

# Too little? Too late? The implications of the *Grootboom* case for state responses to child-headed households

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## 1 INTRODUCTION

Any assessment of levels of destitution, desperation and societal disintegration must surely rank the increasing phenomenon of children living in households without adult caregivers, a consequence of the HIV/AIDS epidemic, as one of the most pressing concerns facing South African society. It has been estimated<sup>1</sup> that by 2005 there will be more than a million children aged under 16 who have lost their parents due to HIV/AIDS and that by 2010 there will be more than two million who have been orphaned and who are fending for themselves and their siblings.<sup>2</sup> Dramatic increases in juvenile criminality have been predicted, based on the supposition that parentless children will migrate from rural areas to cities and towns in search of the means of survival. Once there, they will have no alternative but to steal to stay alive. For this and other reasons,<sup>3</sup> it has been predicted that dramatic social and political consequences, caused by the increased number of children growing up in child-headed households, will affect South African society over the next decade.

In contrast to issues such as land reform, access to water and other themes addressed in this volume, the plight of children living in child-headed households does not necessitate a review of the legacy of apartheid policies. For South Africa, the consequences of the AIDS epidemic have only begun to be felt in the last decade,<sup>4</sup> and the phenomenon of child-headed households really only began to emerge as an issue of public concern toward the turn of the century, that is, well after the transition to democracy in 1994. Thus, the focus of this paper is on an examination of government's response to a deepening social crisis that finds its roots in very recent times, rather than on any redistributive or transformative policy agenda.

The paper commences with an overview of the socio-economic context surrounding the phenomenon of child-headed households. Next, the

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1 See, for example, Centre for Policy Studies 2000: 52.

2 See, for example, Idasa 2001a.

3 See below at s 4.

4 Centre for Policy Studies 2000: 24.

article discusses the constitutional obligations that rest upon the state *vis-à-vis* children growing up in child-headed households. With the above analysis in mind, the state's articulated policy on the situation of child-headed households is described. The article concludes with an assessment of the reasonableness of the state's responses to the growing number of child-headed households, and concludes that the implementation of policy in this area does not appear meet the standards outlined by the Constitutional Court in the seminal decision in *Government of the Republic of South Africa and Others v Grootboom and Others* (hereafter *Grootboom*).<sup>5</sup> The article proceeds from the vantage point of the rights of orphaned children as explicated in the main in section 28 of the Constitution.<sup>6</sup>

The research towards the preparation of this paper commenced in July 2001, against a backdrop of shifting government policy on AIDS related issues. Some changes in the budgetary allocations to support child-headed households, as described in part 5 below, have taken place, in recognition of the deepening plight of children affected by HIV/AIDS. The position in this article generally reflects the situation as at March 2002.

## 2 DEFINITIONAL ISSUES AND SOCIO-ECONOMIC CONTEXT

Policy-makers and international organisations such as Unicef define AIDS orphans as children who, before the age of 15, lose either their mother or both parents due to AIDS.<sup>7</sup> The two possibilities are thus of being maternal orphans or double orphans. Some definitions of AIDS orphans include children whose parents are dying of HIV/AIDS.<sup>8</sup> This is because these children become effective heads of households while their parents' terminal illness progresses to its inevitable conclusion. For the purposes of this article, however, the term 'child-headed household' refers to those children who have lost *both* parents due to HIV/AIDS, and have become the head of the household and breadwinner for younger siblings. In contrast to Unicef criteria, though, the paper assumes that the term should extend to children under the age of 18 who lack parents due to HIV/AIDS, or who are vulnerable to orphanhood because their caregiver is severely ill with HIV/AIDS. One reason for this is that children older than 15 years but

5 *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

6 This does not mean that other foci might not be equally valuable – such as preventing child-headed households coming into being in the first place, through the provision of adequate anti-retroviral drugs to their mothers, proper health services and adequate nutrition to stave of the onset of AIDS-related opportunistic illnesses, all of which would combine to prolong the life of adult caregivers and prevent early orphanhood. The conceptual analysis followed here, however, focuses more narrowly on the state's obligations to affected children.

7 See Mazengera 2001: 4, referring to UNICEF and UN Aids 1999. The South African Law Commission's (SALC's) discussion paper on the review of the Child Care Act, however, regards AIDS orphanhood as extending until children reach the age of 18 years (SALC 2001 "Discussion Paper 103 (Project 110): Review of the Child Care Act" <<http://www.server.law.wits.ac.za/salc/discussn/discussn.html>> 540).

8 Dukhi 2000: 10-11.

younger than 18 years are still regarded as minors and are legally unable to perform certain key acts – such as receiving state grants directly. Further, 18 is constitutionally specified in the children's rights clause, in section 28(3), as the age that defines the end of childhood. Constitutional obligations resting upon the state are therefore linked to this age.

It must be remembered that in a child-headed household, some child members may themselves be infected by HIV/AIDS, although this is not necessarily so. There is also a conceptual distinction to be drawn between *AIDS orphans* and *children living in child-headed households*. The former group may well have been absorbed into extended family structures, placed in informal alternative care or even placed in the formal alternative care system. They therefore do not head households consisting of themselves and younger siblings. However, as detailed below, it is likely that many AIDS orphans will not be absorbed into either informal or formal alternative care, based on present information, and that many AIDS orphans may indeed face the possibility of living in child-headed households in future.

One estimate suggests that there are currently 420 000 AIDS orphans in South Africa.<sup>9</sup> The official report of the National Programme of Action for Children in South Africa (hereafter the *Children in 2001* report) says that by the end of 1999, some 180 000 children aged under 15 had lost either their mother or both parents<sup>10</sup> but acknowledges that projections show a steep rise in deaths and consequently in the number of parentless children. Idasa,<sup>11</sup> quoting a press briefing by the Minister of Social Development, put the number of AIDS orphans in 2000 at 250 000 and by June 2001 estimated the figure to be around 300 000.<sup>12</sup> Another future projection places the number of AIDS orphans at 800 000 by the year 2005<sup>13</sup> (a mere three years from now). It has been estimated that a total of 4.8 million South Africans were infected with HIV/AIDS at the end of the year 2000, based on antenatal surveys of HIV prevalence among pregnant women.<sup>14</sup> The most recent available figures suggest that the numbers of maternal orphans will peak in around 2015 at two million aged under 15 and three million aged under 18. The total number of children who have been affected by the loss of one or both parents is likely to reach 5.7 million by this time.<sup>15</sup>

9 NCMF report 2001: 12. It has, however, been noted that data on the numbers of children infected by HIV/AIDS, orphaned by it and quantifying the number of children living in child-headed households, are not particularly reliable.

10 Office on the Rights of the Child – The Presidency 2001: 88.

11 Idasa 2001a: 10.

12 Idasa 2001b: 2.

13 NCMF report 2001: 12. In Office on the Rights of the Child – The Presidency 2001: 88 the number of orphaned children in 2005 is estimated at one million and the report says that data indicates that this will increase to two million children orphaned by AIDS by 2010.

14 Between 1999 and 2000, HIV prevalence increased significantly among women in their twenties and it has been noted that over the years, women in their twenties have consistently shown the highest levels of HIV infection, making up on average approximately half the adult HIV positive population. This feature of the pandemic has a significant impact on maternal care and on the likelihood of young children being orphaned.

15 McKay 2002: 37.

It has been recognised that the African kinship care system that once would have absorbed children without parents into communal life can no longer be relied upon to fulfill that function. Communities are themselves being decimated by the scourge of the epidemic, with only the elderly and the very young remaining. Also, the stigma attached to AIDS sufferers has affected attitudes towards their offspring and it has been reported<sup>16</sup> that children whose caregivers have died of AIDS are themselves increasingly ostracised and shunned.

