

Social assistance for orphaned children living with family

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This essay describes the current crisis in foster care and outlines how it arose because the Foster Child Grant (FCG), which is linked to the child protection system, was used to meet the social assistance (poverty-related) needs of orphaned children. The foster care crisis is so serious that a High Court ordered the Department of Social Development (DSD) to come up with a "comprehensive legal solution". The solution should ensure that social assistance is readily available for eligible children, including orphans, while also ensuring abused and neglected children have access to quality social welfare and child protection services. One proposed solution is to revert to the Child Support Grant (CSG) as the preferred social grant for orphans living with extended family, with a possible top-up in the grant amount. If accompanied by the necessary amendments to the Children's Act, this could be a step towards a solution to the foster care backlogs and lapsing of FCGs. It may help to alleviate the pressure on social workers so that they can be more responsive to children in need of intervention and protection services.

The essay considers the following questions:

- How do the CSG and FCG differ in their purpose, targeting and processes?
- Why did the number of children receiving the FCG increase so rapidly, and why was this a concern?
- What are the consequences for social welfare services?
- What is the foster care "crisis" and how has the High Court intervened?
- What are the options for a comprehensive legal solution?
- What has happened so far?

How do the CSG and FCG differ in their purpose, targeting and processes?

The CSG is part of the social assistance programme and has been described in detail in other chapters. The FCG is different: although it is also a social grant and is paid out of the social assistance budget, it is explicitly linked to the child protection programme, and only foster parents can apply for it. The FCG was designed as an allowance for foster parents to assist with the costs of providing for children who had been placed in their care by a Children's Court. Typically, these were children who had been removed from their own families because of abuse or neglect, and were found to be "in need of care and protection". These children effectively became wards of the state, but were placed with substitute families because family home contexts are considered preferable to institutions as alternative care environments for children.

The CSG and FCG have very distinct objectives, and despite some similarities, there are important differences between them.

- **The value of the FCG is much higher than the CSG.** In October 2016 the CSG is R360 per child per month, whereas the FCG is nearly three times that value, at R890 per month. This difference in value arose because the FCG was meant to cover the costs of a child who would otherwise have to be cared for by the state, whereas the CSG was intended only to help alleviate poverty by covering the costs of basic nutrition for the child. In reality, neither of the grants is large enough to cover the intended costs fully. However, the higher value of the FCG benefit makes it a much more desirable grant for poor households.
- **The CSG is means-tested, whereas the FCG is not.** This is because the CSG is meant for poor caregivers, whereas the FCG is a state contribution to the cost of caring for a child who has been placed in foster care, irrespective of the income of the foster family. In terms of the law, the FCG should not be means tested.
- **Both the CSG and FCG are paid to the primary caregiver of the child.** In the case of the FCG, this must be the foster parent. The CSG can be paid to whoever is the child's primary caregiver. This decision was made in light of the household arrangements in South Africa, where many children live with extended family. Therefore the CSG has always been available as a poverty alleviation grant for family members caring for children (including orphaned children).
- **The CSG application is a relatively quick and simple administrative process, whereas an FCG application first requires a social worker investigation and a court order.** All grant applications are administered by the South African Social Security Agency (SASSA). Before a family member can even apply to SASSA for an FCG, the child must be placed in foster care by a court. This first requires an assessment and written report by a social worker – a process which is meant to take 90 days but in reality can take longer because of backlogs – followed by an order from the Children's Court.
- **Once approved, the CSG is paid continuouslyⁱ until the child turns 18 years old, whereas there must be a valid court order for the FCG to be continued.** Most foster care orders expire after two years and have to be reviewed and extended for the FCG to remain in payment.ⁱⁱ This requires a reconsideration of the placement, involving a home visit by a social worker, and the social worker must present a written report at the children's court where the order is extended.¹

The more rigorous and arduous procedure that precedes an FCG application arises from the statutory child protection processes: the system is designed to provide checks and balances before removing a child from the care of her parents and placing her with another family.

Section 150 of the Children's Act provides for a child to be placed in foster care if the child is "in need of care and protection". There are a number of reasons provided in the Act for when a child may be in need of care and protection, including if the child is abused or neglected, and if the child is abandoned or orphaned AND without visible means of support. However, there is no clear definition of the phrase "visible means of support", which resulted in differing interpretations by magistrates as shown in case 3.

