunteers as its foundation:

> *Reliance on impoverished communities does not improve accountability on the part of the State, but disguises the problem and does not necessarily lead to community development… The well-known concept of the feminisation of poverty is apposite, as affected children in rural communities rely to a great extent on elderly female substitute care-givers.* [19]

Departmental documents, however, deny that this policy aims to shift the burden onto communities and non-profit and faith-based organisations, which often relied on unpaid volunteers. Rather, the Department emphasises the programme's focus on access at grassroots level, community participation and encouraging traditional community life. Indeed, it appears that to a large extent, the HCBCS programme involves providing funding and support (capacity building) to non-governmental organisations (NGOs) that are already helping children and families, rather than direct government spending on services.

Many reports were circulated confirming that the HCBCS programme was not only poorly funded at the beginning, but that implementation started slowly. In more recent times, though, the government's response to the plight of Aids orphans seems to have improved.

According to a Departmental fact sheet, the Directorate HIV/Aids in the DSD become fully operational during 2002–3. After this, home-based care was scaled up and the R48 million given to the provinces by conditional grants was better managed. This reduced underspending by a large amount.

The Department reports that during 2002–3:

- 324 centres or sites for home- and community-based care and support were identified;
- 29 612 additional children orphaned or vulnerable due to HIV/Aids were identified, bringing the number of children identified since the start of the programme in 2000 to 75 000; and
- the services offered include providing food parcels, clothing, day care and after school/drop in centres, placing children in foster care and residential care, and addressing health and education needs.

However, there are difficulties in assessing the impact of the HCBCS strategy.[20] They include:

- lack of state capacity, resources, and infrastructure to provide professional and financial support to organisations working with children – social workers spend most of their time processing social grants;
- difficulties experienced by NGOs in gaining government funding, despite more funds being available;
- lack of reliable data and information on the programmes being supported; and
- little evidence of real partnerships in practice, despite talk of collaboration – for instance, few NGOs enjoy good relationships with local health facility staff.

Challenges for children

Numerous studies have been done on child-headed households and on children made vulnerable because their care-givers have HIV/Aids. These studies have shown that the greatest challenge is the children's lack of access to food. Children's biggest worry is persistent hunger, followed by a range of other poverty-related concerns, including:

- the struggle to pay school fees;
- lack of school uniforms and other clothing;
- lack of money for transport and health care;

- inadequate housing; and
- insufficient warmth.[21]

Although Government recently established an emergency food relief scheme aimed at providing food parcels to poor people, the funding available for this is quite limited, and not everyone in need can be reached. Government has not yet finalised a comprehensive strategy on food security to ensure that people in desperate circumstances have access to food. These people include children facing starvation and severe hunger, vulnerable youngsters who are unable to provide for themselves, and those who do not have adult care-givers. Civil society should push for an implementable programme regarding food security and access to basic nutrition to be finalised urgently.

As there is no comprehensive strategy to make sure that children's right to have access to food and to nutrition is fulfilled (ss 27(1)(b) and 28 (1)(c) of the Constitution), their entitlement to available forms of social security is critical. The various grants that are available are set out more fully in Part 5 below.

part 5

Tackling specific rights relevant to child-headed households

Identity, birth registration and documentation

A child's right to registration of his or her birth is a vital part of citizenship. It is also part of the constitutional mandate to ensure people's identity is recognised and that they are able to get access to available state resources and institutions (such as schools). Indeed, receiving social security, placing a child in foster care, and fulfilling many other children's rights depend on registration of birth and gaining an approved identity document.

Section 28(1)(a) of the Constitution gives children the right to a name and nationality from birth.

Registration of birth is provided for in the Births, Marriages and Deaths Registration Act 51 of 1992 (as amended). A child must be registered within 30 days of birth by one of his or her parents. This is done by completing a B1-24 notice of birth. Completing this form makes sure that the child will get a birth certificate. If more than 30 days have passed since the child was born, the parents or guardian must give reasons why they did not register the child within the 30 days. If notice is given after a child has reached the age of one year and before age 15, the parents or guardians must given written reasons for this. They must complete Form B1-288 for

late registration of birth. They must also supply all available documents that prove the identity and status of the child, and affidavits by the parents confirming the child's identity and status. If the parents are deceased, a close relative at least 10 years older than the child must provide the affidavit.