As regards the formal alternative care system, recent figures indicate that the majority of children orphaned by HIV/AIDS are not being absorbed through formal placements. Although 35% of orphaned children are being looked after by foster parents and 0.1% are being adopted, only 0.25% of these children are in residential care. The remainder, 65%, remain in family or community care or live in child-headed households.<sup>17</sup> Indeed, the number of children who at present require care exceeds the capacity of the existing child and youth care system to cope with this influx by a very large margin. There are currently approximately 30 000 children nationwide in institutional care facilities, both non-governmental and government-run homes or places of safety, and 65 000 foster care grants were being paid at the end of February 2001 for children in out-of-home care. Most children currently in the institutional care system or in foster care are, however, victims of neglect, abuse and abandonment.

Nevertheless, while the emergence of child-headed households has been documented in press and other reports, there are no comprehensive data on the prevalence of these households in any one province or in the country as a whole. The *Children in 2001* report cites a study in Port Shepstone on the south coast of KwaZulu-Natal which reported seeing 41 child-headed households between August and October 1999, in which the average age of the child heading the household was 11 years. The youngest was only six years old. Numerous press reports were published from September–October 2001<sup>18</sup> during provincial visits of the Minister of Social Development to children living in child-headed households and affected communities. It seems that large numbers of children affected by the HIV/AIDS epidemic live in rural areas and many are struggling to obtain state-funded social assistance.

It has been argued above that South Africa, in terms of all available data, is facing an impending social crisis caused by the deaths of caregivers of children due to HIV/AIDS. The next section considers the relevant legal obligations contained in the Constitution and elaborated in recent judgments of the Constitutional Court.

16 Personal communication, Dr Maria Mabotoa, Chief Director, National Department of Social Development, 16 October 2001. See also the NMCF report 2001: 22.

17 Press briefing by Minister Zola Skweyiya, 14 September 2001.

18 Many of these reports were published on the official website of the Department of Social Development. See <[www.welfare.gov.za](http://www.welfare.gov.za)>

### 3 THE CONSTITUTIONAL FRAMEWORK: SECTION 28(1)(B)

A range of constitutional provisions have a bearing on the South African state's obligations towards children living in child-headed households.<sup>19</sup> First, section 28(1)(b) of the Constitution gives every child the right to "family care or parental care or to appropriate alternative care when removed from the family environment".<sup>20</sup> This section has been the subject of a number of judicial interpretations. In *Jooste v Botha*, Van Dijkhorst J said it is "primarily... aimed at the preservation of a healthy parent-child relationship in the family environment against unwarranted executive, administrative and legislative acts. It is to be viewed against a background of a history of disintegrated family structures caused by government policies".<sup>21</sup> This statement suggests that, given the genesis of

19 There are numerous international law provisions pointing to the obligation that is incumbent upon the state to protect children. For example, article 24(1) of the International Covenant on Civil and Political Rights provides that every child shall have "without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State". However, the primary international instruments of relevance to South Africa regarding child-headed households are the UN Convention on the Rights of the Child (1989) (ratified by South Africa on 16 June 1995), and the African Charter on the Rights and Welfare of the Child (1990) (ratified by South Africa on 7 January 2000).

20 Not surprisingly, given the fact that the 1989 Convention on the Rights of the Child was drafted essentially before the globalisation of the HIV/AIDS pandemic, it contains no express reference either to children's rights or to states parties' responsibilities when large-scale orphanhood threatens to overwhelm traditional alternatives to parental care. The Convention clearly articulates the need for children to grow up in a family environment and requires states parties to support parents in their child-raising task. Article 20 of the Convention is probably the most directly relevant to this particular field of inquiry. It provides as follows:

- "(1) A child temporarily or permanently deprived of his or her family environment . . . shall be entitled to special protection and assistance provided by the State.
- (2) States Parties shall in accordance with their national laws ensure alternative care for such a child.
- (3) Such care could include, inter alia, foster placement, kafalah of Islamic Law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, cultural and linguistic background."

Similarly, the African Charter, in article XXV (Separation from Parents), provides that:

- "(a) any child who is permanently or temporarily deprived of his family environment for any reasons shall be entitled to special protection and assistance."

Although it is not clear from this wording that the obligation to provide such assistance rests on the state, as opposed to the community at large, sub-article 2 of the article cures this defect to some extent by providing for a specific list of duties incumbent upon states parties in respect of children without family care (Gose 2002: 102). Principally, the state is obliged to provide the child with alternative care, which could include foster placement or placement in suitable institutions for the care of children. As a general point, the provisions of the Convention on the Rights of the Child, especially article 20(3), appear to view orphanhood as an isolated phenomenon, rather than as a societal scourge. It is perhaps illuminating, too, that the African Charter does not refer to concepts which have developed some currency in the regional debates around child-headed households, such as community care, cluster care or kinship care. Rather, reliance appears to be placed on rather non-African concepts of alternative care.

21 *Jooste v Botha* 2000 (2) BCLR 187 (T) at 195 F-G.

this right, it serves primarily as a defence against unwarranted state intrusion in family life, which in turn implies vertical application of the right.

The judgment of the Constitutional Court in *Grootboom*<sup>22</sup> appears to differ with the view that this section is primarily of vertical application. The Constitutional Court was of the view that section 28(1)(b) must be read together with section 28(1)(c). While section 28(1)(b) defines those responsible for giving care to children, section 28(1)(c) lists various aspects of the care entitlement.<sup>23</sup> It therefore seems that, according to the Constitutional Court's interpretation in *Grootboom*, both sections are first and foremost of horizontal application and the obligation for fulfillment of the rights they specify lies primarily with parents.

The question arises as to the scope of the state's obligation where the parents are deceased or otherwise unable to render parental care. Three main areas of focus form the basis of this debate. First, does the child who is living in a child-headed household have a right against the state to provide him or her with alternative care? Second, what is the nature of the state's obligation to fulfil children's socio-economic rights, enshrined in section 28(1)(c), over and above the obligation to fulfil their rights to parental or alternative care? Third, where the obligation falls upon the state to ensure alternative care, should it be provided in a setting that approximates parental care? The first and second questions are addressed below and thereafter some answers to the third question are provided.

It has been argued that the answer to the first question is indeed the very import of the judgment in *Grootboom*,<sup>24</sup> because Yacoob J agreed that where children lack parental care, such as where they are orphaned or abandoned, the state assumes the primary obligation to see to those children's needs.<sup>25</sup> It seems obvious from the very wording of section 28(1)(b) that children living in child-headed households, who consequently can be described as lacking a family environment,<sup>26</sup> have a right to be provided with substitute parental or family care, or alternative care (such as institutional care). This right is patently directly enforceable against organs of the state.

The state responsibility for providing for children who lack a family environment, such as those whose plight is under discussion here, can be implemented in a number of ways. However, in the absence of a large-scale building programme to provide many more state controlled residential care institutions (which is in principle both undesirable and costly),<sup>27</sup>

22 *Grootboom*, *supra* note 5

23 *Ibid* par 76.

24 Sloth-Nielsen 2001: 210 at 230-231.

25 See *Grootboom*, *supra* note 5, par 77, where Yacoob J states that "s 28 does not create any primary obligation . . . if children are being cared for by their parents" (emphasis added). Children in alternative care are mentioned at par 79 of the decision.