The usual two-year placement period arises because foster care is supposed to be a temporary placement. It is also for this reason that a foster parent does not acquire full parental rights and responsibilities.

In addition to providing a larger grant, foster care is meant to be linked to a basket of services, including ongoing monitoring and social services to children and foster parents, access to treatment and therapeutic services, and family re-unification services.

There are conflicting perspectives on whether or not all orphans automatically need state protection services, and whether they should receive larger grants than other children on the basis of their orphan status. The CSG is designed to provide income support for poor children irrespective of who they live with, and so is already available to orphans whose caregivers pass the means test. Social welfare and child protection services are meant to be available to any child who needs them. The question is whether orphans living with extended family should be automatically placed in the child protection system.

Why did the number of children receiving the FCG increase so rapidly, and why was this a concern?

For many decades the number of children in foster care placements (and FCGs) remained below 50,000. But when orphaning rates started to increase rapidly in the early 2000s due to rising HIV prevalence rates and the failure of the state to roll out antiretrovirals, there was growing public concern about what would happen to orphans. The number of maternally orphaned children doubled from half a million to over a million between 1996 and 2004.²

In 2002, former Minister of Social Development, Zola Skweyiya, stated publicly that the DSD was "encouraging relatives to take care of orphaned children under the foster care package".³ This shift towards using the foster care system (and the associated FCG) for orphaned children was echoed by politicians and policymakers on a number of other occasions, but without formal consultation or inquiry into the systemic consequences of such a shift.

Case 3: The story of child SS

In the SS case, the child's mother had left him in the care of her aunt and uncle when he was two years old.⁴ The father was not known to the aunt and uncle. The child lived with them for several years and they received the CSG. Then the child's mother died, and they heard that social workers could assist them to obtain a grant with a greater value. They consulted a social worker who initiated foster care proceedings. It took two years before the case was finally heard by the children's court in 2012. The court refused to find the child in need of care and protection because he was already living with relatives and therefore had "visible means of support".

The magistrate stated: "From the evidence, it is clear that the main reason for this enquiry is to alleviate the parties' financial position by a foster care order and receipt of a foster grant. There is no necessity that it has to be a foster grant. I fully agree... that the country's foster care system has become an income maintenance system."

A year later the High Court overturned that case on appeal, but the second High Court judgment also did not present any systemic solutions.

Even at the time, there were concerns about this approach. When the Children's Bill was first being considered, the South African Law Reform Commission proposed the legal recognition of kinship care, with a distinction between court-ordered kinship care and informal kinship care. It proposed that: "relatives caring for children who have been abandoned or orphaned or are for some or other reason in need of their assistance, but who are not *per se* in need of formal protective services, should have access to a simple procedure whereby the necessary parental responsibilities can be conferred on them."⁵ The Children's Act, however, did not incorporate this proposal.

