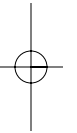
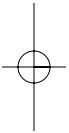
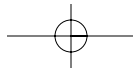


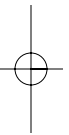
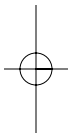
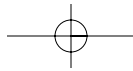
Parallel Policies

Policies relevant to child safety



JEAN REDPATH





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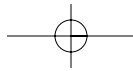
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Cape Town, South Africa
Tel: +27 (0)21 687 9177 Fax: +27 (0) 685 3284
Email: wendy@cjcp.org.za

www.cjcp.org.za

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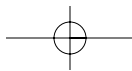
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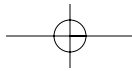
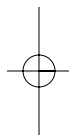
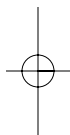
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The author

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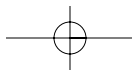
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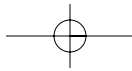
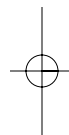
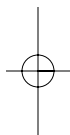
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Parallel Policies: Policies Relevant to Child Safety



Executive summary

The Centre for Justice and Crime Prevention's 2005 National Youth Victimization Study indicated the need to explore existing policy impacting on children from a social crime prevention perspective within a rights-based framework. This policy analysis was commissioned to undertake that analysis.

A social crime prevention perspective is one which views crime as a social problem, stemming from the socio-economic environment and facilitated by through the situation in which crime occurs. The risk factors associated with both victimisation and offending of children are such that policy in the poverty alleviation, health, education and criminal justice sectors are relevant to social crime prevention.

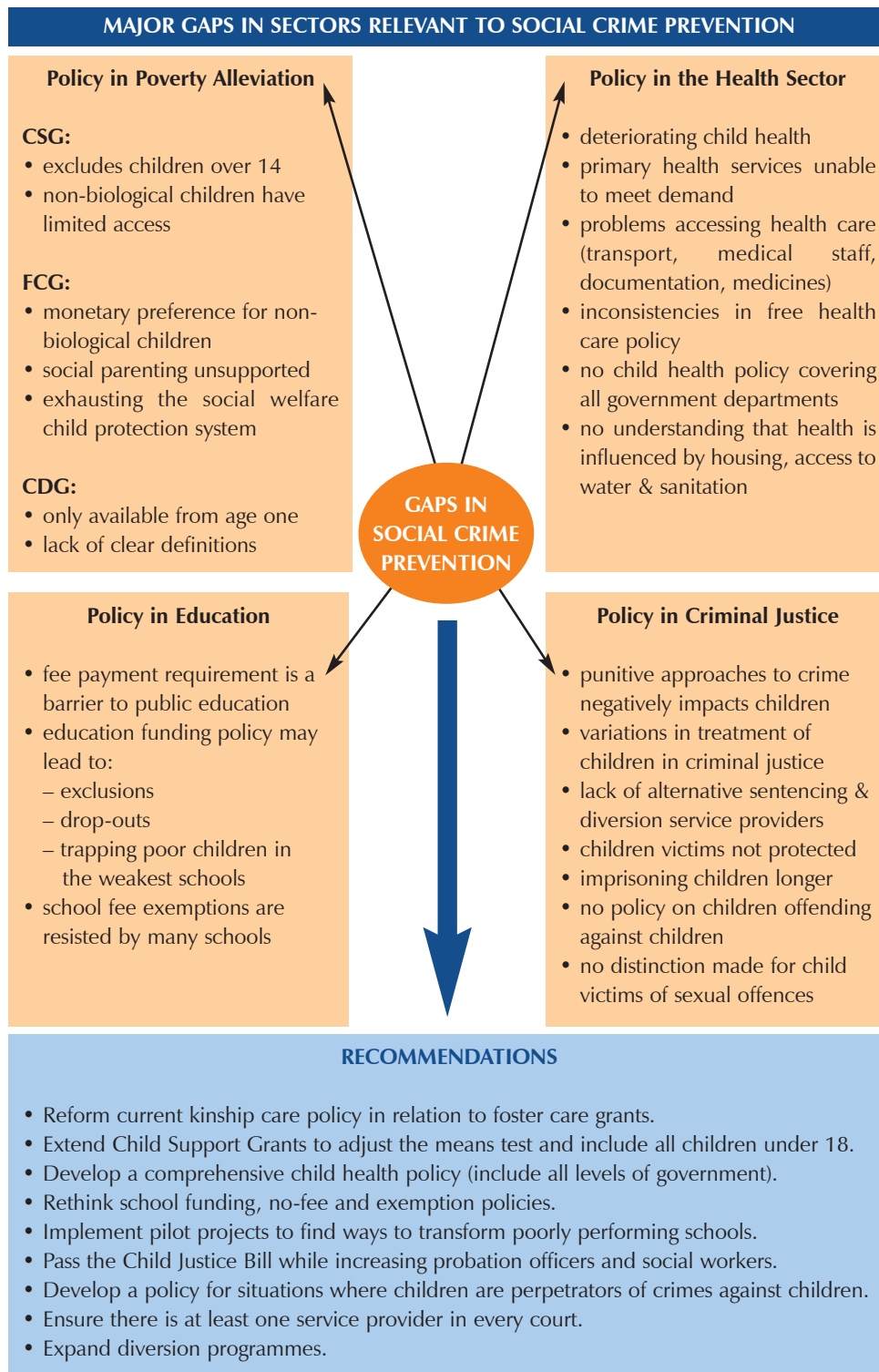
Poverty is widespread among children. The current social grants framework does not appear equal to the realities of poverty in South Africa. Problems include the exclusion of children over 14 from child support, the overburdening of the foster system as a result of pressure driven by HIV/Aids, and limitations on the availability of the care dependency grant.

The overall health of children is poor and appears to be deteriorating. While free primary health care is available, access in terms of transport, medicines and availability of medical staff is problematical. Preventative care may have been neglected in the drive to provide free primary care. There is a lack of recognition that health is influenced by such factors as housing, access to water and sanitation. There is also no single overarching child health policy.

Education funding policy may be having the unintended consequences of exclusions, school drop-outs, and trapping poor children in the weakest, poorest schools.

Criminal justice and child protection policy have been hampered by a swing to a 'tough on crime' approach, which may be exacerbating the social conditions that lead to crime. Children as victims are not yet adequately protected in the system and they are being imprisoned for longer periods, despite imprisonment being 'a measure of last resort'.

Given the matrix of social risk factors South Africa's children are exposed to – poverty, disrupted families, poor health conditions, inadequate schooling – it is no surprise that children are at risk from both victimisation and offending perspectives. The current policy framework falls short of meeting the challenges posed by these risk factors. There is much to be done from a social crime prevention perspective.