26 See the discussion of the scope of the right to family life in current constitutional jurisprudence below.

27 Present costs of institutional care for children are estimated to be R1 000 per month per child. This does not include the capital costs of building facilities (McKay 2002: 26). Many provincial departments are currently refusing to register more institutions, in line

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other measures have to be considered. One would be the programmatic development of foster placements for such children, another the 'sweetener' of an adoption subsidy<sup>28</sup> to encourage permanent placement in a community setting of at least some of these children. Other policy responses could include promoting and subsidising various community-based care models, such as cluster care and collective care.<sup>29</sup> The current state policy of promoting a variety of models of alternative care is examined further below.

### 3.1 The constitutional framework: Section 28(1)(c)

The judgment in *Grootboom* provides further assistance in the assessing nature and scope of the duty imposed on the state by section 28(1)(c) to provide for the socio-economic rights of children living in child-headed households. Children's socio-economic rights constituted a crucial aspect of the eventual decision in view of the fact that the Constitutional Court was obliged to consider the relationship between *everyone's* right to housing in section 26, and *children's* right to shelter, as provided for in section 28(1)(c).<sup>30</sup> The Court held that there was an evident overlap between the rights in sections 26 and 27, which create the right of access to socio-economic rights for everyone (including the right to have access to housing), and those in section 28(1)(c), which concern the rights of children alone. It held that as a consequence of this overlap, section 28 (1)(c) and section 26 could not be regarded as establishing separate and distinct entitlements. This approach, in the view of the Court, would have the effect of rendering the "carefully constructed constitutional scheme" for the progressive realisation of socio-economic rights nugatory, as the right in section 28(1)(c) is not subject to the qualification that the children's right be implemented progressively and subject to available resources.

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with the Interim Policy Recommendations for the Transformation of the Child and Youth Care System of the Department's Inter-Ministerial Committee on Young People at Risk, which dates back to 1996 (Department of Welfare: Inter-Ministerial Committee on Young People at Risk 1996 *Interim policy recommendations for the transformation of the child and youth care system* Pretoria: Department of Welfare, and McKay 2002: 26). By way of comparison, the amount payable since October 2002 under the child support grant is R140 per month and foster care grants are payable in the amount of R450 per month. The SALC suggests that institutional care of children, including orphans, should be a measure of last resort and that all possible measures should be undertaken to promote and facilitate family care (SALC 2001, *supra* note 7, 562).

28 This is proposed by the SALC (2001, *supra* note 7, 831, 880).

29 Cluster care refers to a cluster of houses within a community which are identified as homes for orphaned children. Single women or couples are recruited to care for up to six children in each house. Funding is accessed through a foster care grant for the children. Collective foster care is a variation of traditional foster care, as children are placed into the collective care of a social, religious or work-related body whose members undertake to collectively act as surrogate carers for the children (SALC 2001, *supra* note 7, 550; Loening-Voysey & Wilson 2001: 45).

30 The general aspects of the judgment concerning the right to housing and the reasonableness of state policy towards those in desperate need are addressed in other articles in this volume and are consequently not repeated here.

It was found, therefore, that section 28(1)(c) did not ordinarily create a "direct and enforceable" claim upon the state by children.<sup>31</sup> Rather, it was argued that the rights enumerated in section 28(1)(c) must be understood in the context of the primary duty of parents towards their children, as provided for in section 28(1)(b). Thus, the rights to "basic nutrition, shelter, basic health care services and social services" encapsulate "the scope of care that children should receive in our society",<sup>32</sup> while section 28(1)(c) ensures that children do receive proper parental or familial care. The Court suggested, consequently, that the obligations imposed by section 28(1)(c) rested primarily on parents and families, at least in respect of the right to shelter.<sup>33</sup>

Not unsurprisingly, this passage provided counsel for the government in the subsequent *TAC* case<sup>34</sup> with room to argue that the primary obligation for providing newborn children with the anti-AIDS drug, Nevirapine, rested on their parents and not on the state, the treatment being construed as part of children's health care services as enumerated in section 28(1)(c).<sup>35</sup> This contention was, however, rejected by the Court, which appeared to backtrack somewhat on the stark reading of section 28(1)(c) given in the *Grootboom* case. This reading disappointed children's rights advocates, who had previously assumed that the wording of section 28(1)(c) provided at least a platform from which to lobby for the provision of an essential minimum of socio-economic rights to children.<sup>36</sup>

In the *TAC* judgment, the Court held that the primary obligation for the fulfillment of the socio-economic rights in section 28 did indeed rest upon parents where they can afford to pay for such treatment, but that the *Grootboom* construction of section 28(1)(c) did not absolve the state of all responsibilities towards children in parental or family care.<sup>37</sup> In the context of indigent parents, giving birth to children in public health facilities and unable to access private medical treatment essential to the protection of the child from HIV/AIDS, the duty entail a responsibility upon the public

31 *Grootboom*, *supra* note 5, par 74.

32 *Ibid* par 76.

33 As pointed out in Sloth-Nielsen 2001: 210, the meaning of 'family' in the context of the judgment is not explicit, and it has often been pointed out that the South African notion of family is an extremely fluid one. The Roman Dutch common law duty of support is, however, based on a western definition of biological ties within a narrow nuclear family structure. It is further noted in the above-mentioned article that the right to social services, as contained in s 28(1)(c), does not fit well with the Constitutional Court's construction, since parents are only on a strained reading ordinarily responsible for the provision of social services to their offspring.

34 *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) (hereafter *TAC*).

35 *Grootboom*, *supra* note 5, par 76.

36 Previous interpretations, and the reasoning underlying them, are described in Sloth-Nielsen 2001: 210. It was argued that the absence of the qualification that the rights in s 28(1)(c) should be implemented progressively and subject to available resources (which qualification attaches to other socio-economic rights in the Constitution), as well as the notion that only 'basic' access had to be provided, supported a view that children's socio-economic rights had been prioritised in the constitutional framework.

37 *Grootboom*, *supra* note 5, par 77. The reasoning behind this apparent *volte face* is not evident from the rather cursory way in which the government's argument was dismissed.

sector to ensure the availability of the drug to expectant mothers, and thereafter to their newborn children.<sup>38</sup> Regarding *when* the state obligation arises, the Court in the *TAC* judgment opined that 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”<sup>39</sup> (emphasis added).

It is submitted that the *TAC* interpretation is a definite and welcome advance over the *Grootboom* interpretation in securing children’s access to socio-economic rights. However, it is equally arguable that the Court has left largely unresolved the all-important question on the *extent* of the state’s direct responsibility for fulfillment of children’s socio-economic rights, viewed especially in the light of such large-scale indigence among their caregivers. In the context of vulnerable children facing the possibility of orphanhood as a primary caregiver develops the devastating illnesses associated with full blown AIDS, it may be possible to argue that the primary caregiver has been rendered unable to implement basic care functions with regard to her children, and that the state must therefore assume the liability for provision of basic nutrition, shelter, health care services and social services.

Nevertheless, the *Grootboom* reasoning – that the responsibility for fulfillment of the rights enumerated in section 28(1)(c) rests squarely upon the state insofar as orphaned or abandoned children are concerned – remains untouched by the Court’s approach in the *TAC* case. Logically the *Grootboom* reasoning concerning both section 28(1)(b) and section 28(1)(c) implies that, independent of (or in addition to) the state’s duty to ensure that children in child-headed households are linked with some form of parental, familial or institutional care, the state, as parent substitute, must ensure that their socio-economic rights are also met. It could be suggested, too, that the rights to shelter, nutrition and health care services in this context are not subject to progressive realisation<sup>40</sup> by the state in the same way as they might be for children who *do* enjoy parental or family care. Indeed, since the state must assume primary responsibility for providing the “scope of care that [these] children should receive in our society”, it would be insufficient to merely ensure that children orphaned by HIV/AIDS are provided with adult supervision or guidance in fulfillment of the right to parental or family care, without also providing the resources necessary for their survival and development. In other words, although the state may ‘outsource’ the care function it has to assume in terms of

38 *Ibid* par 79.