According to the Department of Home Affairs, the following documents to confirm a child's status and identity will be considered:

- a certificate by the hospital or maternity home where the child was born, signed by the person in charge. It must contain the institution's official stamp;
- confirmation of the child's personal details from the school register of the first school that the child attended, on the school's official letterhead and signed by the principal. It must contain the school's official stamp;
- the child's baptismal certificate;
- affidavits by the parent(s), or if they are not available, by a close relative at least 10 years older than the child and who is familiar with the child's birth details;
- in the case of an abandoned child, a social worker's report; or
- a clinic card or school report.

Any other documents will also be considered, and applicants are advised to hand in as many documents as they have.

Inheritance

To make sure of children's well-being when there is a possibility that their parent(s) might die from HIV/Aids it is important to make sure that:

1. a guardian is appointed; and
2. the children inherit the family property.

Children who have lost adult care-givers because of HIV/Aids are often dispossessed and evicted after their parents die, which makes them even more vulnerable.

Appointing a guardian

This can be done in a will, which is a written document explaining what must happen on the death of the person who writes the will. It states the person's last wishes. The will must clearly state who will have custody and guardianship of the children. The will can also make sure that the property, land, clothing and household goods of the deceased parent will stay the property of the children.

A will must:

- be written in permanent ink or typed, not written in pencil;
- be signed by the person whose will it is (the testator) and clearly dated;

- be written when the person still has a clear and sound mind and is not being threatened by anyone to make a will;
- be witnessed by two persons 14 years or older (who must be sober); and
- the witnesses must not have any interest in the will, in other words they must not be people who will inherit anything from the will.

Under customary law, the laws of intestate succession (where no will exists) say that on death, immovable property such as land and housing passes to the next male head of the household. Although property received in this way is meant to be communally held under trusteeship for the benefit of the entire family, it has happened that male relatives have evicted children rather than holding the property in trust for their benefit.[22] Further, customary law is based on the principle of primogeniture, meaning that the general rule is that only a male who is related to the deceased through a male line qualifies as an intestate heir.

These rules were recently challenged in the Cape High Court in the case of *Bhe and others v The Magistrate, Khayelitsha and others* (Case 9489/02, dated 25 September 2003). The conclusions of the case will have to be confirmed by the Constitutional Court. The case involved the inheritance rights of two minor Xhosa children, both girls, whose grandfather claimed the house owned by their deceased father. The grandfather, whose claim was based on the customary law of succession, intended selling the property to pay for his son's funeral expenses. However, the Court ruled that the principle of male supremacy violated the rights to gender equality. It declared that some provisions of the Black Administration Act, which governs the transfer of property after death under customary law, are invalid and unconstitutional.

The Law Commission is reviewing the customary laws of succession. The aim is to prepare legislation to address inequality and discrimination in the transfer of property after death.[23]

Social Grants

Three main grants are available relating to children: the foster care grant, the care dependency grant and the child support grant. These grants may help children who have been orphaned get access to support, provided any applicants can meet the necessary rules. It is important to note that these rules, which differ from grant to grant, are strict. They often mean that needy children and their care-givers are disqualified from accessing state financial aid.

In general, the following documents are needed to apply for a grant:

- the 13 digit bar-coded ID of the parent/guardian/foster parent or care-giver;
- the child's 13 digit bar-coded ID OR a birth certificate with the child's ID number;
- proof of income;
- in the case of a foster child, a court order of the Children's Court;
- in the case of a care dependency grant, a medical report from a medical officer;
- in appropriate cases, proof that the child attends school.

The DSD's booklet *You and Your Grants* advises the following:

> *Applications can be made at the welfare office nearest to where you live; the forms will be filled out in the presence of the officer from the Department.*
> *You do not pay to apply.*
> *You must be given a receipt, which is your proof of application.*
> *You must be given written reasons if your application is unsuccessful.*
> *If you are successful in getting approval, your grant is payable from the date of application.*
> *Grants can be received in cash, through a bank, post office or procurator.*
> *Identity documents are required in order to collect the grants; recipients must sign or make a thumbprint on receiving the money.*[24]

A study in 2001–2[25] of 118 households affected by HIV/Aids at six sites in five provinces found that:

- just under 20% of the households received no income other than state grants.
- a further 17% had no regular income at all, and relied on erratic piece work and help from relatives and neighbours.