CHAPTER 1

Introduction

BACKGROUND

The Centre for Justice and Crime Prevention (CJCP) works to develop, inform and promote evidence-based crime prevention practice in South Africa. Noting that investigations of criminal victimisation in South Africa have largely been confined to the experiences and perspectives of adults, the CJCP in 2005 conducted and reported on a national youth victimisation survey among children and youth aged 12–22, to assess the extent of victimisation experiences among people, as well as to assess the nature and correlates of these experiences.¹

The youth victimisation study found that children and youth are disproportionately at risk of falling victim to crime, despite South Africa having committed itself in 1994 to ensuring the rights of children by ratifying the United Nations Convention on the Rights of the Child.² According to the convention, governments are responsible for ensuring that children are provided with the protection and care required for their well-being.³ The study concludes: 'Given the prevalence of crime and violence in their homes, schools and broader communities, young people are evidently not being provided with basic protection and care.'⁴

The youth victimisation study also points to the need to monitor the provision of children's rights on an on-going basis. Furthermore, the victimisation data indicate a need to explore the impact of existing policy on the safety and prevention of crime against children in order to uncover where policy is failing or contributing to children's lack of safety.

POLICY ANALYSIS

This policy analysis was commissioned by the CJCP in 2006, the aim of which was to explore policy gaps and weaknesses within the context of children's safety. The 'safety' of children is defined from a social crime prevention perspective within a rights-based framework.

The social crime prevention perspective views crime as a social problem which stems 'from the socio-economic environment and (is) facilitated through the

situation in which crime occurs'.⁵ Along with the view that causes of crime are social, the social crime prevention perspective focuses on addressing the social causes of crime and the situations which present an opportunity for crime.⁶ This approach views all people as potential perpetrators of crime, depending on circumstances and opportunities.⁷ The social approach to crime prevention requires 'collaboration between organisations providing social welfare services, government and civil society, and the protection of potential victims, rather than the search for perpetrators'.⁸

The social perspective is in sharp contrast to the criminal justice approach, which typically considers only policing and the criminal justice system, and is frequently characterised by a punitive approach whereby crime is seen as being a problem of individuals who lack 'moral integrity'.⁹

This criminal justice approach was predominant until the 1960s when research into the effectiveness of the criminal justice system increasingly showed the inadequacy of this approach to crime prevention.¹⁰ Crime began to be viewed as a social problem arising from the socio-economic environment and facilitated through the situation in which crime occurs, which could be 'reduced but not eliminated'.¹¹

Social crime prevention research has identified a number of social risk factors closely associated with high crime rates. These include:

- poverty and unemployment deriving from social exclusion;
- dysfunctional families with uncaring and incoherent parental attitudes, in which violence and parental conflicts are common;
- social valuation of a culture of violence;
- presence of facilitators such as firearms and drugs;
- discrimination and exclusion deriving from sexist, racist or other forms of oppression;
- degradation of urban environments and social bonds; and
- inadequate surveillance of places, and the availability of goods that are easy to transport or sell.¹²

No single risk factor or environmental opportunity leads directly to criminal activity;¹³ rather, the complex interaction of a range of factors leads to crime. In addition, different kinds of risk factors relate to different kinds of crime,¹⁴ for example, poverty and social inequality are more strongly predictive of interpersonal violence than of other crimes.¹⁵

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Palmary notes that ‘the prevention of crime – in many instances – translates into the prevention of juvenile delinquency’.¹⁶ Put differently, the largest ‘returns’ in social crime prevention can be achieved by addressing the factors that place children at risk of offending.

At the same time, however, the risk factors most commonly associated with victimisation of children include:

- family disruption;
- violence;
- poor parenting;
- poverty;
- inadequate housing and health conditions;
- poor schooling;
- truancy;
- school drop-out or exclusion;
- peer-group activities and pressures;
- discrimination; and
- lack of training and work opportunities.¹⁷

Therefore, similar factors lead to ‘juvenile delinquency’ and to the victimisation of children.

The matrix of risk factors above suggests that social policies impacting on poverty, education and the health of children are key to social crime prevention, particularly in relation to the victimisation of children but also more broadly to the greater social crime prevention project.

Perhaps because social crime prevention is in some respects a rejection of the criminal justice approach to crime, criminal justice policy may be overlooked in social crime prevention analysis. But criminal justice policy has social consequences. For example, in the United States (US) there is recognition that high incarceration rates of poor, African-American men in particular is contributing to the disruption of families and the cycle of poverty, which in turn raises crime and victimisation rates in these communities.

In South Africa, the social crime prevention perspective has informed the nature and content of children’s rights in the criminal justice system. Children’s rights within the justice system seek broadly to protect children from adult justice, in accordance with the social crime approach that all children are susceptible to crime as offenders via their personal matrix of risk factors and opportunity. Criminal justice policy can contribute to social crime prevention by treating young offenders in accordance with this approach. This policy analysis therefore includes an analysis of criminal justice policy as it pertains to children as both victims and offenders, from both a crime prevention and rights perspective.

While social crime prevention is the perspective through which children’s safety is primarily considered, this policy analysis also proceeds within a rights

framework. In addition to understanding the importance of social policy from a crime prevention perspective to keep children safe from crime, government is obliged – via both the constitution and the United Nations Convention on the Rights of the Child – to ensure that the rights of children are met. This includes their socio-economic rights. Given the relevant risk factors, it is difficult to escape the conclusion that if children’s rights were indeed protected, the social crime prevention project goals would largely have been achieved.

But sight must not be lost of the fact that protecting children’s rights is an obligation of government, quite apart from the collateral impact that protecting such rights may have on crime. The ‘safety’ of children from a crime prevention perspective is of little relevance if children are dying from malnutrition and disease. Therefore, while the focus of this policy analysis is on the safety of children predominantly via social crime prevention, a broader approach is adopted when available data suggests this is appropriate from a child rights and child safety perspective.

Due to time and budgetary constraints, this policy analysis cannot claim to be a comprehensive survey of all policies relating to child safety defined from a social crime prevention perspective within a rights-based framework. In particular, no attempt was made to canvas in detail relevant policy at provincial or local government level, and nor was policy outside of the four broad sectors of interest considered.

METHODOLOGY

This policy analysis defines ‘children’ as all persons under the age of 18, in terms of the definition employed in the South African constitution and the United Nations (UN) Convention on the Rights of the Child.¹⁸ The constitution and the convention place substantial responsibility on the state with respect to children.¹⁹ To acknowledge this, each of the four sectors of interest – poverty alleviation, health, education and criminal justice policy – are allocated chapters which begin with a brief explanation of the relevant constitutional or convention right, followed by an overview of relevant data in relation to the right, and a discussion of the relationship between the right and the policy on children’s safety.

The content of the major relevant policy is then described. This is followed by an exploration of known weaknesses, as identified by experts in the relevant fields of interest. Each chapter concludes with a discussion of the broad implications of the identified weaknesses, including some legal discussion and recommendations for the amelioration of these weaknesses.

The analysis concludes with a brief overview of these parallel policies from the four sectors considered together, outlining the overall implications for children from a social crime prevention perspective within a rights framework.

CHAPTER 2

Poverty alleviation policy for children

INTRODUCTION

Children’s rights lobbyists appear to be united in their view that child poverty is at the root of many issues directly impinging on children’s rights.²⁰ From a social crime prevention perspective, poverty is a strong correlate of victimisation of children, particularly in the form of interpersonal violence. The correlation is thought to relate to factors such as lack of appropriate child care, constrained living arrangements and strained relations within households associated with financial insecurity.