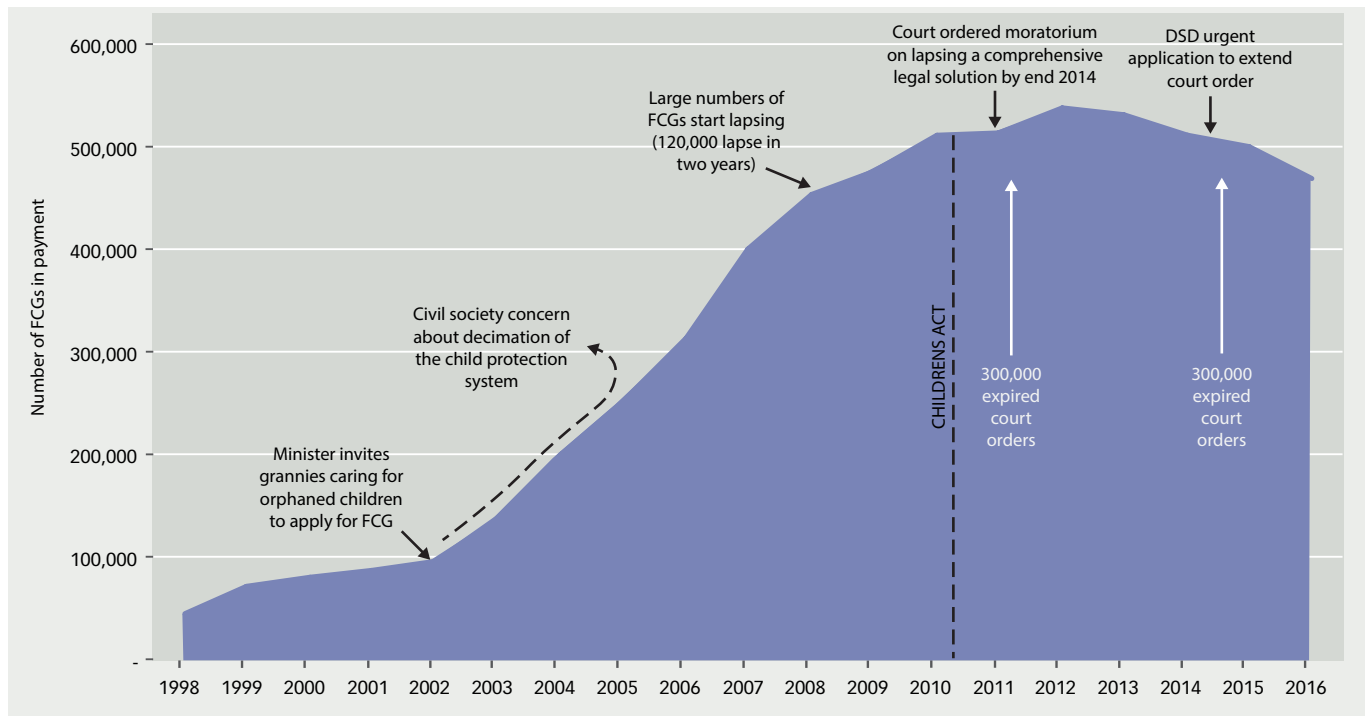
A 2003 research report on the use of the FCG for orphans in the context of HIV/AIDS stated that "while such a grant would undeniably benefit ... the few recipients who would be able to access it, its application on such a large, targeted scale as well as processing procedures which rely heavily on the courts and the social services, raise questions not only of feasibility and ethics, but also of potential unintended consequences."⁶ The report was embargoed by the government department that had commissioned the research, and the number of orphans placed in foster care with relatives continued to rise.

By 2010, over 500,000 FCGs were in payment – ten times the number that the system had been accommodating previously. Over 80% of FCGs went to children who were orphaned, almost all

i The grant may be reviewed, and if recipients (primary caregivers) do not collect the grant with a biometric validation (fingerprint), they are asked to provide life status confirmation (proof of life) once per year.

ii While section 186 of the Children's Act does allow the courts to make foster orders that are longer than two years, not many magistrates have used this in practice.

Figure 23: History of the Foster Child Grant



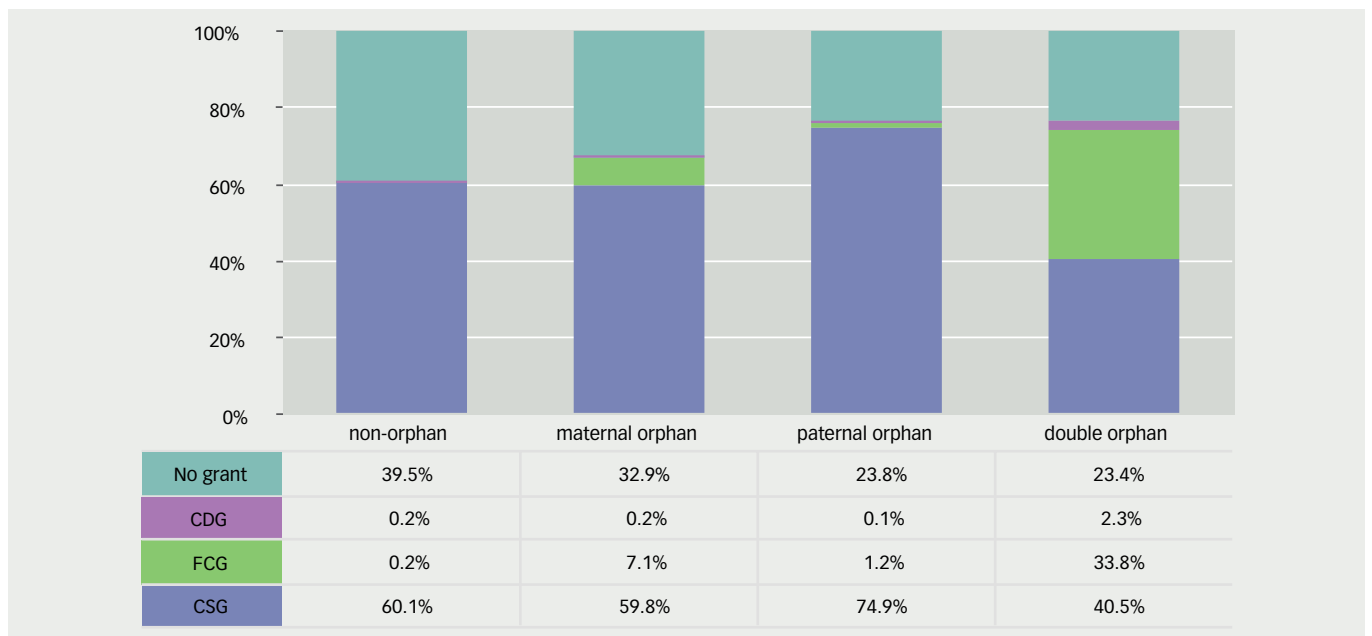
Sources: National Treasury (1998 – 2007) Intergovernmental Fiscal Review. Pretoria: National Treasury; South African Social Security Agency (2008 – 2016) SOCPEN monthly reports. Pretoria: SASSA.
 Note: Number of FCGs in payment at financial year end.