The law makes provision for a grant called the 'social relief of distress', in the form of emergency food relief or a financial award in times of distress. However, its scope is very limited and it is only available for a few months. Getting the grant is not easy and many provinces do not make it available. People often wait many months for the benefit, which is contrary to its purpose.

The new Social Assistance Bill 57 of 2003 takes the social relief of distress benefit away, on the basis that this should be a provincial (and not national) function. There is a risk that some provinces may decide not to have this emergency measure at all, and that different provinces will apply different policies. Even though it is a limited form of assistance, it has provided some relief to people in desperate need, and should not have been excluded from the new legislation that will regulate the grants system.

Foster care grants

A foster grant is payable only after a Children's Court has made an order placing a child in foster care. The foster parent may be a relative of the child, but some Children's Courts refuse to grant applications if the child is already with a member of his or her

family and is not formally in need of care. Children may also be placed with non-relatives in foster care. All applications to the Children's Court for the appointment of a foster parent must be accompanied by a social worker's report.

The requirements for payment of a foster care grant, as for most other grants, relate to the applicant's and the child's bar-coded IDs. However, the income of the foster parent is not taken into account. This means that applicants who earn over a certain amount each year are not excluded. The foster parent need not be a South African citizen, although the child must be living (resident) in South Africa.

The most recent information[26] suggests that 85 000 children were receiving foster care grants as at 19 March 2003. The amount payable for a foster care grant from 1 April 2003 is R500.

It is clear that the foster care grant is frequently used as a way of lessening poverty, which is not desirable. This happens because other means of lessening poverty (such as the child support grant) are inadequate. Helping to arrange foster placements and access to the foster care grant appears to be the main response by social workers to children orphaned by HIV/Aids. This tends to clog up the system, which is already overburdened.

Care dependency grant

The care dependency grant is payable for children up to 18 years who require permanent home-based care because of severe mental or physical disability. This grant is means tested, which means that the income of the applicants is assessed. The combined annual income of the applicant and his or her spouse must not be more than R48 000 per annum after deductions. If the child has an independent income, there are also limitations. Only children and parents who are South African citizens qualify for this grant.

As at 19 March 2003, 56 394 children were receiving the care dependency grant. Since 1 April 2003, the grant has been R700 per month. It has not been officially extended to cover HIV-infected dependent children, even though they may be suffering severe deprivation because of advanced HIV/Aids. Officially, the grant is for children with 'traditional' forms of severe disability who need home-based care. The Taylor Committee of Inquiry into the Social Security System, which investigated and made recommendations to Cabinet about the social security system in South Africa in 2002, did not clearly recommend that the care dependency grant should also be given to children suffering chronic illness as a consequence of HIV/Aids. The latest draft of the Social Assistance Bill 57 of 2003 does not take matters further regarding who is eligible for a care dependency grant. The Bill has been criticised on the grounds that the

grant's focus should be on the needs of disabled children, rather than on whether they are receiving permanent care. Also, children are often denied the grant because of problems in defining and measuring the severity of the child's disability.

However, children's rights advocates lobbied Parliament to consider reviewing who is eligible for the grant so that children with special needs caused by HIV/ Aids infection can qualify for this financial support. Their efforts were not successful, though.

Child support grant

The child support grant was introduced in 1998. It now reaches over three million of the poorest children in the country, although these children are only 23% of all children living in poverty in South Africa.[27] An important feature of the grant is the notion that it should follow the child – it is paid to the person who is the child's primary care-giver. The primary care-giver is the person mainly responsible for meeting the child's daily care needs, without being paid to do so. This person may be the parent, a relative or an unrelated member of the community. The amount payable for the child support grant from 1 April 2003 is R160 per month. A person may not receive the child support grant for more than six children at a time.

Initially the child support grant was limited to children under seven. However, this age barrier was changed in 2003, and between 2003 and 2005, the grant will be phased in for children under 14. Since 1 April 2003, it has been available to children under nine. Children under 11 years will be able to get the grant from 1 April 2004 and a year later, on 1 April 2005, it will be available to children younger than 14.

Government has not agreed to provide a basic income grant (BIG) to all citizens and for this reason civil society groups continue to lobby for the child support grant to be payable until the age of 18.