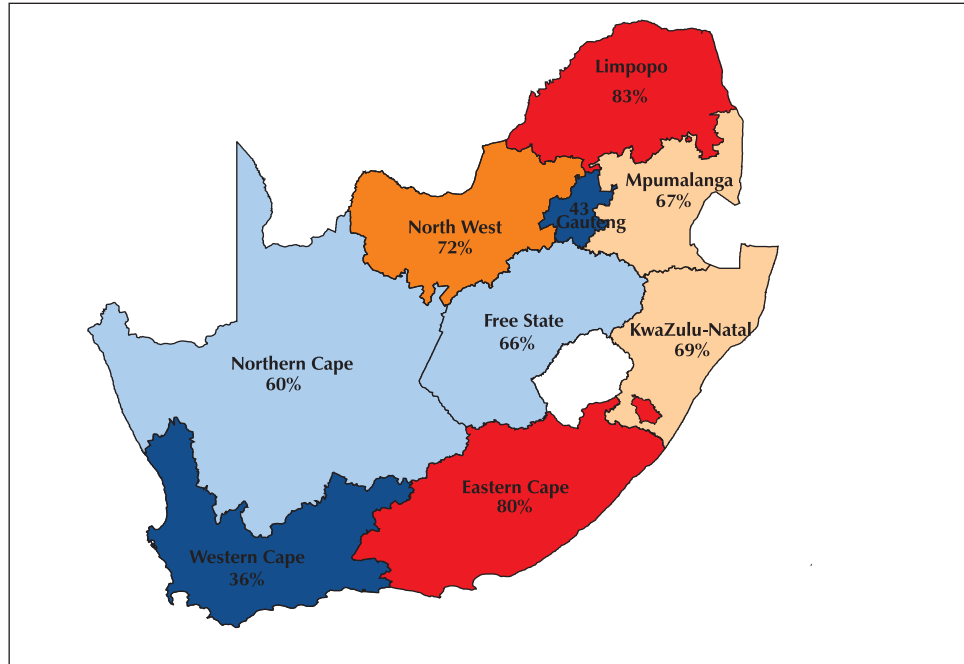
Apart from being a correlate of child victimisation, diseases resulting from and exacerbated by conditions of poverty contribute overwhelmingly to the deaths of children of all ages, and to premature mortality in general. Premature mortality is measured in years of lives lost and thus reflects strongly on deaths of children. The top nine causes of premature mortality, as estimated by the Medical Research Council, are given in Table 1.

Table 1: Top causes of premature mortality, South Africa 2000

Cause	Percentage
HIV/Aids	39
Violence	7
Tuberculosis	5
Diarrhoeal disease	4
Lower respiratory tract infections	4
Road traffic accidents	4
Ischaemic heart disease	3
Low birth weight	2
Protein-energy malnutrition	2

Source: Adapted from Bradshaw et al, *South African National Burden of Diseases Study 2000*, Medical Research Council, 2000, p 29.

Figure 1: Percentage of children living in poverty per province, 2005



Map created using data from *The Children's Institute Child Gauge, 2006*.

Diseases or conditions such as low birth rate, diarrhoeal disease, lower respiratory tract infections and protein energy malnutrition – which feature strongly on this list – are termed diseases of poverty because they are linked to, or are exacerbated by, conditions of poverty.

Poverty among children is widespread, with provincial estimates of children living in poverty ranging from 36% in the Western Cape to 83% in Limpopo (see *Figure 1*). This measure of poverty is the percentage of children living in households with a total income of R1,200 per month or less.²¹

It becomes clear that a comprehensive policy approach aimed at ensuring the safety (and ultimate survival) of children must incorporate poverty alleviation strategies.

CHILDREN'S RIGHT TO SOCIAL ASSISTANCE

One of the primary policy responses to child poverty which is aimed at poverty alleviation is through social assistance – in other words, income support through cash grants. Children's right to social assistance²² is provided for in the 1989 UN Convention on the Rights of the Child, which was ratified by South Africa in 1995, while the South African constitution²³ provides for the right to social assistance in general.²⁴

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Government consequently provides a range of cash grants. The constitution does not, however, oblige government to provide comprehensive social security beyond its reasonable fiscal means (see s27(2)). The state is only obliged to show that it has a plan for the 'progressive realisation' of the right to social assistance, and the plan must be reasonable in terms of available resources.

It has, however, been argued that government does have a stronger obligation toward children via the UN convention and further provisions of the constitution relating to children's basic well-being. For example, section 28(2)(c) of the South African constitution states: *'Every child has the right to basic nutrition, shelter, basic health care services and social services.'*

This right is not expressly limited by available resources. The right is most easily realised by providing families with the means to provide basic nutrition and shelter (among other things) to children. Some experts argue that where families are excluded from social assistance but are unable to provide their children with section 28-level basic rights as a consequence of poverty, the state is effectively failing in its obligation to meet these rights. This point is discussed in more detail in the discussion below.

Three social assistance cash grants are specifically targeted at children to assist their caregivers in realising children's rights to basic nutrition and shelter. These grants are the Child Support Grant (CSG), the Foster Care Grant (FCG), and the Care Dependency Grant (CDG) for children with disabilities that require permanent home care.

GRANTS ADMINISTRATION IN SOUTH AFRICA

The various grants administered by the South African government are currently provided for in terms of the Social Assistance Act 13 of 2004 and the relevant regulations,²⁵ which replaced the Social Assistance Act 59 of 1992. The significance of the 2004 Act is that it shifts responsibility for the management of social security from provincial departments to the South African Social Security Agency (SASSA).

During April 2004, the Minister of Social Development entered into a memorandum of understanding with provincial members of the executive council (MECs) in terms of which the provinces would continue with the administration and disbursement of social grants on behalf of the national department,²⁶ while SASSA was being fully established as a national public entity.²⁷ SASSA began operating in April 2005; however, the full transfer of functions and staff to SASSA was scheduled to be completed by March 2006, according to the Department of Social Development's 2006–2009 strategic plan.²⁸ This was to be followed by the phased-in integration of all SASSA regional offices.²⁹ But according to a statement dated 11 May 2006, SASSA successfully took over the responsibility, administration and delivery of social grants in Gauteng, Northern Cape and Western Cape from 1 April 2006.³⁰

CHILD SUPPORT GRANT (CSG)

The CSG is a monthly cash grant paid to the primary caregiver of a child living in poverty. 'Poverty' is judged by a means test based on the income of the primary caregiver and spouse. The number of CSG beneficiaries in the 2006/7 financial year is 7,212,285.³¹ When it was introduced in 1998, the CSG had a cash value of R100 and was available in respect of children six years and younger.³²

Two income thresholds were put in place for the CSG means test. For children living in rural areas or in informal settlements in urban areas, a cut-off of R1,100 for a joint monthly income was set.³³ Thus, if the income of the primary caregiver and spouse was less than R1,100, the child was eligible for the grant. A lower threshold of R800 a month applied to caregivers of children living in urban areas if their homes were formal (made of bricks).³⁴ This was decided on the basis that formal households have better access to resources than those in rural areas, informal settlements or backyard shacks.³⁵