39 *Ibid* par 79.

40 The question of whether the progressive realisation criterion applies to the rights enumerated in s 28(1)(c), even though not expressly included in the wording of the children’s rights clause, is obscure. The judgment in the *TAC* case disingenuously lumps together the issue of provision of Nevirapine to women and their newborn children, stating that “the policy as reformulated must meet the constitutional requirement of providing *reasonable* measures *within available resources* for the *progressive realisation* of the rights of such women and children” (*TAC*, *supra* note 34, par 122, emphasis inserted) which tends towards the conclusion that progressive realisation has been ‘read in’ as a qualification to the state obligation for fulfillment of rights in s 28(1)(c).

section 28(1)(b) (for example to communities, informal foster parents and so forth), it has then still not divested itself of the obligation incurred under section 28(1)(c), which the Constitutional Court has stated is so clearly linked to section 28(1)(b). In short, even where some alternative arrangement for the care of children living in child-headed households has been made, it is contended here that the state remains the 'parent' who must ensure fulfilment of the rights in section 28(1)(c).

Achieving this can again take on several forms: payment of grants, direct provision of food and clothing, relief from the payment of schools fees and so forth. The argument provided here is not intended to refer to *formal* foster placements, either with strangers or with kin (so-called kinship placements), which are accompanied by the payment of a proper grant (for example, the foster care grant, payable after an order of the children's court has been made placing a child formally in foster care). The foster care grant is an amount nearly four times that payable as a child support grant. Though it is still a low amount, it is indeed intended to provide for the child's health care, food, clothing and so forth. What is more problematic, however, is the informal absorption of children in community placements or other kinds of care, accompanied by the demonstrably paltry child support grant for children aged under seven. In this situation, the state is arguably in breach of its responsibilities to provide for the socio-economic rights of children lacking parental care under section 28(1)(c).

It has previously<sup>41</sup> been argued that the right to social services cannot be viewed as being on the same footing as the other 'care' rights in section 28(1)(c), and that the right to social services is possibly intended to refer to those social welfare services that the state must provide *only* when children lack a family environment or have been removed. For children orphaned by HIV/AIDS and without adult caregivers this would imply that, in addition to finding alternative care and providing children with the means to survive, the state would further be obliged to render supportive social services, including psycho-social support and counselling. The relevance of this point is further elaborated in the next section where the links between prevention of abuse and degradation, on the one hand, and parental care, on the other, are explored.

### 3.2 The constitutional framework: Section 28(1)(d)

*Grootboom* recognises that children's rights to protection from abuse, neglect, maltreatment and degradation in section 28(1)(d) are rights that are directly enforceable against the state.<sup>42</sup> Allusion has already been made to the particular vulnerability of children living in child-headed households to neglect and even maltreatment. Research has indicated that such children suffer a multiplicity of overlapping deprivations, many of which fall outside of the direct scope of the rights contained in section 28(1)(c). These

41 Sloth-Nielsen 2001: 210 at 233.

42 *Ibid.*

include barriers to accessing education, social security, moral and other forms of parental guidance, greater vulnerability to physical and emotional abuse,<sup>43</sup> to child prostitution and other forms of sexual exploitation, greater vulnerability to becoming child labourers working in conditions harmful to their health, education or development,<sup>44</sup> and, again, the increased likelihood of being drawn into criminal activity for survival reasons. Last, a key problem is simply derived from the loss of parental support and protection, coupled with the emotional trauma associated with this loss.<sup>45</sup> The *Children in 2001* report into the situation and special needs of child-headed households describes the violation of children's rights when they are faced with growing up in a child-headed household thus:

Children, especially girls, face more general household duties, care of the sick and of younger children. These tasks and the lack of resources in the household often cause children to drop out of school. Under these circumstances, children may be forced onto the street, into criminal activities or even exploitative forms of child labour . . . In situations of extreme poverty, child-headed households are unsustainable. Children find their way onto the streets where they become involved in commercial sex work, beg, steal and do menial tasks.<sup>46</sup>

The provisions of section 28(1)(d) are helpful, it is suggested, in attempting to address the third question raised earlier, namely: does the scope of the state's obligation entail providing children with alternative care that approximates a family environment? It could be argued that, on the contrary, the state's primary responsibility towards children living in child-headed households is the immediate provision of direct forms of assistance to ensure those children's (and their siblings') continued survival and development. This would mean the state ensuring that they are in receipt of adequate financial assistance in the form of grants, or are otherwise provided with food, clothes, health care and the bare essentials of life. However, given the multiple deprivations and threats to their well-being that they experience, as illustrated in the excerpt above, it is suggested here that the nature of the state's obligations towards children living in child-headed households appears to go beyond the mere provision of material assistance. This view appears also to have some support in current legal analysis and assumes a link between section 28(1)(b) and section 28(1)(d) of the Constitution.

First, it is evident from section 28(1)(b) that the state incurs an obligation to ensure a degree of *parental* care, which suggests that adult supervision, guidance and protection can be as important as material assistance. Second, the research cited above, detailing the exposure of children orphaned by HIV/AIDS to exploitation, criminality and child labour, indicates that children living in child-headed households can be described as neglected, or even abused. In this regard, the duty of the state under

43 NMCF report 2001: 20. The abuse identified by this research was frequently associated with the stigma of being associated with HIV/AIDS sufferers, and the perpetrators of these forms of abuse were often neighbours and relatives.

44 *Ibid* 13–16 and 18–20.

45 *Ibid* 20.

46 Office on the Rights of the Child – The Presidency 2001: 88.

section 28(1)(d) to take preventative and remedial measures to protect children from abuse, maltreatment, neglect and degradation would not be properly accomplished with the mere provision of material assistance. The state's obligation extends to initiating targeted and immediate measures to identify children at risk and to prevent their exposure to neglect and degradation. Third, children's right to social services under section 28(1)(c), referring to *welfare* services – counselling, guidance, advice – cannot be equated with the right to social *assistance*, which takes the form of grants, pensions and other forms of cash payments.<sup>47</sup> There is consequently a strong argument to be made for a range of state welfare services to be put in place, both to provide children living in child-headed households with adult care and to prevent their descent into degradation.

### 3.3 The constitutional framework: The right to family life

A final constitutional issue of relevance to this topic concerns the right to family life. Although the Constitution does not protect the right to family life itself, the Constitutional Court has affirmed, in a series of recent decisions, that the right to inherent dignity that each person has, along with the right to have that dignity respected and protected, means that family life is a constitutional value that is worthy of protection. In *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others*<sup>48</sup> Judge O'Regan affirmed that "the institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children".<sup>49</sup> The Court, referring *inter alia* to the fact that human beings are social beings whose humanity is expressed through relationships with others and recognizing that South African families "come in many shapes and sizes", held, in a purposive interpretation of section 10 of the Constitution, that an unjustifiable violation of family life constituted an infringement of the right to dignity. Of course the Court did not, in the context of the matter before it, suggest as a general proposition that the state should play any instrumental role in establishing families. Nevertheless, it is argued here that where children are *de facto* wards of state and without adult supervision due to being orphaned by HIV/AIDS, the right to dignity would disallow a state policy response that retained this state of affairs and did not attempt to address the children's lack of access to family life in its less tangible facets.<sup>50</sup>

47 Strydom *et al* 2002: 6.

48 *Dawood, Shalabi and Thomas v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (hereafter *Dawood*).