of whom were living with relatives.⁷ This did not nearly reach the number of children who were maternally orphaned, which stood at over 1.5 million children in the same year. The majority of children who receive the FCG are orphans (and particularly double orphans) but, as shown in figure 24, the majority of orphaned children do not receive the FCG.

Since 2012 the number of FCGs has declined. By the end of 2014, around 300,000 foster care orders (60% of all FCGs in payment) were due to expire because they had not been reviewed.⁸

Over the years, a number of civil society organisationsⁱⁱⁱ have highlighted multiple concerns about the use of the foster care system for orphans living with relatives.⁹ The points they raised include the following:

Figure 24: Grant uptake by orphan status of child



Source: Statistics South Africa (2015) *General Household Survey 2014*. Pretoria: Stats SA. Analysis by Katharine Hall, Children's Institute, UCT.
 Note: CDG = Care Dependency Grant, for children with disabilities. Only around 120,000 CDGs are in payment, versus 500,000 FCGs and nearly 12 million CSGs.

iii These organisations include Johannesburg Child Welfare, Childline SA, Pietermaritzburg Child Welfare, Children's Institute, Centre for Child Law, Black Sash and the National Association of Child Care Workers.

Table 5: Children’s co-residence arrangements, orphan status, and income level

Category ^{iv}	Number of children (0 – 17 years)	Median per capita income (excluding child grants)	Median per capita income (including child grants)
Live with both parents	6,233,000	R1,000	R1,088
Live with mother, not father	7,342,000	R338	R477
Live with relatives – mother alive	2,857,000	R338	R472
Live with relatives – mother dead	1,010,000	R338	R531

Source: Statistics South Africa (2015) *General Household Survey 2014*. Pretoria: Stats SA. Calculations by Katharine Hall, Children’s Institute, UCT.

- Orphans (and their caregivers) experience long delays in accessing FCGs because of the time-consuming process of foster care placements.
- Although the number of children in foster care increased rapidly from 2002 to 2012, it only ever reached a third of maternally orphaned children. Even though orphan numbers are gradually declining, it is highly unlikely that the foster care system would be able to cope with all orphans.
- Many children who are not orphaned live with relatives (for example because their parents are migrant workers) and these children are not regarded as being in need of protection or regular monitoring, although they are greater in number and live in similar circumstances to orphans. For example, 1.2 million maternally orphaned children were living with relatives in 2014, compared to nearly three million children living with relatives whose mothers were living elsewhere.¹⁰
- Although many children live in deep poverty and are in need of financial assistance, orphans living with extended family are not, as a category, necessarily “poorer” than non-orphans living with extended family. The greater value of the FCG may in fact create income inequality between categories of children (see table 5 above). From the existing evidence, it is not clear whether orphans living with relatives are vulnerable in other ways when compared with non-orphans living with relatives.¹¹
- 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.¹²

What are the consequences for social welfare services?