The income thresholds for the CSG means test have not changed since 1998. However, both the amount of the grant and the age criteria have changed over the years. From April 2006, all children under 14 have been eligible and the value of the grant is now R190 per child per month, a rise that has kept pace with inflation.³⁶

WEAKNESSES IN CSG POLICY

- The CSG is currently not available to children aged 14–18 years living in poverty.³⁷ Thus children living in poverty who turn 14 become ineligible for the grant, despite the fact that their circumstances may be exactly the same.
- Primary caregivers who are under the age of 16 cannot apply for the CSG in respect of children in their care.³⁸
- The number of CSGs available to one caregiver is limited – CSGs may not be drawn in respect of more than six non-biological children.³⁹
- The CSG means test has not kept pace with inflation.⁴⁰ Researchers at the Children's Institute have calculated that in 2005, caregivers had to be 50% poorer than they were in 1998 to qualify for the grant.⁴¹ Their study found that in a section of Khayelitsha, 40% of children under 14 who were not eligible for the grant under the current criteria would have been eligible if the income threshold in the means test had kept pace with inflation.⁴²
- The cost to government of applying the means test has been conservatively estimated by University of Cape Town researchers at R18 per applicant.⁴³ For applicants, however, the cost of the means test has been estimated at R25,⁴⁴ essentially operating to exclude those most in need.

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- The CSG means test does not take into account the number of children living in a household (i.e. household income per child is not taken into account). Thus caregivers who earn slightly too much for the grant and who may be carrying the burden of caring for many children, may be excluded from the grant.⁴⁵
- A study has found that just over 20% of children nationally who should be receiving the grant, are not.⁴⁶ This raises questions about the efficacy of this or any means test.
- Documentation requirements are frequently burdensome, especially where access to home affairs or marriage registers is difficult.⁴⁷

FOSTER CARE GRANT (FCG)

The FCG is payable to a foster parent in respect of a child 'in need of care' who has been legally placed in the custody of the foster parent. A 'foster parent' means a person, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law.⁴⁸ The FCG is thus inextricably intertwined with the foster care system. Foster care is quintessentially a 'child protection' response in situations where children cannot be adequately protected in their homes and must be removed and placed in foster care by the state. As the FCG is dependent on the income of the child and not of the foster parent (see below), a foster care placement is usually accompanied by a FCG. In other words, the majority of children in foster care will also have a grant paid to their foster parent.

Foster placements currently take place through the provisions of the Child Care Act 74 of 1983; however, the act is to be repealed by the Children's Act No. 38 of 2005, which was assented to on 8 June 2006, but the date of commencement has yet to be proclaimed. Consequently the Child Care Act provisions remain in force at the time of writing concerning foster placements. There were an estimated 351,735⁴⁹ beneficiaries of the FCG in the 2006/7 financial year. This grant therefore reaches less than one-twentieth of the number of children reached by the CSG. The amount of the grant is currently R590 per month, which is just over three times the CSG amount. Sections 13–15 of the Child Care Act provide for placement in foster care of 'children in need of care'. A child is in 'need of care' in terms of section 14 of the 1983 Child Care Act (still in force) if s/he has no parent or guardian, or they cannot be traced, or if s/he:

- has been abandoned or is without visible means of support;
- displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;
- is in a state of physical or mental neglect;

- lives in circumstances likely to cause or lead to his or her seduction, abduction or sexual exploitation;
- lives in or is exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
- has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
- is being maintained in contravention of section 10 of the Act, which provides for the maintenance of children apart from their parents under certain conditions only.⁵⁰

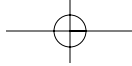
The last few points were introduced into the Child Care Act as late as 1996, while the explicitly worded provisions of the section which referred to abuse and neglect of a child, as usually understood, were removed.⁵¹ The current wording emphasises the condition of the child rather than the treatment by the parent or guardian. In comparison, section 150 of the Children's Act replicates the current provisions with minor changes,⁵² and indicates that placement in foster care is one of the orders a court may make if a child is found to be in need of care or protection.⁵³

The FCG, like the CSG, is subject to a means test.⁵⁴ However, in contrast to the CSG, the means test applies to the *child's* income and the threshold provided for in the means test changes as the amount of the grant changes. The FCG means test states that the grant is not payable if the income of the child exceeds twice the annual amount of a foster care grant.⁵⁵ So, at present, if the child's annual income is less than R14,160, the foster parent will be eligible for the grant, regardless of such foster parent's income.⁵⁶ The foster parent remains eligible for the FCG as long as the child is legally in his/her custody.⁵⁷

Currently, placements in foster care are made for two years at a time with ongoing monitoring by social workers, and a renewal process is necessary in order to extend the placement and thus the foster grant.⁵⁸ The Children's Act also provides that an order of foster placement will lapse after two years, unless extended by the court.⁵⁹ The FCG is payable until the end of the calendar year in which the child turns 18,⁶⁰ unless the child is still completing secondary schooling, in which case the grant is payable until the age of 21.⁶¹ However, the Children's Act provides that no court order for a foster placement may extend beyond the child's 18th birthday.⁶²

WEAKNESSES IN FCG POLICY

The weaknesses and problems of the FCG have been thoroughly investigated by the Children's Institute, and a summary of their conclusions appears below.



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- **The child protection functions of foster care placement have been diluted, seriously affecting the ability of the state to intervene in situations where children are being victimised in their homes.**

The use of foster care as a poverty alleviation mechanism for orphans and their caregivers detracts from the real purpose that the foster care system serves in the protection of particularly vulnerable children. The continued implementation of this approach stands to reduce the effectiveness of the foster care system to meet the needs of children who require the State to intervene in their care arrangements; for example, children who have been abused, neglected or who require temporary removal from their families.⁶³

- **At the same time, with the statutory nature of the FCG being temporary and focused on child protection, its widespread actual application as a poverty alleviation mechanism with respect to kinship care foster placements is not adequately served.**

Meintjies et al of the Children's Institute argue that a foster care placement:

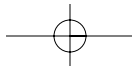
is generally associated with child protection practices, including removal of the child from his or her home context and ongoing monitoring of the placement. Provisions made in the Child Care Act for placements are based on the notion that they are temporary, and that the child will return, after the provision of 'family reunification services', to the care of his or her biological parent(s).⁶⁴

This is made explicit in the South African Law Reform Commission discussion papers accompanying the Children's Bill:

Within the formal child care system in South Africa, foster care is normally considered to be the preferred form of substitute care for children who cannot remain with their biological families and who are not available for adoption.⁶⁵

In practice, Meintjies et al argue that the FCG has become a poverty alleviation mechanism particularly aimed at children who have been orphaned as a result of the HIV/Aids epidemic.⁶⁶ Families of orphaned children seek the FCG not only because it is far more valuable than the CSG, but also because it is claimable after the child is no longer eligible for the CSG. Meintjies et al conclude therefore that:

with its application to orphans and their caregivers, the purpose of foster care placement is *de facto* shifted from one of child protection to one focused on poverty alleviation. This will increasingly be the case as the AIDS pandemic progresses, unless alternative policy is instituted.⁶⁷



