**CONSOLIDATED INPUTS AND PROPOSALS: SOCIAL ASSISTANCE AMENDMENT BILL [B8-2018]**

1. **Introduction**

The Portfolio Committee on Social Development held Public Hearings on the Social Assistance Amendment Bill (B 8-2018) on 19 and 27 February 2020.

After the hearings, the Department considered all submissions and proposed amendments advanced by various organisations and stakeholders. The following report provides the Department’s comments and views on the proposed amendments received during the public hearings.

1. **Consolidated inputs and proposals for the proposed amendments (Social Assistance Amendment Bill [B8-2018])**

|  | Proposed amendment  | Clause explanation | Proposed amendments/ comments | Departmental input/comment |
| --- | --- | --- | --- | --- |
|  | " **'disaster'** means "disaster" as defined in section 1 of the Disaster Management Act;"; | Clause 1 of the Bill seeks to amend Section 1 of the Act to insert a definition for ‘‘disaster’’, in order to align the Act with the Disaster Management Act. | **BLACK SASH**Black Sash agrees that using the definition provided for in the Disaster Management Act for disaster and disaster management is useful.  | Comment of support is noted. |
|  | " **'Disaster Management Act'** means the Disaster Management Act, 2002 (Act No. 57 of 2002);"; | Clause 1 of the Bill seeks to insert amend Section 1 of the Act to insert a definition for ‘‘Disaster Management Act’’, in order to align the Act with the Disaster Management Act. | **BLACK SASH**Black Sash agrees that using the definition provided for in the Disaster Management Act for disaster and disaster management is useful.  | Comment of support is noted |
|  | **“Independent Tribunal"** means the Independent Tribunal appointed by the Minister as contemplated in section 18(1);"; | Clause 1 of the Bill further seeks to amend Section 1 of the Act to insert a definition for ‘‘Independent Tribunal ’’, in order to provide for proposed section18 amendment. | The reference to “appointed by the Minister” in the definition of “Independent Tribunal” should be deleted as no substantive law should be created in a definition. The appointment issue is in fact provided for in section 18(2)(b) of the SAA.  | Concern is noted. Propose the amendment of the definition by deleting reference to the Minister. Proposed new definition:“Independent Tribunal” means the Independent Tribunal as contemplated in section 18(1)”. |
|  | " **'person'** for the purpose of social relief of distress in the event of disastermeans the head of the household or anyone within the household acting on his or her behalf or an organisation rendering disaster relief services;"; and | Clause 1 also seeks to redefine the definition of a “person” to include organization rendering disaster relief services to enable SASSA to partner with NGO’s in the provision of disaster relief.  | Black Sash supports the inclusion of extending the definition to also include the head of the household, for Social Relief of Distress.  | Comment of support is noted. |
|  | " **'social assistance'** means a social grant, social relief of distress or an additional payment contemplated in section 12A;". | Clause 1 of the Bill seeks to amend Section 1 of the Act to expand the definition of social assistance to make provision for additional payments. | Black Sash supports expanding the definition of social assistance by including additional payments as contemplated in Section 12A.  | Comment of support noted. |
|  |  |  | **NOMHLE NKWANYANA** **Additional payments:** Money from the Social Development to help the needy. | Noted. Proposal to include new definition “ Additional payment means, additional payment as contemplated in section 12 A  |
|  |  |  | **Child headed household** – A child or children looking or taking care of other children at home. No parents or have died.  | Proposal is not supported as the child headed household is already defined in the Children’s Act. |
|  | Section 4 of the principal Act, 2004, is hereby amended—*(a)* by the substitution for the heading of the following heading:"**Provision of social [grants] assistance**";*(b)* by the deletion of "and" at the end of paragraph *(f)*, the substitution of the expression "; and" for the full stopat the end of paragraph *(g)* and the addition of the following paragraph:"*(h)* social relief of distress. | Clause 2 is amended to provide for other forms of social assistance, including social relief of distress.  | N/A | **N/A** |
|  | **Substitution of section 6 of Act 13 of 2004**1. The following section is hereby substituted for section 6 of the principal Act, 2004:

"**Child support grant****6.** Subject to section 5*(a)* a person who is the primary care giver of a child; or *(b)* a child who heads a child-headed household as contemplated in section 137 of the Children’s Act, 2005 (Act No. 38 of 2005), is eligible for a child support grant.". | Clause 3 seeks to amend Section 5 of the Act to allow the child head of a child headed household to be able to access a child support grant on behalf of themselves. | **BLACK SASH**Black Sash supports the extension of the Child Support Grant to include child headed households**SOUTH AFRICAN CATHOLIC BISHOPS’ CONFERENCE**We welcome the greater clarity regarding the recipients of various grants, particularly regarding the Child Support Grant. However, there is little effort to deal with the Foster Care Grant, which has created a crisis in the foster care system where the needs of children in need of care and protection have been merged with children who are in what is, essentially, kinship foster care. | Comment of support is noted.This amendment together with the Children’s Act amendment Bill seeks to address the crisis within the foster care system. |