The reliance on the foster care system to provide income support to orphaned children and their families has had severe negative impacts on the foster care system itself, as well as on the capacity of social workers to deliver services to abused and neglected children and others in need of social welfare services.

Social workers simply do not have the capacity to deal with hundreds of thousands of foster care placements on top of the other services they need to provide. The Department of Social Development acknowledged that “insufficient numbers of available social workers make it difficult to deliver social services where they are needed”.¹³ According to DSD, the ratio of social workers needed to handle foster care cases is 1:60,¹⁴ but at the end of 2014 the ratio of social workers to foster care placements was estimated at 1:94¹⁵ – and this ratio holds only if the social workers do nothing but process and review foster care placements.

Social work services are often constrained by poor and inadequate working conditions, infrastructure and resources. Studies have found that many social workers have to operate in environments characterised by a lack of offices, inadequate office equipment, shortages of vehicles, high caseloads and staff shortages.¹⁶

The use of social workers to process foster placements for orphans living with family may be an ineffective and inappropriate use of scarce resources in the context of high rates of violence against children: “There are preventable injuries and deaths among neglected and abused children, because social workers are doing paperwork to renew grants, and are therefore insufficiently available to respond speedily to calls for protective services.”¹⁷ Inappropriate use of social workers forces them to implement child protection services from a remedial or crisis intervention approach at the expense of comprehensive and holistic services embedded in the social development approach.¹⁸

What is the foster care “crisis” and how has the court intervened?

The increase in demand for foster care placement has created a crisis in the foster care system.

FCG lapsing and the 2011 court case

Between April 2009 and March 2011 approximately 120,000 FCGs stopped being paid by SASSA (lapsed) because of “court order expiry / failure to review”. In terms of the Children’s Act, most foster care orders need to be extended by the court on a two-yearly basis

^{iv} These four categories cover 95% of all children in SA.

to remain valid. Yet due to the shortage of social workers and the high demand for FCGs, many foster care court orders expired and were not renewed in time.

In May 2011 the Centre for Child Law and Minister of Social Development reached a court-ordered settlement to prevent further lapsing of FCGs due to expired court orders. The May 2011 settlement order:

- placed a temporary moratorium on lapsing of further 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 2014.¹⁹

However, by early December 2014, the Department had not designed a comprehensive legal solution, and they were still facing a significant backlog of expired foster care court orders – estimated at 300,000 at that time. They applied to court on 12 December 2014 on an urgent basis asking for the May 2011 court order to be extended for a further three years.

2014 court case

In December 2014, the High Court granted the varying and extension of the May 2011 order. The effect is that the Department has an extension until December 2017. During this time some foster care court orders can continue to be administratively extended by the Department. Also during this time, the Department must design a comprehensive legal solution (bringing the total time they will have had to design a solution to six years).

The Department is required to report to the Court and the Centre for Child Law every six months on its progress in clearing the backlog of foster care orders in need of extension. The Department’s reports have reflected concerted efforts in reducing the backlogs, but the numbers remain very high and new applications are slowing down, as illustrated by the decrease in FCGs in payment since 2012.

Establishment of committees to consider possible solutions

There are two Ministerial Advisory Committees that are relevant to the foster care crisis. One is the Foster Care Committee which was established in 2014 to investigate the situation of children in foster care, and has already uncovered serious fraud in the grant system, allegedly perpetrated by departmental officials.²⁰ The other is the Committee for the Review of the Welfare White Paper. It has made a number of important recommendations regarding orphans in the care of relatives:²¹

- Support an extended CSG (also referred to as the “CSG top-up”) for orphans in the care of relatives and children in child-headed households as approved by Cabinet on 9 December 2015.²²
- Amend the Social Assistance Act and regulations to enable the extended CSG to be operationalised.
- Ensure that the budget is approved to enable the above.
- Fast-track amendments to section 150 of the Children’s Act and related sections to align with the extended CSG. The effect of the amendments will be to ensure orphans and abandoned children living with relatives are screened at community level by a social service practitioner, who will refer them to apply for the extended CSG and may refer them to a social worker only if it appears that the child has care and protection needs.
- Retain relatives already receiving the FCG for orphans in their care in that system, but make increased use of section 186 of the Children’s Act which extends the orders until the child turns 18 and requires home visits at two-year intervals by a social service professional.