- **By placing a monetary preference on non-biological children, the FCG creates an inherently inequitable system of poverty alleviation.**

This is because, as mentioned, the CSG is worth less than a third of the FCG and is only available in respect of children up to the age of 14; furthermore, it is means tested in relation to the primary caregivers' income. Meintjies et al argue that children eligible for the CSG may be just as in need (of money rather than parental care) as children eligible for the FCG and conclude that:

The State providing support to poor relatives to care for children, without providing adequate and equal support to biological parents living in poverty to care for their own children, is questionable. Such a system ... is inequitable. ... The question that needs to be asked of the current provisions of these two Acts, and the Bill in progress is why, in the context of widespread poverty, children in the care of relatives should require special grants different to children living with biological parents? Why should children in the care of people other than their biological parents qualify for considerably longer (up to the age of 18 vs. up to the age of nine in 2003, progressively to 14 by 2006) for a (more substantial) grant ... than poor children in the care of their parents? Why is the poverty of children living with relatives considered more of a priority than the poverty of children living with their parents?⁶⁸

- **The FCG does not support the South African reality of informal fostering or 'social parenting', which is characterised by high mobility of both children and caregivers.**

Meintjies et al conclude that:

Thinking in these terms of 'social parenting' – and its likely increased role in the context of the AIDS pandemic – one particular aspect of foster care as defined in the Child Care Act (and replicated in the current draft of the Children's Bill) could have negative social repercussions if applied broadly to children experiencing orphanhood: statutory foster care 'placements' require children to remain resident with the person to whom foster parent rights are granted by the courts. It is illegal for a fostered child to be shifted into the care of an alternative caregiver without going through a legal transfer process (Child Care Act, s. 34).⁶⁹

Indeed, research alluded to by Meintjies et al found that in some isolated instances the FCG may even lead to 'reluctant mobility', whereby biological parents *voluntarily* give up custody of their children in order that the FCG may be accessed in respect of the child via a kinship care foster placement.⁷⁰

- **The FCG requires two processes (foster care placement, followed by FCG application), which increases the associated cost and time taken before the**

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FCG is granted. The foster care placement part of the process, in particular, leads to the most delay.

Research conducted by Meintjies et al found that:

Turnover time for foster placements – from the point of application to the granting of a court order – was said to vary in the urban sites from roughly six months to 18 months, depending on social work backlogs and on whether people had the correct supporting documents at the start of the process (a frequent problem). In the rural sites, where there were fewer social workers and no dedicated children’s courts (and instead only a few hours per week – if that – allocated to children’s cases), it could take even longer.⁷¹

The FCG is thus consuming a disproportionate amount of social workers’ time.

The facilitation and monitoring of legalised foster care placements for orphan children was not only by far the most widespread response on the part of social workers in all the research sites to dealing with children who had lost parents, but also the activity that consumed the bulk of their time. This is not surprising in the light of the State’s emphasis on formal fostering as a response to orphans, the large – and increasing – numbers of applications from caregivers caring for children who qualify on the basis of their orphanhood for foster placement, and the lack of alternative poverty relief mechanisms provided by the State for children in general.⁷²

- **FCGs do not, and increasingly will not, reach the majority of children who are eligible in terms of the law and policy due to the huge demands placed on the system by kinship-care placements.**

[T]he numbers of foster care applications in many parts of South Africa already far exceed social workers’ capacity to process them. If one considers the predicted number of orphans that the country will face ... it is clear that social welfare and court capacity and resources are utterly inadequate. Thus, if the State is to enable and encourage the use of the foster care system – or, in terms of the draft Children’s Bill, ‘court-ordered kinship care’ placements of these children to provide poverty relief or even to address issues of their legal guardianship ... – it is likely to create further bottlenecks in an already severely over-burdened and cumbersome social work (in particular) and children’s court system, and to continue to fail to reach vast numbers of vulnerable children and their families who need material support.⁷³

CARE DEPENDENCY GRANT (CDG)

The CDG is available to caregivers (including foster parents)⁷⁴ on behalf of children up to the age of 18 who have severe mental or physical disabilities for which they

need 'permanent home care'.⁷⁵ In order to qualify for the grant, a medical officer must certify the child as a care-dependent child.⁷⁶ The CDG is means tested on the basis of the caregiver's household income, unless the grant is in respect of a foster child, in which case the income of the child must not exceed twice the annual amount of the FCG to ensure eligibility. The grant can be extended to beneficiaries to the age of 21 if they are still at school. The value of the grant from April 2006 is R820 per month per child. The estimated number of beneficiaries in the 2006/7 financial year was 79,358.⁷⁷ The care-dependent child must:

- remain in the care of the parent or foster parent;
- have accommodation;
- be fed and clothed;
- receive care and stimulation services;
- receive medical and dental care; and
- be evaluated by an education authority for attendance at a specialised school at the age of six years.⁷⁸

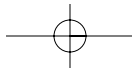
WEAKNESSES IN CDG POLICY

Guthrie et al⁷⁹ have identified various shortcomings of the CDG, some of which are summarised below:

- **The CDG is only available from when the child reaches the age of one. Children under the age of one with mental and physical disabilities are excluded.**
- **The ambit of the CDG is limited and does not include children with chronic illnesses such as HIV/Aids or those with milder disabilities, and does not take into account needs arising from the disability.**

With regard to HIV/Aids, only those who are very ill are likely to qualify for the CDG. Guthrie et al explain:

The purpose of the CDG should [be] ... to meet the extra needs of the child due to the illness or disability ... Eligibility criteria should be determined by the need resultant from the particular disability or illness, and not dependent on the nature or severity of the disability or illness ... Currently the CDG benefits only severely disabled children permanently at home, and does not cater for the many others with milder disabilities, or those in day care



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facilities ... These children have many additional needs and expenses and caring for them constitutes a large burden on the family's resources.

There are many children who are not in receipt of the CDG and who attend state subsidised special schools, yet require special home care after school hours and during the school vacation. There are no policy guidelines for special after care.