|  | **Insertion of section 12A in Act 13 of 2004**1. The following section is hereby inserted in the Social Assistance Act, 2004, after section 12:

"**Additional payments** **12A.** (1) The Minister, with the concurrence of the Minister of Finance, may prescribe an additional payment linked to a social grant.(2) The Minister may, in prescribing an additional payment, differentiate on the basis of need between beneficiaries of social grants. | Clause 4 seeks to amend section 13 of the Act to expand the definition of social assistance to include the additional amounts that the Minister may pay | **BLACK SASH**In its presentation to the Portfolio Committee, the Department of Social Development indicated that one of the main objectives of the amendments was to empower the Minister, with the concurrence of the Minister of Finance, to make additional amounts available for social grants to: a) Implement the extended Child Support Grant policy which was approved by Cabinet in December 2016; and b) Regularize the practice of paying additional amounts on the Old Age Pension Grant for those over 75 years. Black Sash supports the amendment for the Minister to be empowered to consider an increase in the amount of social grants to be paid.**CHILDREN’S INSTITUTE**We welcome the amendments to the Social Assistance Act which are aimed at introducing a higher valued Child Support Grant for relatives caring for orphaned children. • Section 12A, read with s32 (3) (b) gives the Minister of Social Development the authority to announce by government notice an additional payment linked to a social grant, for certain categories of beneficiaries who have a need for an additional payment. This decision will require the concurrence of the Minister of Finance. • Section 32(2)(d) gives the Minister the authority to prescribe in regulations additional requirements or conditions that beneficiaries need to meet in order to access the additional payment. The Minister could therefore prescribe that relatives caring for orphaned children are eligible for a CSG ‘Top-Up’ if they prove that the child is an orphan. The supporting documents that they will be required to submit could for example include death certificates and/or affidavits or letters from reputable persons. If the CSG Top-Up is designed and implemented effectively, we believe it could ensure that the majority of orphaned children in the care of relatives receive an adequate social grant quickly without delays, and that they continue to receive their grants without interruption. It could also have a significant impact on solving the challenges currently occurring in the foster care system, as well as improving the response of the child protection system for abused children. It will do this by: (a) Reducing the demand for foster care placements. (b) Reducing the foster care case load of social workers and children’s court magistrates (c) Freeing up time for social workers and magistrates to provide responsive and quality protection services and therapeutic support to children who have been abused and neglected. (d) Freeing up time for social workers and magistrates to ensure children in alternative care are provided with regular placement reviews, therapeutic support and family re-unification services. We therefore support the amendments to section 12A and 32, but we would like to bring to your attention evidence that needs to be taken into account in the design and implementation of the CSG Top-Up.While we are aware that the details will be set out in the government notice and regulations, the success or failure of the CSG Top-Up, as well as ensuring that is does not result in a constitutionally regressive step for orphans, depends on the decisions about these detail. It is imperative therefore that members of parliament are aware of this context and request clarity from the Minister and her Department as to the intentions on these key details. For example, (a) if the CSG Top-Up amount is too low, it could constitute a regressive step for the orphans who are currently legally eligible for the higher FCG. However, a reasonable amount, coupled with an accessible system which ensures quick uptake and guaranteed continued receipt, could result in a net benefit for the affected population. (b) If the proof required to qualify is two death certificates, the majority of orphans will not be able to comply. This is because many fathers are unknown or absent from children’s lives, 65% of children do not have their father’s details on the unabridged birth certificates, and their relatives therefore have limited access to the details needed to access their death certificates. We can provide evidence on how to ensure that the CSG Top-Up can be designed and implemented to prevent regression, while remaining affordable to the state in the current economic climate. **CINDI**Section 12A, read with s32 (3) (b) gives the Minister of Social Development the authority to announce by government notice an additional payment linked to a social grant, for certain categories of beneficiaries who have a need for an additional payment. This decision will require the concurrence of the Minister of Finance. * Section 32(2)(d) gives the Minister the authority to prescribe in regulations additional requirements or conditions that beneficiaries need to meet in order to access the additional payment.