49 *Ibid* par 31. See too, article 16(3) of the Universal Declaration of Human Rights which provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. See also article 23 of the International Covenant on Civil and Political Rights and article 18 of the African Charter on Human and People's Rights, which are to all intents equivalent.

50 In family law this is usually described as the *consortium omnis vitae*, a term which describes the totality of rights and responsibilities that characterise family life, including fidelity, care and support, reciprocal duties of maintenance and so forth.

Therefore, in response to the third question raised above, it is concluded that the state indeed incurs an obligation to ensure that children living in child-headed households are integrated into some form of family environment, to ensure fulfilment of both their material and their social, developmental and other needs. This means that a policy response that provided only arm's length services to child-headed households might fall short of the required constitutional standard.

#### 4 CURRENT STATE POLICY: DESCRIPTION OF THE HOME-BASED CARE MODEL

Recent community-based action research to investigate approaches to caring for children orphaned by HIV/AIDS<sup>51</sup> details six typical models currently in use for these vulnerable children in various communities in South Africa. They include:

- independent orphaned households (where children have no formal help);
- informal care offered by community members to children in their area (also called indigenous care);
- programmes (e.g. income generating programmes or awareness raising programmes) that seek to identify and support children;
- home-based care offered both to critically ill adults and to their dependent children;
- non-statutory residential care, operating from private homes without them being registered as places of care or children's homes; and
- finally, recognised formal placements.<sup>52</sup>

As stated earlier, however, the capacity of the formal alternative care system to absorb orphaned children is extremely limited and the likely demand in the future far exceeds available places.

Perhaps in recognition of this, the Department of Social Development formulated a *Draft Strategic Framework for Children Infected and Affected by HIV/AIDS* (hereafter the draft policy) after a consultative workshop held in November 1999.<sup>53</sup> It acknowledged that recommendations from the consultative workshop and other consultations with provincial structures form the main component of the programmes proposed in the draft policy.

51 Loening-Voysey & Wilson 2001.

52 *Ibid* 26.

53 Department of Social Development (DSD) 1999 "Draft Strategic Framework for Children Infected and Affected by HIV/AIDS" Accessed from <[www.welfare.gov.za/Documents/archive/2000%20-1996/2000/childaids.htm](http://www.welfare.gov.za/Documents/archive/2000%20-1996/2000/childaids.htm)> Hereafter referred to as the draft strategic framework. As is the case with many of this Department's policy documents, it is doubtful whether the draft policy will ever be elevated to a more final status. Draft policy on foster care developed in the late 1990's and the former Department of Welfare's Interim Policy Recommendations for the Transformation of the Child and Youth Care System, which dates back to 1996, have never been finalised. Possibly, however, the National Integrated Plan (discussed below) can be regarded as having superceded this earlier document.

Proceeding from the point that increasing numbers of children are losing one or both parents as a result of the AIDS epidemic and that family structures and roles within families are changing rapidly, the draft policy highlights the fact that children may have to be fostered or adopted, as traditional family and extended family structures will be unable or unwilling to absorb them into existing kinship networks:

The traditional safety net for orphans, the extended family (which is one of our most reliable support systems), has come under huge strain as a result of the loss of many breadwinners and caregivers.<sup>54</sup>

The draft policy identified a range of needs of children infected with or affected by HIV/AIDS, which are, arguably, uniformly applicable to children living in child-headed households. These include medical care, alternative care, which should preferably be community based, basic needs such as food, clothing, shelter and general nurture, education, life skills and vocational training and assistance with psycho-social needs. The draft policy consequently identified, as the two main priorities, transforming the care system to ensure efficiency, effectiveness and appropriateness, and strengthening families and communities to maximise their potential to care for their vulnerable children. Concrete proposals included:

- implementing and further developing effective and affordable community based care and support models and targeted preventative initiatives;
- identifying external supports for communities and enabling communities to build support networks;
- assisting children, families, communities and provinces to identify the most vulnerable, help prioritise resources and preserve family life;
- strengthening families, children and communities to use their own strengths to help themselves through prevention programmes, counselling and support to those who have been traumatised;
- establishing and strengthening poverty alleviation and poverty eradication programmes in affected areas; and
- establishing training programmes for professionals, community workers, child and youth care workers, community leaders, families, NGOs and CBOs.

The draft policy clearly envisaged a range of care models for these children, including traditional foster care and alternative institutional care, but it is weighted towards community and home-based care (hereafter CHBC). This is reportedly due to the proven efficacy of CHBC models in other African settings.<sup>55</sup> It must be pointed out, too, that local field research on community approaches to caring for children orphaned by HIV/AIDS, conducted by Loening-Voysey & Wilson, strongly supports the idea of a *range* of care models to underpin government policy. As they detail, in terms of a children's rights-based approach, children orphaned by HIV/AIDS

54 DSD, *supra* note 52, p 3.

55 *Ibid* p 7.

face special challenges which include threats to their survival and threats to their security.<sup>56</sup> They also have socialisation<sup>57</sup> and self-actualisation needs,<sup>58</sup> not to mention the need for palliative care, including bereavement counselling. These needs are often best met in a supportive community setting, although that does not obviate the need for formal alternative placements such as foster care outside the family or community.

The application of these essential elements [for realising orphan's rights] should be guided by the unique and individual characteristics of each child, such as HIV status, stage of development, cultural context and life experiences. Children of different age groups, from infants to teenagers have different needs. For example, infants and toddlers require constant care and regular meals, while teenagers may be able to do a number of things by themselves and can go longer without food. Even within age groups needs may differ, some orphans may be able to attend school while others are unable to because of domestic responsibilities, financial constraints or illness. In addition, some of the orphaned and vulnerable children may be HIV positive and others not. Given these variations, there can and should never be a rigid approach to addressing [their] rights and needs.<sup>59</sup>

CHBC models appear to use volunteers as their backbone. The volunteers may be paid a small stipend, but are essentially not salaried staff.<sup>60</sup> However, this there are clear and worrying constraints on this model. These include:

- poor access to remote rural areas, which creates a barrier towards detecting or identifying children living in child-headed households in order to ensure that their needs can be addressed;
- the depth of poverty in communities, with the rural areas being the worst off;<sup>61</sup>
- lack of access to emergency assistance, including financial assistance and access to grants from the Department of Social Development, such as the child support grant;<sup>62</sup> and

56 These range from protection of their inheritance and property, to the need for affection from a caring, considerate and available caregiver. Loening-Voysey & Wilson 2001: 15.

57 The need for a sense of personal continuity, the need for personal identification documents. *Ibid* 15.

58 Such as relief from domestic and nursing responsibilities, as well as the right to leisure and recreation. *Ibid*.

59 *Ibid* 15–16.

60 Initially, the focus of most home-based care projects was the care of sick adults, but as the numbers of vulnerable children increased, they found their services extending to orphan-related care. Mostly, the service includes identifying vulnerable children, providing material relief when available and finding a possible caregiver or referring to a welfare placement agency to organise a formalised placement for the children. *Ibid* 35. Community based volunteers have also been reported to have started food growing projects and other income generating initiatives to improve children's access to nutrition. The scale and success of these initiatives remains unknown.

61 Loening-Voysey & Wilson report on the comments of a home-based care worker in the Shongwe district, who said, "We are sitting on a crisis and have nowhere to go". In one month her group had identified 700 orphans who were starving but apart from teaching them trench gardening, the home-based care project had nothing to give them. *Ibid* 35.