The child support grant has the potential to be an enormous source of financial support to children living in child-headed households, and other children in compromised and vulnerable circumstances due to HIV/Aids. This is especially in cases where it can be received on behalf of a number of younger siblings. However, there are difficulties in getting full access to the grant. These include:

- the scarcity of social workers and social services staff able to process grant applications;
- uncertainty among staff of social development departments about who is eligible for the grant;
- a lengthy delay between an application for a grant and actually receiving the payout;
- lack of transport available to departmental officials to enable them to work in remote areas;

- difficulties associated with getting the necessary documents – such as children's birth certificates, care-giver's death certificates, etc.;
- the burdensome costs to impoverished grant applicants in getting to the necessary officer to finalise grant applications;
- termination of grants upon the death of a primary care-giver – and then the delay caused when a new care-giver has to apply to have the grant re-instated.

The key barrier for child-headed households is that children younger than 16, who do not have IDs, cannot get the grant for their siblings. Given the established emphasis in the children's rights arena upon the evolving maturity and capacities of children, and in the light of the fact that children of 13 years or 15 years may be doing what is normally done by an adult care-giver, excluding them from an important source of state support must be challenged.

Guardianship, mentorship and difficulties with consent[28] by or on behalf of minors

At present the law relating to guardianship of children is in the Guardianship Act No 192 of 1993. It says that parents have joint guardianship over their children born in a lawful marriage. The father of a child born out of wedlock can get guardianship by applying to the High Court. Where children are born out of wedlock, the child's mother is automatically a guardian of the child, unless she is a minor. (For now a minor is a person aged under 21 years as provided for in the Age of Majority Act, Act 57 of 1972. The proposed Children's Bill intends to change this to 18 years, in line with the Constitution). A minor's guardian(s) becomes her child's guardian until she is no longer a minor.[29]

S 28(3) of the Constitution defines a child for the purposes of the rights set out in s 28 as a person aged below 18 years.

In common law, a child without a parent or guardian such as a child orphaned by HIV/Aids falls under the guardianship of the High Court, which is the upper guardian of all children in its jurisdiction. This guardianship is obviously very inaccessible for most orphaned and vulnerable children, and there is no real system in place to implement it. High Court applications are also prohibitively expensive.

There is a need for better options for transferring guardianship where children are orphaned or where their guardians are terminally ill and unable to be effective. The Law Commission tried to deal with this gap in several ways, including the proposal about household mentors (see pp 18–19). A further proposal was that a parent could nominate a parent substitute,[30] who would not have parental rights over the child, but

who would be able to carry out responsibilities and have the obligation to protect the child's health, well-being and development. This person could fulfil a role similar to a guardian, where necessary.

The requirements suggested in draft legislative provisions for the appointment of a parent substitute are that the appointment:

- must be in writing and signed by the parent;
- may form part of a will;
- may be withdrawn by the parent at any time in writing, in which case it must be signed by the parent; and
- takes effect only after the death of the parent and then only if the parent substitute accepts the appointment.

Guardians (usually parents) have a particular (historic) legal role to play in giving consent for various activities, and also helping children with legal matters (signing contracts, buying property, pursuing litigation). This is a valuable mechanism to protect children from abuse and exploitation. However, it also poses special difficulties in a society with a rising number of orphans, and with inadequate legal mechanisms for replacing an adult guardian. A High Court application would ordinarily be required to replace an adult guardian.

For these reasons, the Law Commission proposed that it should be easier to get access to courts for appointing guardians, and that the Children's Court should be able to grant these orders. This proposal did not survive later drafts of the Children's Bill. The High Court is still the court that will have to make findings in this matter, unless Parliament rejects the latest draft.

In two recent cases applications were brought to the High Court for two orphaned children who risked being excluded from a potentially life-saving medical treatment programme. This was because they had no guardian who could legally consent to medical treatment. An activist reported:

> *Although both applications have been successful in facilitating access to treatment, the costs of applications such as these are prohibitive and it is clearly impractical and inconvenient to bring applications to the High Court every time a child without a legal guardian or parent requires access to HIV testing or treatment.*[31]

Accessing education

It is still difficult for many children affected by HIV/Aids to get access to education. The point has been made that HIV/Aids responses are not only the responsibility of the Departments of Health and Social Development, but other sectors have a key role

to play. Nor does the right to have access to education simply involve school enrolment. This is clearly shown in the following quote from primary research with children living in child-headed households or made vulnerable due to the expected death of their primary care-giver:

> *We found many instances of schools suspending children, withholding report cards, punishing, preventing children from moving to the next grade, not allowing children to write exams, and not providing transfer letters, all through the non-payment of school fees, even though legal provision is made for exemptions…Many children face discrimination and abuse at the hands of teachers.*[32]

The Convention on the Rights of the Child requires States Parties to make primary education compulsory and available free to all.[33] Section 29 of the South African Constitution also enshrines the right to basic education, including adult basic education. Courts in South Africa have not yet interpreted or explained what obligations Section 29 imposes.