In formulating the criteria for the CSG Top-Up, it is important that careful consideration is given to both the amount of the grant and the supporting documentation required for eligibility. The grant should aim to be easily accessible for quick uptake. Orphan children are currently eligible for the higher value FCG but fail to access it due to administrative constraints. Too low an amount for the CSG stands to further deny these orphans the support they require. CINDI's research shows that the higher the amount of the grant, the more care and support caregivers were able to provide to children. In addition, the CSG Top-Up application process must avoid duplicating the administrative burdens of the FCG process whilst still ensuring the grant is reaching those for whom it is intended. Consideration must be given to what documents are required for proof of orphanhood, especially given that father’s names are often not recorded on birth certificates and the high number of absent fathers in South Africa. | Comment of support is noted.Comment of support noted and the advice provided on determining the value of the additional benefit and eligibility criteria will be considered when drafting the regulationsComment of support noted and the advice provided on determining the value of the additional benefit, eligibility and access criteria will be considered when drafting the regulations.Comment of support noted and the advice provided on determining the value of the additional benefit, eligibility and access criteria will be considered when drafting the regulations. |
| 10 | **Substitution of section 13 of Act 13 of 2004** 1. The following section is hereby substituted for section 13 of the principal Act, 2004:

**"Social relief of distress**13. (1) A person is, subject to section 5, eligible for social relief ofdistress if the person qualifies as prescribed.(2) Notwithstanding subsection (1) and sections 27, 41 and 55 of the Disaster Management Act, any person may qualify for social relief of distress if his or her household has been affected by a disaster. (3) The Agency must, subject to subsections (1) and (2), disburse the social relief of distress as prescribed. (4) Notwithstanding subsection (2), the Agency may in the event of adisaster and depending on the magnitude of the disaster and the availability of resources, determine as prescribed, the needs of the affected communitiesand disburse the social relief of distress.”. | Clause 5 seeks to amend Section 12 of the Act to make the provision of SRD for disaster relief more clear. | N/A | **N/A** |
|  | **Amendment of section 14 of Act 13 of 2004, as amended by section 2 of Act 5 of 2010****6.** Section 14 of the principal Act, 2004, is hereby amended by the substitution in subsection (3)*(b)* for subparagraph (iii) of the following subparagraph:"(iii) of his or her right **[to request reconsideration and his or her rights]** of appeal contemplated in section 18 and of the mechanism and procedure to invoke **[any]** such right.". | Clause 6 seeks to amend Section 14 of the Act by removing the clause related to reconsideration to provide easier access to the right to administrative justice to applicants and beneficiaries by allowing direct access to lodge an appeal to the Independent Tribunal, thereby reducing the length of the Appeals process.  | **BLACK SASH**The DSD argues that the current reconsideration mechanism within SASSA allows for an administrative review of the decision making process and does not add substantial value as SASSA has its own quality control processes. While the Black Sash understand the rationale for removing the internal reconsideration to appeal directly to the Tribunal (i.e. for a grant application or review with SASSA), we have concerns the Tribunal will have to the additional burden to resolve small issues. Black Sash also raised capacity concern of the Independent Tribunal to deal with increased numbers of appeals (refer to presentation)Concern regarding locality of the Independent Tribunal | Although the concern of the Black Sash is noted, the Social Assistance Amendment Bill, read together with the Social Assistance Act, is very specific as to which matters may be referred to the Independent Tribunal for consideration as appeals. The Amendment Bill limits it to a decision taken by the Agency in relation to an application for social assistance as contemplated in section 14 (grant application or review). Should further be noted that section 27 of the Social Assistance Act determines that one of the functions of the Inspectorate is to establish a complaints mechanism and it is believed that the operationalization of the Inspectorate will also go a long way to address the concern raised by the Black Sash. Since the establishment of the Independent Tribunal in 2008, the Tribunal has streamlined its business processes to ensure optimization of its resources. The Tribunal is therefore confident that it will be able to manage the increased estimated number of appeals. Even though the national office of the Independent Tribunal is located in Gauteng, Provincial Coordinators have been appointed for all the Provinces. The Provincial Coordinators are responsible to conduct awareness raising sessions within the respective Provinces and to ensure continued collaboration with all SASSA local, district and regional offices to ensure that all appeals lodged are timeously processed and submitted to the Independent Tribunal for consideration. In addition thereto, the Tribunal has identified the Provinces from which the largest number of appeals are forthcoming and has subsequently established operational Provincial Offices in KZN and EC.Further to the above, to give effect to the existing Protocol Agreement between the Agency and the Independent Tribunal, the Regulations will place an obligation on the Agency to fully inform persons on their right to lodge an appeal and to assist them to execute this right by providing assistance and the required forms and thereafter submit the appeal within a specified time period to the Independent Tribunal for consideration. |