Finally, it should be noted that although the High Court orders of 2011 and 2014 have prevented the FCG from lapsing when foster care orders expire, the number of children receiving the FCG is steadily dropping (from 536,747 in 2012 to 470,015 in 2016). This is despite the fact that there were approximately 1.2 million maternally orphaned children in 2014 who could be eligible under the current law.²³ There are several possible reasons for the declining numbers: Social workers and courts may be channelling caregivers away, on the basis of conflicting interpretations by the High Courts of the words “without visible means of support”. The first judgment in the SS case²⁴ (see case 3 on p. 69) said that if a child is living with her grandmother (or any relative who has a common law duty to support her) then she has visible means of support and is therefore not eligible for the FCG. A second judgment²⁵ softened the effect of this by saying that if the grandmother was so poor that she could not support the child, even with the CSG, then she was eligible for the FCG. The cases caused considerable confusion.

Another possible reason for the drop in numbers of children in foster care is that social workers’ time is so taken up with clearing the backlog of expired foster care orders, that they are unable to bring new cases into the system at the same rate as before.

What are the options?

There are at least four possibilities for consideration:^v

Leave the law as it is and improve social work capacity through special units working on foster care

The problem is that there is a finite number of social workers, the majority of whom are already working on foster care. Furthermore, if all maternally orphaned children in the care of relatives are to be treated equally then nearly a million more foster care orders would have to be granted. As the system was unable to cope with 500,000 when the number of FCGs was at its peak, this is clearly not a feasible option.

^v This is a simplified list of options presented and discussed by the authors. Additional options are outlined in the DSD’s Draft National Policy on Foster Care (version 4, 2014).

Shift all orphans living with relatives onto the CSG

This would be more equitable as all children living in poverty would be treated the same, but would not be politically acceptable due to the low value of the CSG (R360 per month in October 2016) and may be unconstitutional because it appears to be regressive.

Shift all orphans living with relatives onto the CSG but increase the CSG for all children

This could, for example, be done by aligning the amount with the lower bound poverty line proposed by Statistics South Africa, which was R621 in 2015. This is equitable and may be constitutional if undertaken as part of a careful plan to improve the situation of the majority of orphans, but it has significant budget implications and a substantial increase is unlikely in the short-term.

Shift orphans living with relatives onto the CSG system and provide a top-up amount for this category only

In order to avoid being regressive, those already receiving the FCG would continue to receive it. It is important to note that 100,000 children fall off the FCG each year as they “age out” of the system. If the numbers of new children coming into the foster care system are reduced (as a result of being channelled towards the extended CSG) then the overall numbers of children in foster care are likely to return to a manageable size within three to four years.

The last option is the most advanced in terms of policy commitment by government, and has been referred to variously as an “extended CSG”, “CSG-plus” or “CSG top-up”. Using the CSG system for orphans will resolve the delays in providing access to social assistance for orphans and will free up social workers to do more preventive work and care and protection work with children who are abused and neglected, irrespective of their orphan status.

What has happened so far?

Civil society groups have been advocating around this issue for some years, and have had multiple meetings bringing together researchers, practitioners and government officials from DSD, Treasury and SASSA. While there is concern from some sectors that orphans as a category may need additional welfare services, there is general agreement that the current approach is preventing these services from reaching children.

The Social Security Directorate of DSD supports the idea of a CSG top-up and has been leading the reform process. The Minister approved the idea in theory in 2012 and established an inter-departmental task team to discuss and develop it further. The proposal was included in the 2015 Medium Term Strategic Framework, for implementation in 2018.²⁶

A proposal for the CSG top-up for orphans was passed by Cabinet in December 2015.²⁷ However the details of its implementation still need to be developed. The essay on p. 91 raises some key questions to be considered further.

Procedures needed to meet the 2017 deadline

The 2014 High Court order is temporary, pending a holistic solution to the foster care crisis. The court order will expire in December 2017. Cabinet approved a draft Social Assistance Amendment Bill in October 2016 which will allow the Minister of Social Development to create the CSG top-up.²⁸ An amendment to the Children’s Act will be required to bring it in line with the proposal for the CSG top-up. Amendments to both Acts need to be passed and implemented before December 2017.

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