Currently the assessment is on purely medical grounds. It should also take into account the costs of the required medical treatment, the level of care required (hours and intensity), the cost of assistive devices, specialised clothing and nutritional needs, transport costs and the need for special schooling.⁸⁰

- **The CDG policy suffers from a lack of clear and appropriate definitions:**

There are problems identifying what constitutes 'permanent home care'... There is lack of clear definition between non-disabling or intermittent chronic illnesses and those that lead to disablement.⁸¹

- **Disability is subjectively assessed, which may lead to inconsistency in application of the CDG:**

Due to the unclear eligibility criteria, the assessment test can be highly subjective and open to the personal interpretation of the Medical Officer. There is lack of training and guidelines in the assessment procedure ...⁸²

- **There is a lack of clarity and uniformity regarding aspects of eligibility:**

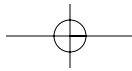
It is extremely difficult for caregivers (non-parents and 'nonformal' foster parents) to access the grant. ... There is a lack of clarity regarding the eligibility of children in daycare centres or [learners with special educational need] schools for the CDG, and there exist differing practices among different provinces ... There is a lack of clarity with regard to foster parents receiving a foster grant as well as receiving the CDG. Some provinces do allow receipt of both grants.⁸³

- **There are problems with the means test:**

[W]hile means-testing enables targeting of the poorest quintiles, in practice it is rarely used correctly, is administratively demanding and has been reported as demeaning.⁸⁴

DISCUSSION

While a number of studies have shown that social assistance has alleviated



poverty (but not inequality), millions of children continue to live in poverty and are at risk from a social crime prevention perspective. Furthermore, the current social grant system does not appear to give effect to government's commitment in signing the UN Convention on the Rights of the Child 'to recognise the right of the child to benefit from social security'. Millions of children who are poor are not able to benefit from the current grants framework: the right to benefit from social security is not recognised for children aged 14–18 years, who are neither disabled nor in foster care.

Creamer has argued that the 'progressive realisation' of the 'qualified' socio-economic right to social assistance is distinct from the 'unqualified' right of children in need to basic shelter, nutrition, health services, social services and education contained in section 28 of the South African constitution.⁸⁵ Creamer argues that children in families that cannot afford basic services could be considered to have a direct and immediate claim for these basic rights.⁸⁶

Budlender agrees that on 'plain reading', section 28 rights are not qualified by progressive realisation, and the 'correct understanding is probably that if the parents are not able to provide, and the state does not do so, then the state is in breach of its constitutional obligations'.⁸⁷ However, Budlender notes that any remedy a court might provide if the issue were litigated would be tempered by deference to the executive, and the acknowledgement that rights such as these cannot be realised 'overnight'.⁸⁸ Subsequently, the Constitutional Court in the case of *Khosa*⁸⁹ opined that the constitution mandates special protection for children, and therefore the denial of the child support grant (in *Khosa* to non-citizens) infringes on children's rights to 'basic nutrition, shelter, basic health care services and social services'.⁹⁰ The Court furthermore found that the cost in this case of including the excluded group (permanent residents) was small in relation to the amount allocated to grants.⁹¹ The exclusion was therefore not reasonable and not a justifiable limitation of rights.⁹²

Would it be reasonable to extend the CSG to all children now? The CSG is set to reach more than 7 million children during 2006; at the current rate of R190 a month or R2,280 a year, the CSG transfers alone (excluding administrative costs) will cost the government about R16 billion in 2006. But the Alliance for Children's Entitlement to Social Security (ACCESS) estimated that during 2005 some 2.5 million children aged between 15 and 18 were living in 'dire poverty'.⁹³ An extra 2.5 million CSG beneficiaries would cost a further R5.7 billion for the grants alone. To place this in perspective, the social transfers budget is already projected to increase by more than R5 billion from 2006 to 2007.⁹⁴ Government would argue that its plan for progressive realisation of the right is not unreasonable and children's rights not unjustifiably limited. But the state is nevertheless failing in its obligation to children aged 14–18 whose parents are unable to provide for their basic rights.

Children who are in foster care do not have their social assistance terminated at age 14; however, the notion of the 'child in foster care' has changed radically

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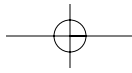
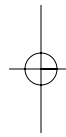
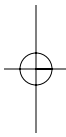
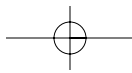
from one of 'last resort' in situations of child abuse and neglect, to one which encompasses situations of kinship care where parents are unable to care for their children as a result of death or disease. The attempt to cover children in such situations has clearly led to the overburdening of the system, to the subsequent detriment of children in need of protection from serious abuse and neglect.

In fact, Dr Jackie Loffel has argued that the child protection system and the foster care system are in danger of collapse. The huge demand for foster care, particularly kinship foster care, has been linked to the termination of the CSG at age 14, the greater financial value of the FCG compared to the CSG, and the very different applicable means tests in a context of profound, widespread poverty.

Adjustment of the CSG means test and extension to age 14 may reduce some of the demand on the foster care system. Adjustment downward of the amount payable to kinship care foster placements (or upward of the CSG) may also be called for, as there is a strong equality argument: why should children living with foster parents be better provided for by the state than children living with parents who, due to poverty, are not able adequately to provide for their needs? Is this a justifiable limitation of the right to equality?

Lastly, that the CDG requires children with HIV to be very ill before it is payable creates perverse incentives. The CDG currently reaches about 80,000 children, while HIV prevalence among children is estimated at 360,000.⁹⁵ Proper care of HIV-positive children requires, at the least, adequate nutrition and transport to medical facilities. In particular, HIV-positive children over the age of 14 living in poverty who have not yet developed AIDS may not only be without any financial support to assist them in maintaining their health, but may also drop out of school for financial reasons (see Chapter 3).

In conclusion, the existing three-grant framework does not appear equal to current realities. Adjustments to the framework and to the rules applicable to the current grants in the context of widespread poverty and high HIV prevalence among caregivers (HIV prevalence in pregnant woman was 28% in 2005) are required. Children in families beset by poverty and disrupted by disease are susceptible to crime and to becoming involved in crime. A key component of social crime prevention – poverty alleviation – is not adequately in place, which in turn is contributing to poor health conditions and poor schooling, which creates further risk factors of both victimisation and offending.



CHAPTER 3

Health policy for children

INTRODUCTION

Social crime prevention research indicates that inadequate health conditions are risk factors for the victimisation of children. The mechanism by which health and crime are correlated may relate to a number of factors, including the fact that caregivers coping with disease may struggle to properly supervise small children, while older children may be required to assume responsibilities that place them at risk.

Children who are sick may place a drain on caregiver resources, with the result that caregivers may leave children unattended while working or seeking work. In South Africa, stigmatisation of HIV/Aids may also lead to victimisation of both children and adults who are ill because communities may fear they are vectors of disease. The need to travel long distances to access health care may also place children at risk. Chronically ill children may also not be able to attend school, which is in itself a further risk factor for both victimisation and offending.

Furthermore, the safety of children is directly affected by health policy. Not only can properly implemented child health policy prevent illnesses among children, but where illness and injury do occur, appropriate child health policy can see to it that children recover. The most important aspect of child health policy in the context of poverty is policy concerning access to health care. This chapter therefore explores the extent to which current health policy ensures adequate access to health care in the context of poverty, as well as the extent to which child health policy is meeting children's health needs.

Solarsh and Goga argue that there is good evidence to suggest that a child health transition associated with improvements in child survival and reductions in disease burdens due to infectious and nutritional disorders, was already well established in South Africa by the mid 1990s.⁹⁶ However, there have been recent increases in mortality and morbidity of children. These increases, they argue, are largely attributable to the HIV/Aids epidemic. Consequently, they argue that programmes for the prevention of mother-to-child transmission (PMTCT) of HIV, followed by interventions effectively to manage HIV-positive children, remain the

best option to reduce infant and child mortality in South Africa.⁹⁷ However, as programmes to reduce mother-to-child transmission of HIV take effect, Solarsh and Goga further argue that programmes to improve the quality of child survival will become increasingly important. Specifically, programmes that tackle child abuse, neglect and the causes of childhood disabilities, including accidents and injuries, should become priorities even as the agenda of infectious diseases and under-nutrition continues to be addressed.