The South African Schools Act 84 of 1996 prohibits a school from unfairly discriminating against learners in its admissions policies.[34] It also provides for school fees in public schools, but it says that school fees must include equitable criteria and procedures so that parents who are unable to pay can be totally or partially exempted.[35] In practice, though, the biggest problem with children's access to education is school fees that cannot be paid, and lack of access to clothes and transport to get to school.

After a recent review of costs in the public education system, the Department of Education has acknowledged that the system makes it difficult for poor learners to get access to education, and this includes children made vulnerable through the death of parents and care-givers from HIV/Aids. In it's Action Plan[36] released after the review, the Department emphasises the need to make sure that the poorest 40% of learners in South Africa experience improvements in the quality of their education. This means removing barriers to access, such as the distance that has to be travelled to school, school fees, the costs of school uniforms and books. It could include other barriers as well.

The Action Plan proposes abolishing school fees in the bottom two quintiles of schools. It also suggests providing a basic minimum package of R450 per learner, at 2003 costs, for expenses not related to staff costs.[37] Exemptions processes in less poor schools will be made stronger. Importantly, learners who qualify for certain social service grants and payments will automatically be exempt from paying fees.[38] Implementing this aspect of the Action Plan could offer a lot of help to learners who have lost their care-givers due to HIV/Aids or are surviving in child-headed households.

The Cabinet has approved the Action Plan. When he anounced this, the Minister

of Education said that these measures would start during 2004. Advocacy efforts must concentrate on making sure that the plans are put into effect and that they make it much easier for child-headed households to get access to schooling.

Health care and welfare services

Health legislation does not specifically refer either to children or to HIV/Aids. The Health Act 63 of 1977 has been criticised as it does not clearly set out what the right to health care services means.[39] Although the Constitution provides for children's rights to basic health care services (section 28(1)(c)), so far the main thing that has been done to put this section into effect was the introduction in 1996 of free health care services for children aged under six.

Government has been involved in developing a new National Health Bill for some time. The National Health Bill 32 of 2003 was tabled in August 2003, and the latest drafts do advance children's rights to basic health care services in a few limited ways. For instance, the Bill will prohibit discriminatory or abusive treatment of youth infected with and affected by HIV/Aids in the health care environment.[40] In addition, the previous policy position that children under six who are not on medical aid have free access to primary health care services will now get statutory recognition.

Nevertheless, there is still a concern that the Bill, which is by now at an advanced stage of parliamentary procedure, does not recognise that the vulnerability of children needs special focus and attention.[41] Indeed, it has been said that some provisions in the Bill actually take steps backwards, rather than providing more rights for children in the health care system.[42] Civil society calls for more detailed attention to the content of children's rights to basic health care and services, as enshrined in section 28(1)(c), have not met with the desired legislative response.

On the issue of consent to HIV/testing and the confidentiality of the results of any such test, the provisions of the proposed Children's Bill as initially developed by the Law Commission are instructive. The Law Commission suggested that legislation should include provisions protecting children from HIV/Aids testing unless testing is in their best interests, and unless consent has been given.[43] The Bill enhances children's rights to privacy, too, by providing that no person may disclose the HIV/Aids status of a child without consent (clause 139).

In practice, though, children are often tested for HIV/Aids without their consent. An example is when a foster placement or placement in a children's home or place of safety is being considered. In addition, the need for pre- and post-test counselling is often ignored. At present, the law says that parents or guardians should consent to

HIV testing, although the superintendent of a hospital may give consent in an emergency. If there is no emergency, the Minister may be approached for consent. Children of 14 or older may, however, give consent in terms of section 39 of the present Child Care Act 74 of 1983. This legal framework has been described as confusing, and organisations have difficulty when dealing with children who have no apparent parent or guardian.[44]

In a recent case brought by the Aids Law Project, an application to the High Court had to be made to get consent for a group of orphans to receive potentially life saving treatment for HIV/Aids. The treatment formed part of a medical research project, and the ethics of the research meant that informed consent was necessary. Although the application was successful, the legal position remains unchanged, and there is still no one able to provide consent if it becomes necessary.