|  | **Substitution of section 18 of Act 13 of 2004**1. The following section is substituted for section 18 of Social Assistance Act, 2004

“**Appeal against decision of Agency****18.** (1) The Minister must appoint an Independent Tribunal comprised of appropriately qualified persons, as may be prescribed, to serve as members of the Independent Tribunal, to consider appeals against decisions of the Agency contemplated in subsection (2), in the prescribed manner. (2) If an applicant or a beneficiary disagrees with the decision of the Agency in relation to an application contemplated in section 14, that person or a person acting on his or her behalf may, within 90 days of the decision being made, lodge a written appeal with the Independent Tribunal in the prescribed manner.(3) The appeal contemplated in subsection (2) must set out the reasons for the appeal against such a decision and why the Independent Tribunal should vary or set aside such decision or make any other decision which is just.(4) The Independent Tribunal must, upon receipt of the written appeal contemplated in subsection (2), request the Agency to provide the reasons and all relevant records which informed the decision, to the Independent Tribunal.(5) The Agency must submit the reasons and all relevant records to the Independent Tribunal in the prescribed manner.(6) The Independent Tribunal must, upon receipt of the reasons and all relevant records contemplated in subsection (5), consider the appeal and may confirm, vary or set aside the decision of the Agency or make any other decision which is just. (7) Notwithstanding subsection (2), the Independent Tribunal may in the prescribed manner condone any late lodgement of an appeal.”. | Clause 7 seeks to amend Section 18 of the Act to remove the clause related to reconsideration to provide easier access to the right to administrative justice to applicants and beneficiaries by allowing direct access to lodge an appeal to the Independent Tribunal and improving the appeals process to reduce the length of the Appeals process.  | Same comments as above. | Refer to comment above |
|  | **Amendment of section 24 of Act 13 of 2004, as amended by section 43 of Act 30 of 2007****8.** Section 24 of the principal Act, 2004, is hereby amended by—*(a)* the substitution for subsection (1) of the following subsection:"(1) **[The]** There is an Inspectorate for Social Assistance **[is hereby established as a national department** **contemplated in Schedule 1 to]** which must be a national government component contemplated in section 7(2)*(c)* of the Public Service Act, 1994 (Proclamation No. 103 of 1994), **[and is headed by a person designated as Executive Director]** and established in accordance with section 7(5)*(c)* of that Act."; and*(b)* by the deletion in subsection (5) of the word "and" at the end of paragraph *(a)*, the substitution for the full-stop at the end of paragraph *(b)* of the expression "; and", and the addition of the following paragraph:"*(c)* furnish him or her with recommendations with regard to any matter relating to the functions of the Inspectorate.". | Clause 8 seeks to amend Section 24 of the Act to change the organizational form of the Inspectorate to that of a government component.  | Section 24 of the Social Assistance Act provides for the establishment of an Inspectorate for Social Assistance. While staff was recruited by DSD the Unit was unable to implement this function. Black Sash supports the establishment of the Inspectorate that functions independently of both the DSD and SASSA. Black Sash recommends that the skills and expertise of the Inspectorate must include but not limited to at least one retired member of the judiciary with suitable expertise and experience in law and at least one person with experience or expert knowledge of forensic auditing and risk management. Currently there is no proper and adequate oversight mechanism in place to monitor and protect the integrity of the national social assistance payment system. The payment system as administered by SASSA and SAPO is not properly and adequately insulated from fraud and corrupt activities. We anticipate that amendments to the SASSA Act should make provisions for: a) Compel SASSA and SAPO to submit regular performance reports including reports involving fraud and corrupt activities to the Inspectorate; and  b) Compel SASSA and SAPO to ensure that the national social assistance payment system data base is not used for commercial gain.  | Comment of supported noted. The Inspectorate for Social Assistance is designed and will operate differently from the Judicial Services Commission of Correctional Services – which requires a Judge to chair the Commission.The Department is not convinced that it is necessary for the Inspectorate to be headed by a judge, since it will not arbitrate any matters, but rather refer cases to other law enforcement agencies and organs of state. The Inspectorate will concentrate mainly on investigations, so it will recruit investigators with qualifications, expertise and experience in forensic investigations. At the leadership level, the requirement is for a fit and proper person, with skill and integrity. The comments relating to reporting between SASSA and SAPO relate to a contractual relationship between SASSA and SAPO. The Department is of the view that it is not appropriate to manage a contractual relationship through legislation and Service Level Agreement. So the compulsion will be better placed in the Master Service Level Agreement. Should the clause not be adhered to, the Inspectorate will be able to invoke section 28 of the Act to subpoena the information. With regard to the protection of the database, this will be adequately addressed by the Protection of Personal Information Act, which will come into effect in the near future. |
