

CENTRE FOR CHILD LAW SUBMISSIONS
ON
THE SOCIAL ASSISTANCE AMENDMENT BILL, 2018



CENTRE FOR
CHILD LAW

FACULTY OF LAW, UNIVERSITY OF PRETORIA

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UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA
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1. ABOUT THE CENTRE FOR CHILD LAW

The Centre for Child Law (the Centre) is an impact litigation organisation that is registered as a Law Clinic with the Legal Practice Counsel. The Centre aims to set legal precedent to improve and strengthen laws pertaining to children. The Centre contributes towards the establishment and promotion of the best interests of children through litigation, advocacy, research and education.

The Centre has advanced children's rights nationwide in areas related to social assistance, children in contact with the criminal justice systems as victims or offenders, the right to basic education, the right to birth registration, advancing the rights of children with disabilities and more.

2. THE CENTRE'S SUBMISSIONS

The Centre welcomes and supports the proposed amendments set out in clause 4 of the Bill (insertion of section 12A in Act 13 of 2004) as passed by the National Assembly. The Centre believes that this proposed provision will contribute to the Minister's formulation of a comprehensive legal solution to the foster care crisis that has been the subject of litigation since 2011; namely a "top-up" to the child support grant to be provided to relatives caring for orphaned children. This will drastically lessen the pressure on the foster care system that is causing the crisis in the system.

2.1 The foster care crisis: how did we get to where we are?

The foster care system functioned for many decades with the number of children in foster care placements remaining below 50, 000. However, when orphan rates started to increase rapidly in the early 2000s due to the rise in HIV prevalence the number of maternally orphaned children doubled from half a million to over a million between 1996 and 2004. This rise in orphaning rates saw a shift in the system allowing relatives caring for orphaned children to have the children placed in foster care with them, which would allow for access to the foster child grant (FCG) which was larger in amount than the child support grant (CSG). There has, since then, been an exponential rise in the number of children in the foster care system and FCGs in payment.

Multiple concerns have been raised over the years by civil society organisations and practitioners about the negative impact that using the foster care system for orphans living with relatives will have. Some of these concerns include:

- Orphans (and their caregivers) experience long delays in accessing FCGs because of the time-consuming process of foster care placements.
- It is highly unlikely that the foster care system would be able to cope with all orphans. It is currently only reaching a fraction of the eligible orphans in the country.
- The foster care system does not cater for the fluidity of childcare arrangements whereas the CSG is designed to follow the child.
- A foster care order does not give foster parents full parental rights and responsibilities, and is therefore not an appropriate arrangement for orphans, whose orphan status is by definition permanent (adoption or guardianship may be more appropriate).
- The capacity of the social welfare system, and in particular the child protection system, has been greatly strained by the need to enrol and monitor large numbers of children in the foster care system, leaving abused and neglected children without the responsive protection services they need.

2.2 The foster care crisis the subject of litigation: court orders to keep the system afloat

The strain placed on the foster care system has resulted in the lapsing of foster care orders because social workers and children's courts cannot keep up with the high numbers of foster care orders that have to be renewed every 2 year as required by the Children's Act 38 of 2005. When court orders lapse the South African Social Security (SASSA) cannot pay out foster child grants. In 2011 over 120 000 foster care orders granted by Children's Courts across the country lapsed. The Centre, after being approached by concerned civil society organisations and practitioners, approached the High Court, Pretoria on an urgent basis for an order to revive lapsed foster care orders. The High Court granted the order and required the Department to design a comprehensive legal solution to the foster care crisis by 31 December 2014.

In December 2014, the Minister and the Department of Social Development had still not developed a comprehensive legal solution and faced a significant backlog of approximately 300 000 expired foster care orders. On 12 December 2014, the High Court granted an order which broadly had the effect of extending the 2011 order for a three-year period. In November 2017 there were still no signs of a comprehensive legal solution and foster care orders were at risk of lapsing. The Centre again approached the High Court for relief, an order was granted.



The most recent court order was obtained on 26 November 2019, when the Minister had still not met the terms of the 2017 court order; particularly developing a comprehensive legal solution. The Minister approached the High Court for a further extension. The court order gave the Minister 12 months to develop a comprehensive legal solution; that is until November 2019.

2.3 The Social Assistance Amendment Bill and the comprehensive legal solution to the foster care crisis

The comprehensive legal solution that is the most workable is to have orphans living with relatives on the child support grant system and provide a top-up amount for this category only (CSG top up).

Orphaned children already receiving the FCG would continue to receive it so as to not be regressive.

1. The number of new children coming into the foster care system would then be reduced to those actually in need of care and protection because of abuse, neglect and other reasons set out in the Children's Act.
2. This would ensure that the overall numbers of children in foster care returns to a manageable size for the resources and personnel in the child care and protection system.
3. Social workers and Children's Courts would be freed up to do more preventive work and care and protection work with children who are abused and neglected, irrespective of their orphan status.

The proposal in clause 4 of the Bill (insertion of section 12A in Act 13 of 2004) would be the first of two legislative amendments needed to put the proposed comprehensive legal solution into place. If designed effectively in the government notice and regulations, this reform could ensure the majority of orphans living with relatives are able to access an adequate social grant, quickly and without interruption through the CSG top up which does not require court processes and only application to the South African Social Security Agency (SASSA).¹

The use of the foster care system to channel poverty relief to families has impacted negatively on the child protection system and on the families in need of the poverty relief. A more efficient and

¹ Children's Institute Submissions to the Kwa Zulu Natal Legislature (2020).



cost-effective way of providing poverty relief is already available and can rather be utilized for this purpose. This is why we support the CSG top-up as part of the solution.²

Besides a social grant, families caring for orphans may also have other needs, for example counselling or legal services to secure guardianship.³ The Children's Act provides for a range of prevention and early intervention programmes, which should be available to all children who need them; whether they are in the foster care system or not. These include grief counselling and parenting skills programmes. In theory, an orphan can be referred for grief counselling or an elderly relative caring for a challenging teenager can be supported in a parenting programme. Each family will require an individualized response from the social service professional assisting the family.⁴

The second phase of amendments that would be needed would be to the Children's Act 38 of 2005. It is hoped that these amendments would clarify for social workers and children's courts that only children in need of care and protection are to be put in the foster care system and orphans being cared for by relatives (and who are not in need of care and protection) should be diverted to the CSG top up.

3. ORAL SUBMISSIONS

The Centre requests the opportunity to make oral submissions.

² As above.

³ As above.

⁴ As above.