The Law Commission has also recommended that children of 12 or older should have the right to confidential access to contraceptives, without needing parental consent.

The version of the proposed Children's Bill certified by the State Law Advisers contained provisions on children's health rights. The Bill will soon be introduced into the Parliamentary process. These provisions appear in a general chapter on children's rights, and say that every child has the right to have access to information on health promotion and the prevention of ill health, on sexuality, and on reproduction. Children are also given the right to confidentiality on their health status generally, as well as confidentiality on the health status of their parents, care-givers or family members, except when it is not in the best interests of the child.

Civil society organisations should lobby for the Children's Bill to include full child-rights based provisions to regulate HIV/Aids testing and confidentiality.

part 6

Conclusions and recommendations for advocacy

Though new legislation has recently enjoyed the attention of Parliament, the rights of children who are vulnerable to growing up in a child-headed household have not been sufficiently addressed. The piecemeal way that law reform is being tackled leaves gaps and uncertainties. For example, the question of who should take responsibility for children when there is no legally responsible person is still unclear. The fact that children under 16 who are primary care-givers of younger siblings cannot apply for available social grants is discriminatory, and could be challenged constitutionally. It is also not yet certain whether children who are suffering from Aids can be regarded as care dependant for the purposes of the care dependency grant.

Civil society organisations concerned about the plight of the orphan generation must therefore remain alert to the gaps and exclusions that affect this group of children. There is a lot of work ahead to re-establish the full package of law, policy and social security provisions in the Children's Bill that was initially developed by the Law Commission.

Also, while policy advances have been made to roll out community-based care and protection to children in child-headed households, there are many weaknesses in service delivery. The lead departments should be monitored to make sure there is a continued improvement of services to reach out to vulnerable children. The Department of Education must be held to the recent plan to remove barriers to learning for poor children, and once the roll out of anti-retroviral drugs takes place, care must be taken to make sure that people in most desperate need benefit. This includes the parents of minor children who otherwise risk being orphaned.

Key points for advocacy and lobbying

- The implementation of the Promotion of Equality and Unfair Discrimination Act should be monitored to ensure that discriminatory practices related to children living in child-headed households, and those affected by HIV/Aids, are challenged.
- Government should be lobbied to change the law that will prevent children heading households who are aged below 16 years from receiving the child support grant on behalf of younger siblings.
- Government should be lobbied to develop a food security policy that ensures the rights of children in child-headed households to have access to basic nutrition.
- The Children's Bill process should be closely followed to make sure that the legal status of child-headed households is properly accommodated.
- Legal requirements about getting consent to treatment for orphans should be revised and simplified.
- Provision should be made for the appointment of household mentors with legal capacities in respect of child-headed households, without depriving those households of their autonomy.
- Government's plans regarding access to education and school fee exemptions should be closely followed.

Notes

1 In August 2003, the Government of South Africa announced the roll out of a plan to provide state funded treatment to HIV infected citizens. The details of access to this programme have not, at the time this was written, been finalised (eg whether a means test will apply). If significant gains are achieved through better access to drugs which delay the terminal stages of full blown HIV/ Aids, it could dramatically prolong the lives children's care-givers, and reduce substantially the predicted scale of orphanhood of children.

2 Giese and Meintjes et al 2003a.

3 Desmond *et al* 2003.

4 See, for example, the Access (Alliance for Children's Entitlement to Social Security) submission to the DSD on aspects of the Children's Bill related to Social Security for children, dated 29 September 2003.

5 Dr L Tshiwulla, Committee Member representing South Africa on the African Committee of Experts, at a seminar on the African Charter on the Rights and Welfare of the Child, held at the University of the Western Cape, 26 July 2003.

6 See sections 26, 27 and 29 of the Constitution.

7 2000 (11) BCLR 1169 (CC).

8 See par 76, 77 and 79 aod the *Grootboom* decision.

9 *Grootboom* par 44.