|  | **Amendment of section 29 of Act 13 of 2004****9.** Section 29 of the principal Act, 2004, is hereby amended by—*(a)* the substitution in subsection (2) for paragraph *(a)* of the following paragraph:"*(a)* delegate to a staff member **[of the Inspectorate]** or any officer of the Department any power delegated to him or her in terms of subsection (1)*(a)*;";*(b) by* the insertion after subsection (2) of the following subsection:"(2A) The Executive Director may in writing—*(a)* delegate to a staff member or any officer of the Inspectorate any power conferred upon the Executive Director by this Act; *(b)* authorise a staff member or officer of the Inspectorate to perform any duty which he or she has been authorised to perform by this Act or in terms of subsection (1)*(b)*."; and*(c) by* the substitution for subsection (3) of the following subsection:"(3) Any person to whom a power has been delegated or who has been authorised to perform a duty in terms of subsections (1) **[or]**, (2) or (2A), must exercise that power or perform that duty subject to the conditions determined by the person who effected the delegation or granted the authorisation.”. | Clause 9 seeks to ament Section 29 of the Act to expand the scope to whom the DG can delegate to, to refine the language related to delegations in the Inspectorate. | N/A |  N/A |
|  | **Amendment of section 32 of Act 13 of 2004****10.** Section 32 of the principal Act is hereby amended —*(a)* by the substitution in subsection (2) for paragraph *(a)* of the following paragraph:"*(a)* the application for and payment of **[grants, including maximum amounts of such grants]** social assistance;";*(b)* by the substitution at the end of subsection 2*(c)* for the full stop of a semicolon; and the addition of the following paragraphs:"*(d)* additional requirements or conditions in respect of a payment contemplated in section 12A; and*(e)* differentiation on the basis of need between beneficiaries of social grants as contemplated in section 12A (2)."; and*(c) by* the addition of the following subsection:(3) The Minister, with the concurrence of the Minister of Finance—(a) must determine amounts payable in respect of social assistance; and1. may determine additional payments or benefits linked to a social grant, by notice in the *Gazette*.".
 | Clause 10 seeks to amend Section 32 of the Act to increasing the scope of the Minister to make regulations – in particular as it relates to the new clauses on additional payments | N/A | No amendments were proposed |
|  | **Transitional arrangements****11.** (1)  For the purposes of this section, unless the context indicates otherwise, any word or expression to which a meaning has been assigned in the Social Assistance Act, 2004 (Act No. 13 of 2004), has the meaning assigned to it in that Act, and—"this Act" means the Social Assistance Amendment Act, 2018.(2) Notwithstanding the amendment to section 14(3)*(b)*(iii) of the Social Assistance Act, 2004 (Act No. 13 of 2004), by section 6 of this Act which repeals the reconsideration provisions of the Agency, the Agency must reconsider any application received from an applicant, beneficiary or person acting on his or her behalf in relation to a decision which was made by the Agency before the commencement of this Act. (3) The Agency must reconsider any application contemplated in subsection (2) within 90 days of receipt thereof.(4) If an application for reconsideration contemplated in subsection (2) was not lodged within 90 days of the date of the decision by the Agency during grant application or review, such applicant, beneficiary or person acting on his or her behalf must lodge a new application for a social grant with the Agency.(5) An appeal contemplated in section 18 of the Social Assistance Act, (2004 Act No 13 of 2004), in respect of a decision made by the Agency during a grant application or review after the commencement of this Act, must be lodged directly with the Independent Tribunal. | Clause 11 seeks to amend the Act to make provision for transitional arrangements and to provide guidance and legal clarity during the transitional period of the implementation of the Act to minimize the opportunity for opportunistic litigation and ensure that the Agency finalizes all reconsideration applications relating to decisions which were taken before the implementation of the Act within a specified period thereby creating legal certainty.  | N/A | No amendments were proposed |