62 *Ibid* 27, 29.

- lack of access to formal identification documents, made more difficult by the costs occasioned by travelling to Department of Home Affairs offices to apply for the necessary documentation.

Reliance on impoverished communities to provide informal home-based care does not improve accountability on the part of the state, but disguises the problem and does not necessarily lead to community development.<sup>63</sup> 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 carers.

There can, it is suggested, be little objection to the primary policy objective of furthering different models of CHBC programmes with multiple support functions to assist child-headed households. In terms of the *Grootboom* principles articulated in the preceding section, the state would not be fulfilling its constitutional obligations towards children deprived of a family environment were the chosen policy objectives to rest on an extension of, for example, the grants system alone. In any event, no grant is available to support children who fall outside the qualifying age cohort for the child support grant. Once it is accepted that the state bears primary responsibility for supporting children who are orphaned by HIV/AIDS, it becomes evident that a variety of strategies need to be put in place, involving both formal and informal approaches and accompanied by fiscal support (including direct transfers in the forms of grants to children and their caregivers).

## 5 CURRENT STATE PRACTICE: INTER-SECTORAL AND INTERDEPARTMENTAL COLLABORATION, FISCAL ALLOCATION AND IMPLEMENTATION OF THE COMMUNITY AND HOME-BASED CARE MODEL

A *National Integrated Plan for Children and Youth Infected and Affected with HIV/AIDS* (hereafter the NIP) was developed subsequent to the draft policy of the Department of Social Development described above, and was approved by Cabinet in 2000.<sup>64</sup> It is an intersectoral plan, the lead departments being Social Development, Education and Health. Indeed, the NIP is so named because it is premised on successful collaboration between the lead departments, and between government and communities.<sup>65</sup> In 2000, Cabinet initially allocated funding in the amount of R450 million over a three-year period to fund the three (originally four) main components of the plan, the money having being set aside as a top-slice from the National Revenue Fund.<sup>66</sup> The overall allocation for the NIP commenced with R75 million for the first year of implementation (2000-01), the projected annual figure rising to R332 million in 2004-05.

63 *Ibid* 25.

64 See Idasa 2001b and Idasa 2001c for an initial examination of the budgetary implications of the NIP.

65 Idasa 2001b: 3.

66 *Ibid* 2; Idasa 2001c: 3.

As has been pointed out, it is not clear how the original figure of R75 million was arrived at.<sup>67</sup> The initial estimates were substantially revised in the March 2002 Budget.<sup>68</sup>

The three components of the NIP are the CHBC programme, voluntary counselling and testing for HIV/AIDS, and life skills education programmes.<sup>69</sup> HIV/AIDS awareness raising forms an element of each programme. A guiding principle behind the CHBC intervention is to ensure that children are taken care of within their communities as much as possible. The programme thus includes the provision of material support, provision of psycho-social care, including spiritual support, nutritional care and other interventions focusing on children's basic needs.<sup>70</sup> However, the CHBC programme is not solely (or even mainly) aimed at children, or at child-headed households, but includes all affected citizens.

Analysing the fiscal allocations for the CHBC programme is fairly complicated, as allocations go to both the Department of Health, for medical treatment and care of people with HIV/AIDS, and to the Department of Social Development, for social relief aspects.<sup>71</sup> An amount of R14.9 million was allocated to the national Departments of Health and Social Development for implementing the CHBC programme for the financial year 2000–01 (the initial estimate was R13 million). The revised estimate of funds expended for CHBC in the 2001–02 budget period was an amount of R25.5 million and, while R68 million was initially set aside for the 2002–03 financial year, the revised 2002–3 budget for this programme is R94.5 million.<sup>72</sup> The total amount available for care<sup>73</sup> of persons infected or affected by HIV/AIDS in this year is R524.5 million, of which R400 million was to be transferred to provinces as a targeted increase in their equitable share. The 2002 Budget shows considerable evidence of a shift to placing more fiscal emphasis on care and treatment of HIV/AIDS patients, as a result of increased awareness on the part of government of the growing size of the HIV-positive population.<sup>74</sup>

It was originally planned to pilot all three programmes (voluntary counselling and testing for HIV/AIDS, and life skills education programmes) at one district in six provinces, which were selected on the basis of poverty levels and HIV/AIDS prevalence.<sup>75</sup> In 2001–02, it was proposed to extend implementation to three districts per province. The programme plan was then to roll out the CHBC programme to three additional sites in each of

67 Idasa 2001c: 4.

68 Idasa 2002.

69 Office on the Rights of the Child – The Presidency 2001: 89.

70 *Ibid* 89.

71 *Ibid* 9.

72 Idasa 2002: 10.

73 "Care" in the 2002–03 budget has also been expanded to include new forms of care, such as "step down care". As regards the amounts transferred to provinces, it is not clear what proportions will go to community home-based care (CHBC) programmes and which to other care interventions.

74 Idasa 2002: 7.

75 Idasa 2001b: 2.

the six provinces that were piloting the CHBC models during 2001–02. However, the targets were revised at a CHBC workshop in April 2001 and the plan was to have 200 CHBC sites by March 2002. It is unclear whether sufficient funding was allocated to achieve this, as also whether the capacity existed at provincial level to administer the allocated funds.<sup>76</sup> Participants at a colloquium held in March 2002 maintained that little (if any) evidence existed of any progress in setting up the CHBC programmes. Nevertheless, the NIP calls for the eventual establishment of 2 050–2 400 CHBC programmes by 2010.

It seems, from pioneering work done by the Idasa Budget Information Service on this topic, that a large chunk of spending in the initial phases of the NIP was destined for implementing the life skills programme in primary and secondary schools. This money (R68 million in the revised estimate for 2001–02) went to education, in other words. By far the largest item of expenditure, however, was the amount of R142 million allocated to the Department of Health for prevention programmes such as condom distribution and media programmes to promote public awareness about HIV/AIDS. By way of comparison, these allocations were respectively almost three and nearly six times the amount set aside for the care programmes in the 2001–02 budget year.

However, it has become clear in the revised allocations that care of those infected and affected by HIV/AIDS has been accorded far greater fiscal priority by government. The share of HIV/AIDS funds going to care would therefore “jump from just 7% last year to over 50% of the HIV/AIDS budget this year,”<sup>77</sup> rising further to a projected 63% of HIV/AIDS funding by 2004–05. There are also real increases allocated to all NIP interventions, with the amount intended for CHBC rising to more than R1 150 million by 2004–05.<sup>78</sup>

As pointed out by Idasa,<sup>79</sup> the primary focus of the NIP at inception of the programme was prevention. This was evident from the initial rather paltry allocation for the CHBC programme, which in turn flowed from the executive’s policy decision to emphasise prevention, change behaviour patterns and increase awareness of the disease.<sup>80</sup> This explained the weighting of the allocated funding towards the life skills programme in schools and other methods of promoting prevention. Subsequent to the initial plans, though, there has been a reprioritisation, seen most dramatically in the revisions brought about in the 2002 Budget. In consequence, the NIP, now into its third year, will experience a significant shift in fiscal emphasis,<sup>81</sup> most notably a declining emphasis on prevention. This policy

76 For example, in 2000–01, none of the monies allocated for CHBC to the Department of Health were spent (Idasa 2001b: 2).

77 Idasa 2002: 1.

78 Idasa 2002: 9.

79 Idasa 2001c: 4, 2002: 7.

80 *Ibid* 2.