10 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

11 In operation (in part) from 16 June 2003.

12 For instance, the refusal to admit HIV infected children to care institutions and early childhood development centres. In October 2003, a judge in Gauteng upheld the right of a private institution to refuse admission to a pre-school facility. This decision will reportedly be taken on appeal, however (*Business Day* 22 October 2003).

13 The single exception is a definition of a care-giver, which includes foster parents, kinship care-givers, family members who care for children in informal kinship arrangements, a person caring for a child in temporary safe care, a primary care-giver who is not the biological or adoptive parent of a child, and the child at the head of a child-headed household to the extent that the child has assumed the role of primary care-giver. This definition is presently linked to provision in the body of the legislation which details the factors to be taken into account when determining what is in the best interests of children (clause 5 and 6), and to the requirement that care-givers are obliged to safeguard the health, well-being, and development of children in their care, and to protect them from maltreatment, abuse, neglect, degradation, discrimination, exploitation, and any other physical

or mental harm or hazards (clause 32(1)). The care-giver will also have the responsibilities and rights necessary to do this even though he or she is not a parent. This will include the right to consent to medical examination or treatment of the child where consent cannot reasonably be obtained from the parent (clause 32(2)).

14 The submission of the Black Sash, ACESS, Children's Institute, Community Law Centre and SA Federal Council on Disability (dated 9–10 June 2003).

15 See, for example, the presentations to the Portfolio Committee on 22 September 2003, accessed 29 September 2003.

16 Previously clause 234 of the Bill, now clause 136. The section does not appear in the first Bill certified by the State Law Adviser that will serve before Parliament.

17 This was originally the HCBC programme – home- and community-based care.

18 Giese and Meintjies, 2003b.

19 Sloth-Nielsen, 2003.

20 These are summarised from Giese and Meintjies, 2003b, pp 45–46.

21 See, for example, Giese and Meintjies, 2003a, and the earlier study of Loening-Voysey and Wilson, 2001.

22 This is what occurred in *Mthembu v Letsele and others* 2000(3) SA 867 (SCA),

23 The Recognition of Customary Marriages Act 120 of 1998, in force from 15 November 2000, dealt with some of the inequalities inherent in the customary family law.

24 DSD, 'You and your grants', accessed 8 October 2003; DSD 'Social services procedures manual 2003', accessed 8 October 2003.

25 Giese and Meintjies, 2003a.

26 DSD factsheet, 'Registration campaign', accessed 8 October 2003.

27 www.pmg.org.za/docs/2003/viewminutes.php?id=3280.

28 Consent to HIV testing and other matters relating to consent in the specific area of health rights is discussed under the next section of this publication.

29 This is provided for in the Children's Status Act 82 of 1987. Both the Children's Status Act and the Guardianship Act will be repealed once the proposed Children's Bill is enacted.

30 See clause 38 of the Law Commission's Draft Children's Bill, now provided for in clause 26 of the Bill certified by the State Law Adviser on 24 October 2003.

31 Gerntholtz, 2003.

32 Giese, 2003. "Looking for signs of Vulnerability" vol 7 no 50 *ChildrenFirst* 12.

33 Article 28(1)(a). This is also provided for in the International Covenant on Economic, Social and Cultural Rights (1966) which South Africa has signed but not yet ratified.

34 Note that this legislation does not apply to pre-schools and day care centres.

35 Section 39, read with section 40.

36 Cabinet approved the Action Plan on 11 June 2003.

37 Education non-personnel expenditure would include school-based expenditure on text books, stationery, water and electricity, maintenance of facilities and teaching equipment.

38 See the press release by the Minister of Education on the release of the Action Plan.

39 National Aids and Children Task Team, 2003, accessed 13 October 2003, p 32.

40 Ibid p 35.

41 See the Children's Institute's submission on the draft National Health Bill.

42 Ibid.

43 Clause 136 of the draft Children's Bill prepared by the Law Commission.

44 National Aids and Children Task Team, 2003, p 38.

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Department of Home Affairs: www.home-affairs.pwv.gov.za

DSD website: www.welfare.gov.za

DSD draft of the Children's Bill as at 13 August 2003 is available at www.socdev.gov.za/Legislation/2003/childbill.pdf

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Minister for Health and Others v Treatment Action Campaign and others 2002 (10) BCLR 1033 (CC)

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