This 'unfinished agenda' is linked to poverty, as poverty has a direct impact on infectious diseases and under-nutrition. Poverty is also relevant in the discussion on the quality of child survival and access to health care – indeed, in the context of widespread and deep poverty, access to health services becomes a crucial issue.

CHILDREN'S RIGHTS TO LIFE, HEALTH AND ACCESS TO HEALTH CARE

The South African government ratified the UN Convention on the Rights of the Child in 1995. A number of the state obligations contained in the convention are relevant to child health, including the right to state care in the absence of parental care, the right to life and the right to health, which includes the right of access to health services.⁹⁸ The latter provision includes an obligation on state parties to take measures to reduce infant and child mortality.

Children's socio-economic rights are contained in section 28 of the South African constitution. This section includes the right to basic health care services – section 28(2)(c): *'Every child has the right to basic nutrition, shelter, basic health care services and social services.'*

The right is not expressly limited by the 'progressive realisation' and 'limited resources' principles that have developed out of the general socio-economic rights contained in section 27(2). This means that government has an obligation to ensure children's right to basic health care services. This is a reality now for all South African children (see Chapter 1).

CHILD HEALTH POLICY

The Reconstruction and Development Programme (RDP) policy introduced key aspects of current child health policy, in particular, free treatment for children under the age of six at clinics and health centres:⁹⁹ *'Health care for all children under six years of age, and for all homeless children, must immediately be provided free at government clinics and health centres.'*¹⁰⁰

This RDP commitment has been expanded to include primary health care for those older than six. Primary health care, however, does not include treatment in hospitals. Adult patients and children older than six who do not have disabilities and who are treated in government hospitals are charged according to a tariff called the Uniform Patient Fee Schedule (UPFS), unless the service is designated as free.

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A range of services are free to all patients at public health facilities, including hospitals (the first three have been legislated for and the remainder are provided for by regulation):

- Health care services to pregnant women and children under the age of six (includes all *available* public health services), unless the patient is a member or dependant of a medical scheme.¹⁰¹
- Primary health care services, unless the patient is a member or dependant of a medical scheme.¹⁰² Primary health care includes treatment with medicines on the Essential Drugs List.
- Termination of pregnancy services in terms of the Choice on Termination of Pregnancy Act.¹⁰³
- Examination services in terms of the Criminal Procedure Act relating to allegations of assault and rape; post mortems and attendance at the administration of corporal punishment by the police and in prisons.¹⁰⁴
- Treatment services ordered by court in terms of the Child Care Act.¹⁰⁵
- Examination services of persons with mental disorders for medico-legal purposes, and mentally disturbed patients admitted to psychiatric hospitals in terms of the Mental Health Act.¹⁰⁶
- Certain services relating to the following infectious, 'formidable' and notifiable diseases: venereal diseases (excluding complications) on outpatient basis only; pulmonary tuberculosis; leprosy; cholera; diphtheria; plague; typhoid and paratyphoid; haemorrhagic fevers; meningococcal meningitis; HIV/Aids (only the initial diagnostic procedures and attendant laboratory services are free if patients specifically ask for the HIV test to be done. Patients requiring treatment must pay an amount assessed at the prescribed tariffs).¹⁰⁷
- Malnutrition and pellagra (treatment only).¹⁰⁸

Primary health care is therefore free for all patients, except those on medical schemes. However, the Medical Schemes Act 131 of 1998 provides that any benefit option provided by a registered medical scheme must cover in full the diagnosis, treatment and care costs of certain specified conditions.¹⁰⁹ These are called prescribed minimum benefits and are listed in Annexure J to the UPFS. The state thus specifies the minimum conditions and treatments to be covered by a private medical scheme.

The UPFS sets a tariff according to the income of the patient, the level of

hospital providing the treatment, and the category of medical staff providing the treatment. According to the UPFS, patients who receive social pensions or who are formally unemployed are classified 'H0' and can get all health services free of charge. Patients must provide documentary evidence that they fall into this category. Those who have never been employed cannot provide documentary evidence of unemployment. Unemployed persons are issued with Unemployment Insurance Fund cards if they have paid into the fund during formal employment (including domestic work) and subsequently become unemployed. Other patients with low incomes are partially subsidised in categories 'H1' and 'H2'. The default classification for someone without an income is H1, not H0. Those who have an income of more than R72,000 for a single person or R100,000 for a family must pay the full UPFS fee (H3).

There are four UPFS income categories of patients in public hospitals:

- Full subsidisation H0 – recipients of social grants and the formally unemployed.
- Partial subsidisation H1 – less than R36,000 single income or less than R50,000 family income per year.
- Partial subsidisation H2 – between R36,000 and R72,000 single income or between R50,000 and R100,000 family income per year.
- No subsidisation H3 – more than R72,000 single income or R100,00 family income per year.¹¹⁰

The amount charged per income category (H1, H2, H3) also depends on the level of hospital (levels 1 to 3) and the type of professional (e.g. nurse or specialist) providing the service. For example, the 2005 UPFS inpatient fee in an intensive care ward for an H1 patient per 30 days is R25 in a district hospital, but R70 in a tertiary hospital.¹¹¹ An H1 outpatient general practitioner consultation is R10 while a specialist consultation is R25 (plus the relevant facility fee of R20 in a district hospital).¹¹²

Apart from the commitments to free health care for children under six and free primary health care, a number of structural, policy and programmatic strategies have also been put in place by government in relation to child health. South Africa has a National Programme of Action for children (that includes child health), which is coordinated through the Office on the Rights of the Child in the President's Office.

Dedicated maternal, child and woman's health directorates have been formed at a national and provincial level, along with several parallel programmes that address child health issues. Efforts to improve the delivery of services to children include the Integrated Management of Childhood Illness (IMCI) programme,

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PMTCT, a policy on school health services, youth and adolescent health policy, mental health policy and others. A detailed exposition of all health policy relevant to children is, however, beyond the scope of this paper.¹¹³

The key national child health strategy for reducing mortality and morbidity of children is the IMCI programme. It has three intervention areas, namely:

- improving the skills of health care personnel managing children in the use of case-management guidelines that address the most important causes of mortality and morbidity in young children;
- strengthening the health system (equipment, supplies, communication and referral systems); and
- improving household, family and community behaviours to facilitate and promote child health and development.

The programmes which link with or are encompassed by the IMCI strategy include PMTCT, the Perinatal Problem Identification Programme (PPIP), the Expanded Programme on Immunisation (EPI) and the Integrated Nutrition Programme (INP). Government has also aligned itself with international processes and goals for children. The most recent was the adoption of the Millennium Development Goals, which require South Africa to reduce infant and child mortality by two-thirds before 2015 and to halve infant and child malnutrition.