|  | **GENERAL COMMENTS** |  | **NOMHLE NKWANYANA** The Bill [B8 – 2018] will assist in bringing dignity and coherence into the society at large as it allows ordinary citizens to improve their lives, and to understand how the government and its entities operates, e.g. South African Government. It will provide and encourage the provision of opportunities for persons, especially from disadvantaged communities to enter and participate in the development of our country, South Africa. Contribute to an enabling environment for job creation in different industries The South African Constitution (see, no 108, 1996) entrenches the right of access to health care on the basis of equality and Freedom from any form of unfair discrimination on a number of grounds including race, gender, sex, disability and language (Sections 9 and 27) The South African National Health Act (61 OF 2003) States that: The health care provider concerned must where possible, inform the user ….. In a language that the user is familiar with or understands and in a manner which takes into account the user’s level of literacy. The Bill seeks to amend the Social Assistance Act, 2004 so as to insert new definitions to provide for additional payment linked to social grants, to provide for payment; of benefits to a child – headed household to provide for social relief of distress in the event of a disaster, to repeal the internal reconsideration process, to provide for an Independent Tribunal to consider appeals against decisions of the Agency, to provide for the establishment of the Inspectorate as a government component and to provide for matters connected therewith: The Amendment of section 1 of Act 13 of 2004 as amended by section 99 of Act 75 of 2008. This Act include disabled person. **Definition of concepts** In order for readers to understand abuse and problems facing women and children the definition of concepts are provided. **Disabled person:** A person having dysfunctional limbs and unable to help herself or himself.**Amend:** Addition or subtraction of any Laws from the Bill.**Social grants:** An amount of money from the government **Benefits:** A certain amount of income to elevate poverty.**Culture:** Gerber and Linda (2010:53) distinctions are made between physical artifacts created by society; it’s so called material culture, and everything else which is the intangible, such as language, customs, beliefs and values that are the main referent of the term culture. Patriarchy: According to Grieve and Van Deventer (2005:150) Patriarchy is a social system in which the husband is sovereign, possesses power and exercises control. **Sanderson** (2001:198) refers patriarchy to the structure of modern cultural and political systems which are ruled by men. As an educator (retired) at present, I do support the passing of the Bill based on the following reasons:- **SOUTH AFRICAN CATHOLIC BISHOPS’ CONFERENCE****Social Responsibility**In late November 2019, Pope Francis, speaking Tokyo, Japan with people affected by Japan’s 2011 “triple disaster” criticized society’s indifference toward the suffering of others. He said that decisions will have to be made about the use of natural resources and future energy sources, and noted other major issues, such as wars, refugees, food, economic disparities, and environmental challenges. He concluded: “But the most important thing, I believe, is to progress in building a culture capable of combating indifference.”[[1]](#endnote-1) There is a need to react with compassion toward those in distress. “Climate change, environmental degradation, rapid urbanization and population growth contribute to an expected increase in the number and severity of emergency events [and] the humanitarian community is called to respond to an unprecedented number of people in need.”[[2]](#endnote-2) South Africa has faced many such crises during the past year. Many of these could have been avoided with better planning and foresight. **Conclusion**There is a desperate need for an integrated approach to community services and hopefully these amendments will do much to facilitate this.*"Every person has the right to life, to bodily integrity, and to the means which are suitable for the proper development of life... Therefore, a human being has the right to security in case of sickness, inability to work, widowhood, old age, unemployment****…”[[3]](#endnote-3)*****CENTRE FOR CHILD LAW**The foster care crisis: how did we get to where we are? The foster care system had for many decades functioned 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. This shift was as a result of a policy decision expressed the Minister of Social Development in 2002 when he stated that the DSD was “encouraging relatives to take care of orphaned children under the foster care package”1 As a result of the above, there was an exponential rise in the number of children in the foster care system and FCGs in payment. In 2010, there were over 500, 000 FCGs in payment – this is ten times the number that had previously been accommodated by the foster care system. The number of children in the foster care system as fluctuated over the years – in 2011 there were 512 874 foster orders registered, in 2017 financial year there were 440 016 foster orders and in the 2019 financial year 386 019.2 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 only reaching a fraction of the eligible orphans in the country. The foster care system does not cater for the fluidity of child care 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 to revive lapsed foster care orders. The Centre and the Minister of Social Development a settlement that was made an order of court, the court order: * placed a temporary moratorium on lapsing of further FCG orders and FCGs;