81 The plan is now named the “Enhanced Response to HIV/AIDS”, and includes a variety of new mechanisms designed to enhance service delivery and expenditure of allocated funds. See, generally, Idasa 2002.

shift was apparently motivated by concern emanating from the NIP team about the increased need for social and medical relief as the HIV/AIDS epidemic expands.<sup>82</sup>

## 6 FUTURE POLICY-RELATED INITIATIVES

It has been recognised by service providers that children living in child-headed households face a multiplicity of legal difficulties which affect their ability to access socio-economic rights and to function more generally as unassisted minors in society. Signing documents, such as grant applications, receiving grants, applying for exemptions from school fees where such a scheme exists, inheriting family land, and, last but not least, taking legal responsibility as custodians of younger siblings, are all at present beyond the legal capacities of children aged below 18.

The South African Law Commission's Project Committee on the Review of the Child Care Act<sup>83</sup> recently produced a discussion paper which proposes far-reaching legal and policy improvements, some of which have as their key aim dealing with the situation of children infected with or affected by HIV/AIDS in general, and children living in child-headed households in particular. Proceeding from the point that there is an urgent need to formalise in legislation the variety of care models that are emerging in practice, the Commission recommended that the proposed legislation empower the Minister for Social Development to make regulations allowing for in-home support of families affected by HIV/AIDS, and that legal recognition be given to the placement of orphaned children within the extended family (as an alternative to current placement options). This would involve transferring parental responsibilities to the extended family through a simplified procedure.<sup>84</sup> Further, the discussion paper proposed that legal recognition be given to child-headed households, provided that a court<sup>85</sup> allocating, for example, parental responsibility or a foster grant to such a household, is satisfied that suitable adult support will be available to the household. The discussion paper also proposed that specific budgetary provision should be made for the support of child-headed households.<sup>86</sup>

The Commission suggests further that schemes to appoint selected adult "household mentors" should be given legal recognition. These persons – a district social worker or an NGO could fulfil this role – would

82 *Ibid.*

83 The author is a member of this project committee. The Discussion Paper (no 103) referred to here was approved by the Commission on 14 December 2001 and released at a media briefing in January 2002. A draft Bill and final Report had, at the time of writing, been completed and accepted by the Commission on 7 December 2002. SALC 2001, *supra* note 7. The Minister for Social Development indicated in October 2002 that he would wish the Bill to be tabled and debated in 2003. It remains to be seen, however, whether the proposals are accepted in legislative form by the legislature and the executive.

84 *Ibid* par 13 3.7.

85 This would be the proposed Child and Family Court, which is intended to replace the current Children's Court.

86 SALC 2001, *supra* note 7.

bear responsibility for a cluster of child-headed households and would be able to access grants and other benefits on behalf of the children concerned.<sup>87</sup> The mentor would also be empowered to guide the child at the head of the household, but would not be able to make decisions on behalf of the household without consulting him or her, or without giving due weight to the views of any siblings, bearing in mind their age, maturity and stage of development.<sup>88</sup> The household mentor would be accountable to the Department of Social Development, to a recognised NGO or to a court.<sup>89</sup>

Further recommendations of relevance include legal provisions requiring schools to identify children who are absent due to AIDS within the family, so that children who are at risk of abandoning their education can be linked with community support structures. Reference has already been made to the Commission's recommendation concerning the establishment of a grant aimed at subsidising adoption, in order to encourage families and communities to accept children who have been orphaned by HIV/AIDS into their homes. Regarding grants more generally, the discussion paper motivates strongly for the extension of the existing child support grant to all children under the age of 18, suggesting that this proposal should be seen in the context of the possible introduction of a basic income grant for adults and children alike, and that such a grant should not be means tested.<sup>90</sup> The Commission also proposes the development of an "add-on" or "top-up" grant, focussing especially on extremely vulnerable children such as those living in child-headed households.<sup>91</sup> The Commission has requested the Department of Social Development to identify which categories of special needs children should benefit from such a top-up grant and to design criteria outlining the precise circumstances under which it could be payable. It also proposes that administrative barriers to child-headed household accessing existing grants be removed, through amendments to the Social Assistance Act and its accompanying regulations.

The Commission's proposals can be seen as a mix between improvements to the fiscal support structure for children living in child-headed households and improvements to the legal regulation of their care (e.g. the proposal concerning household mentors). Notably, though, the Commission's proposals have yet to be accepted by government. Also, they are to some extent limited to changes to the legal framework and by definition do not affect policy directly, nor do they affect the availability of resources or the implementation of programmes. Nevertheless, according some legal recognition to the multiple problems surrounding the care and support of children living in child-headed households would, it is submitted, constitute an important advance, especially as the proposals are explicitly designed to act as a spur to the provision of increased access to socio-economic rights for children living in community based care settings.<sup>92</sup>

87 *Ibid.*

88 Draft Report on the Child Care Act 2002: 157 (copy on file with author).

89 *Ibid.*

90 SALC 2001, *supra* note 7, par 25.4.

91 *Ibid.*

92 The Commission nevertheless proposes important benefits for children living in the formal alternative care system as opposed to community based settings. Key among

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## 7 ANALYSIS OF STATE POLICY RESPONSES TO CHILD-HEADED HOUSEHOLDS, MEASURED AGAINST THE GROOTBOOM CRITERIA

As stated above, the CHBC programme, along with existing formal care options such as foster care, appears at first blush to be the only viable way to proceed to address the multiple needs of children living in child-headed households, given the undesirability of a massive programme of institutionalisation of children orphaned by HIV/AIDS. The NIP is therefore a creditable<sup>93</sup> policy reaction to the problem, and, in addition, deserving of praise because of its integrated interdepartmental implementation mechanism, and its allocation of different responsibilities to national and provincial spheres of government. Indeed, it is worthy of note that the lion's share of the budget is allocated to provinces, which are primarily responsible for delivery of the programmes.

However, it is a point of concern that the split between provinces does not appear to accommodate the differential in HIV infection rates, which would naturally result in an uneven distribution of children living in child-headed households between provinces. Indeed, available research points to the fact that the scale of the problem appears to be most acute in KwaZulu-Natal, Mpumalanga and the Northern Province. It is likely that the Eastern Cape is also badly afflicted, although there is little available material to substantiate this, be it anecdotal or statistical. These provinces are also notorious for the particular problems experienced in accessing social grants and other welfare services. As the NMCF report<sup>94</sup> details:

government (social security/welfare) is not seen to be particularly helpful in facilitating the provision of social welfare services, e.g. speeding up applications for grants and neither is government seen to be visible and proactive in collaborating with other role players and in communicating how social services can be accessed.<sup>95</sup>

Overall social welfare services were considered to be difficult to access due to red tape (documentation requirements, verification of status of applicants and would be beneficiaries). Rural villages in all provinces were even more disadvantaged in respect of availability and access to social welfare services. It is therefore reasonable to expect that the support to provinces is divided in a manner that mirrors the prevalence of, at least, known HIV/AIDS infection rates, if not actual data on children who have been orphaned and are without alternative care. This would suggest a

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these is the proposal that a child who is infected by HIV/AIDS should qualify for what is now known as the 'care dependency grant', payable to children with chronic illnesses and with moderate to severe disabilities. This is intended to promote foster care and adoption of HIV/AIDS infected infants.

93 This assertion is put forward despite the argument that a community care model rests on an assumption that traditional caregivers (women) will be available to fulfil this function, and women are presently disproportionately heavily affected by HIV/AIDS infection rates.