* ordered the Department to re-instate the FCGs that had already lapsed;  granted the Department temporary authority to extend the majority of foster care court orders administratively – i.e. social workers need not apply to court to extend the court orders but could do it administratively, following a review of the child’s situation. As this temporary authority was in direct conflict with the requirements of the Children’s Act, a time limit for finding a more sustainable solution was set; and  required the Department to design a comprehensive legal solution to the foster care crisis by amending the Children’s Act 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. The order was handed down by agreement between the Minister and the Centre. 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 – by agreement between the Centre and the Minister – was granted. The order declared that the delay by the Minister in amending legislation to develop a comprehensive legal solution was unconstitutional, unlawful and invalid. As well as the delay in putting in place the necessary mechanisms, structures, resources to ensure that the foster care system operates in a sustainable and effective manner. The order required the Minister to put measures in place to ensure the necessary legislative amendments, to bring about a comprehensive legal solution to the foster care crisis, to be concluded within a period of 2 years. It also ensured that children whose foster care orders have lapsed or are due to lapse are reinstated or extended. 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 Centre, amongst other things, requested that more stern conditions be placed on the Minister. The court order, reached by agreement, retains the finding of unconstitutionality against the Minister and gives the Minister 12 months to develop a comprehensive legal solution. It also places stringent reporting requirements on the Minister – who needs to report to the Court and the Centre on progress made in implementing the court order every 3-months. The Social Assistance Amendment Bill and the comprehensive legal solution to the foster care crisis During all of these court applications attempt have been made to engage with the Department on what the comprehensive legal solution should be. The solution that has been put forward as 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). Children already receiving the FCG would continue to receive it so as to not be regressive. 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. 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. 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 one of two legislative amendments needed to put the proposed comprehensive legal solution into place. The second phase of amendments that would be needed would be to the Children’s Act 38 of 2005, that 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 (who are not in need of care and protection) should be diverted to the CSG top up. This was previously set out in October 2018 version of the Children’s Amendment Bill (the current version of the Bill that will be before the Committee in due course does not contain this provision and this fact will be the subject of submissions made in relation to the Bill). The October 2018 version made it clear that an orphaned child in the care of a family member is not automatically considered to be in need of care and protection due to their care arrangements. Such children would therefore not be placed in foster care and would be eligible to receive the CSG top-up: Section 150 of the principal Act is hereby amended— (a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: “(a) has been abandoned or orphaned and is [without any visible means of support] not in the care of a family member as defined in paragraph (c) of the definition of family member in section 1;”;”  Transitional arrangements for the proposed comprehensive legal solution As mentioned above, children already receiving the FCG should continue to receive it in order to prevent retrogressive effects of the implementation of the new policy and in so doing deprive an often marginalised and vulnerable group of people (children and economically disadvantaged members of society) of access to a basic social service. “New children” would be referred to the CSG top up if they are being care for by relatives and are not in need of care and protection. It will be necessary to have this transitional arrangement reflected in the Children’s Amendment Bill in order to give clarity on how this Bill (the Social Assistance Amendment Bill) and the Children’s Amendment Bill will be implemented in unison once both are finalised. We submit that a clause should be inserted in the Children’s Amendment Bill clearly providing direction to social workers and children’s courts on who should be referred to the foster care system (children found to be in need of care and protection) and who should be referred to the CSG top-up (orphaned children being cared for by relatives and are not in need of care and protection).  | Comment of support is notedComment is noted. However, it is not relevant to the current scope of the amendment.Comment is noted.  Comment is noted. However, it is not relevant to the current scope of the amendment and requires substantial policy consideration and possible further research. The department will give consideration to this in future amendments.Comment is noted. However, it is not relevant to the current scope of the amendment.Comment is noted. However, it is not relevant to the current scope of the amendment. The comment is noted but deals with another piece of legislation. The committee to note the Comment when processing the Children’s Amendment Bill |

1. [↑](#endnote-ref-1)
2. [↑](#endnote-ref-2)
3. [↑](#endnote-ref-3)