94 The four provinces included in this study were KwaZulu-Natal, Mpumalanga, Northern Province and Gauteng.

95 NMCF report 2001: 19.

strong focus in the allocation of resources towards KwaZulu-Natal, where the infection rate is three times that of the Northern Cape and four times that of the Western Cape.<sup>96</sup> Counterbalancing this view, though, is the reality that provinces have vastly different population rates, so that prevalence rates taken as a percentage of the provincial population may mask the actual numbers of children affected – thus the Free State province may have a high incidence of infected people but far less numerically than a more populous province.<sup>97</sup> It must be conceded that, ultimately, a reasonable policy and fiscal allocation would ideally be based on reliable, quantified data.

### 7.1 Too late?

Beyond the above, a number of critical points must be made. First, the problem remains that the intervention has come at a very late stage in the onset of the epidemic. Government's tardy and reluctant response to the HIV/AIDS epidemic is arguably epitomised in the Department of Health's "ferocious defence"<sup>98</sup> against the lawsuit of the Treatment Action Campaign around the refusal to provide anti-retroviral drugs to all infected pregnant mothers, in order to prevent mother-to-child transmission of HIV/AIDS. By a similar token, the fact that the NIP saw the light of day only in 2000, when by the government's own estimates the numbers of children orphaned were already in the hundreds of thousands, has obviously impacted upon the implementation of the CHBC programmes. Budgeting for the first few years will naturally have been constrained by the governmental medium-term expenditure framework budgetary process. Further, the actual delivery<sup>99</sup> of programmes does not appear to have commenced on any notable scale, despite a long-predicted surge in the numbers of afflicted children. Nevertheless, the substantial (if belated) augmentation of the profile of CHBC programme in the 2002 Budget is to be welcomed as confirmation that government's policy priorities are now focussed on those in desperate need, including child-headed households.

### 7.2 Too little?

*Grootboom* provides that national government has overall responsibility for allocating national revenue to provinces and to local government to ensure adequate fulfillment of the rights which form part of the state obligation.<sup>100</sup> As Yacoob J opined in relation to the right to housing in *Grootboom*:

96 Idasa 2002: 4 notes, 100, the concern that provinces with the highest prevalence rates may not be favoured in the targeting process.

97 I am indebted to Judith Streak of the Children's Budget Project, Idasa, for her valuable comments on this point.

98 See *Business Day* 2001.

99 Information provided by representatives from NGOs at the colloquium held in March 2002 on the implications of *Grootboom*. Repeated efforts by the author over a period of months to ascertain the details of existing CHBC programmes – location, numbers of children being serviced and so forth – met with no useful response from the Department of Social Development.

100 The sufficiency of governmental resources to implement a national mother-to-child transmission programme to prevent HIV/AIDS was not a factor impeding the roll out of

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... effective implementation requires at least adequate budgetary support by national government. This in turn requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs ... requires it to plan, budget and monitor the fulfillment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief ...<sup>101</sup>

At the zenith of the projected budgetary allocation, the total for the NIP has been raised from the initial plan to spend R330 million per annum, to a vastly increased amount R1.790 billion<sup>102</sup> of which 63% will be spent on the care facets of the programme. This is indeed a welcome development.

However, what seems to be especially concerning is whether the CHBC programme, or indeed any of the NIP interventions, are going to be able to assist to sustain children living in child-headed households.<sup>103</sup> Unless these children qualify for a child support grant, or are able to access financial support through foster care grants, the CHBC programme can do little more than provide social and medical support, rather than the nutritional support they desperately need. For this reason, it is arguably unlikely that the needs of children living in child-headed households can be met in a community setting other than through an extension of the child support grant to a greater range of beneficiaries (or through the establishment of other grants as recommended by the South African Law Commission). Both of these will require additional funding.

### 7.3 Too lame?

The initial weighting of the NIP so significantly towards life skills programmes must be regarded as very suspect, given the abysmal plight of children in desperate need. *Grootboom* stresses the need for programmes that provide urgent relief for those in desperate need. Indeed, the court held that the state housing programme fell short of constitutional obligations to the extent that it failed to recognise the need to provide relief for those in desperate need.<sup>104</sup> It is to be commended, therefore, that the NIP has been altered to provide for more fiscal emphasis on the CHBC programme by 2004–5.

As mentioned above, though, this still begs the question as to whether government has made adequate provision for emergency relief for those children without adult support who face starvation now, particularly those whose age excludes them from being beneficiaries of the child support grant. It must be pointed out that the failure of the government's HIV/AIDS programmes to address emergency relief as a priority would constitute a contravention of *Grootboom* principles. It is suggested, therefore, the constitutional rights of children living in child-headed households are not adequately met by the NIP framework.

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the provision of Nevirapine to pregnant women and their children in the *TAC* case. See *TAC*, *supra* note 34 par 120 of the judgment.

101 *Grootboom*, *supra* note 5, par 68.

102 *Idasa* 2001 d, 2002.

103 The NMCF report 2001: 15, 22 identifies food as the priority need for children living in child-headed households.

104 See *Grootboom*, *supra* note 5, par 66.

The enormity of scale of the HIV/AIDS epidemic requires a reprioritisation of resources, both human and fiscal, if South Africa is to raise the orphan generation. This means, first and foremost, attending to the basic survival needs of children who have lost, or are in the process of losing, their adult caregivers.

## Sources

- Centre for Policy Studies *AIDS orphans in Africa: Building an urban response* 2000 Johannesburg: Centre for Policy Studies
- Business Day* 2001 "Ruling in TAC case far reaching" 18 December
- Department of Social Development 1999 "Draft Strategic Framework for Children Infected and Affected by HIV/AIDS" available at < [www.welfare.gov.za/Documents/archive/2000%20-1996/2000/childaids.htm](http://www.welfare.gov.za/Documents/archive/2000%20-1996/2000/childaids.htm) >
- Dukhi A 2000 "The impact of HIV/AIDS on orphans in South Africa: A human rights perspective" unpublished LLM dissertation University of the Western Cape
- Gose M 2002 "The African Charter on the Rights of the Welfare of the Child" Bellville: Community Law Centre University of the Western Cape
- Idasa 2001a *An evaluation of the Department of Social Development's response to the HIV/AIDS crisis* Cape Town: Idasa
- Idasa 2001b *Are we making progress in realising the rights of children affected by HIV/AIDS?* Budget Brief 68 Cape Town: Idasa
- Idasa 2001c *Funding mechanisms of the National Integrated Plan for HIV/AIDS* Cape Town: Idasa
- Idasa 2002: *What Budget 2002 means for HIV/AIDS* Budget Brief 90 Cape Town: Idasa
- Loening-Voysey H & Wilson T 2001 "Approaches to caring for children orphaned by AIDS and other vulnerable children" unpublished report prepared for UNICEF
- Mazengera S F 2001 "The impact of AIDS on children's rights: The case of child-headed households" unpublished LLM essay University of the Western Cape
- McKay P 2002 "Orphans – The case for community care" 6 *Children First* 42
- Nelson Mandela Children's Fund (NMCF) 2001 "Report on a study into the situation and special needs of child-headed households" unpublished report June 18
- Office on the Rights of the Child – The Presidency 2001 *Children in 2001: Report on the state of the nation's children*
- Strydom EML (ed) 2002 *Essential social security law* Cape Town: Juta & Co
- Sloth-Nielsen J 1995 "Ratification of the Convention on the Rights of the Child: Implications for South Africa" 11 *SAJHR* 331
- Sloth-Nielsen J 2001 "The child's right to social services, the right to social security, and primary prevention of child abuse: Some conclusions in the aftermath of *Grootboom*" 17 *SAJHR* 210
- South African Law Commission 2002 "Draft report on the Child Care Act" (copy on file with author)