Despite these commitments, policies and interventions, child health indices have systematically worsened over the past few years. What policy weaknesses are contributing to the worsening of child health?

WEAKNESSES IN CHILD HEALTH POLICY

The central weaknesses in current child health care policy are discussed in brief below.

- **Primary health care services are unable to meet current demand. Shortages of nursing staff and medicines have become the main issues.**

The state has attempted to ensure access to health care services through the complicated policy described above, which combines some free services, some paid services on a sliding scale related to income, as well as reliance on private provision through medical aid schemes. Research by the Children's Institute in 2006 found that the majority (60%) of poor children who needed health care did indeed have access to a public health facility.¹¹⁴ Some (15%) went to private general practitioners, but the majority accessed public sector health facilities.¹¹⁵ Free health care at primary level facilities was found to work well and was applied

as envisaged in the policy, in that the services were provided free of charge.¹¹⁶ Consequently, difficulties identified by the Children's Institute as experienced by patients were mostly related to overburdening of the system, the attitudes of nurses towards the patients, as well as long waiting times at facilities, which sometimes resulted in patients being turned away.¹¹⁷ Patients also reported that the required medicines are not always available (even basics such as infant formula and painkillers), with the result that patients choose to pay for care in the private sector, using money that would otherwise have been used for food or education.¹¹⁸

- **There is a lack of accessible, affordable transport to and from health care facilities, which is inhibiting access to health care.**

The Children's Institute research found that the availability of health facilities was a problem in rural areas.¹¹⁹ Transport and the money it requires to get to hospitals and clinics are major factors for poor rural households.¹²⁰ For mothers of older children who are seriously ill, the distance to a clinic is vitally important, as is the availability of money to transport a child when sick.¹²¹

- **Free health care policy in hospitals is not applied consistently or appropriately.**

At hospital level, the Children's Institute research showed that the free health care policy is not applied consistently and correctly at all times, with some children who should not have been charged actually being charged for health care.¹²² A further problem is that the default classification of H1 places the burden of proof on poor families with older children to prove their indigent status and requires a large administrative system to follow up on unpaid fees, which may not be worth the small amounts charged in some instances.¹²³

- **Child health is not prioritised outside the health sector.**

Shung-King has argued that the health of children in South Africa remains poor and may be deteriorating because the majority of factors which impinge on children's health fall beyond the domain of the formal health sector, where the majority of child health policies are located.¹²⁴

There is little or no child-specific focus or prioritisation when central budgets, and non-health sector plans are developed, quite contrary to the spirit and letter of the Convention on the Rights of the Child and the South African constitution, which urges us to 'put children first' and 'in every matter concerning the child to consider the best interest of the child'.¹²⁵

Shung-King points out that despite the strong link between life-threatening illnesses and lack of basic amenities such as water and sanitation, no local government integrated development plans and none of the plans of the

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departments responsible for water, sanitation and housing take indicators of child health into account when planning the distribution of resources and services.¹²⁶ Indeed, Shung-King argues that even within the health sector, inter-sectoral issues are largely deferred to the Children's Bill (now the Children's Act). The Children's Act, which has not yet officially come into force, provides simply that

all organs of state in the national, provincial and, where applicable, local spheres of government involved with the care, protection and well-being of children must co-operate in the development of a uniform approach aimed at co-ordinating and integrating the services delivered to children.¹²⁷

Original drafts of the Children's Bill provided for a more comprehensive National Policy Framework.¹²⁸

- **Focus on comprehensive primary health care has undermined child health care.**

Shung-King argues that the health policy focus on comprehensive primary health care has undermined health care, especially preventative care, for children.¹²⁹ She bases her contention on preponderant anecdotal evidence, which suggests that prevention and health promotion initiatives for children, such as developmental screening, nutrition programmes, the EPI and PMTCT programmes are, in practice, neglected in favour of curative and adult health activities.¹³⁰ For example, in the Children's Institute research, nurses describe how immunisation coverage has dropped: the introduction of the free primary health care policy has meant that nurses are no longer able to leave in-clinic queues to do home or crèche visits. As a result, children are not immunised because working mothers cannot bring the children to the clinics.¹³¹

In the quest for comprehensive primary health care, the very fundamentals of the Primary Health Care approach as it pertains to children have been undermined. A mass of anecdotal evidence suggests that crucial prevention and health promotion interventions for children are neglected in lieu of curative and adult health activities. Important programmes for children such as developmental screening, nutrition programmes, EPI and the PMTCT are not adequately implemented. Only one province in the country has a programme for developmental screening of children. Research in the Mount Frere area reveals a serious lack of knowledge among frontline health workers concerning the management of malnourished children in hospital. A rapid situational analysis of clinics in 2002 that looked at key interventions for children with HIV, gave a picture that is probably true for many other child health interventions. The study showed that only 35% of clinics reported administering Vitamin A, only 20% of clinics knew what the correct protocols were for prophylactic and support programmes for children with HIV, and only 4% of clinic respondents knew the correct dosage for

Cotrimoxazole. This points to a potentially huge knowledge gap around child health issues at primary level, as well as an inability to deliver the most basic child health interventions.¹³²

- **Lack of a clear strategic plan for child health within health services.**

Shung-King argues that there is no clear national strategic plan for child health that is capable of ensuring the integration and coordination of child health issues throughout the health system.

Policies and programmes are developed in piecemeal fashion with each component of child health services competing for attention with many others. Systemic health policies and plans often do not consider children's issues in a systematic and child-orientated fashion.¹³³

DISCUSSION

Health is a crime prevention issue, but it is also central to child survival. Clearly, free health care at the primary level is an appropriate policy in a context of widespread and deep poverty. However, the key challenge is to ensure that within the policy of free primary health care, there is sufficient budget and staffing for preventative health care activities, which appear to have become somewhat neglected. Furthermore, it has become apparent that barriers to accessing health care now revolve around factors such as availability of staff and medicines, and, crucially, a lack of safe, affordable reliable transport to health care facilities has emerged as a key issue.

While the precise ambit of 'basic' remains undefined in terms of children's unqualified right to basic health care (despite the free primary health care policy), many children are not even receiving primary care. Innovative ways of bringing health care to children, such as peripatetic doctors and nurses who visit schools and communities, may be required.

Recognition at policy level that children living in poverty are more susceptible to ill health due to factors such as poor sanitation and a lack of clean water, is also required. This strongly suggests the need for an overarching policy document which speaks to the roles not only of the Department of Health but also of entities responsible for services such as transport and sanitation, because these are closely connected to ensuring the health and safety of children. Also required is an integrated document which brings together in a holistic fashion the many health policies applicable to children. Lastly, inconsistent application of fee policy at hospital level suggests there is a need to reassess the policy – at least with respect to children.

CHAPTER 4

Education policy for children

INTRODUCTION

Good schooling is internationally recognised as a protective 'resilience factor': children who have good schooling are more likely to succeed in life and less likely to become involved in crime;¹³⁴ poor schooling is also a risk factor for victimisation of children. Education policy therefore becomes relevant not only for the safety of individual children by providing them with resilience, but also in helping to prevent victimisation of children.

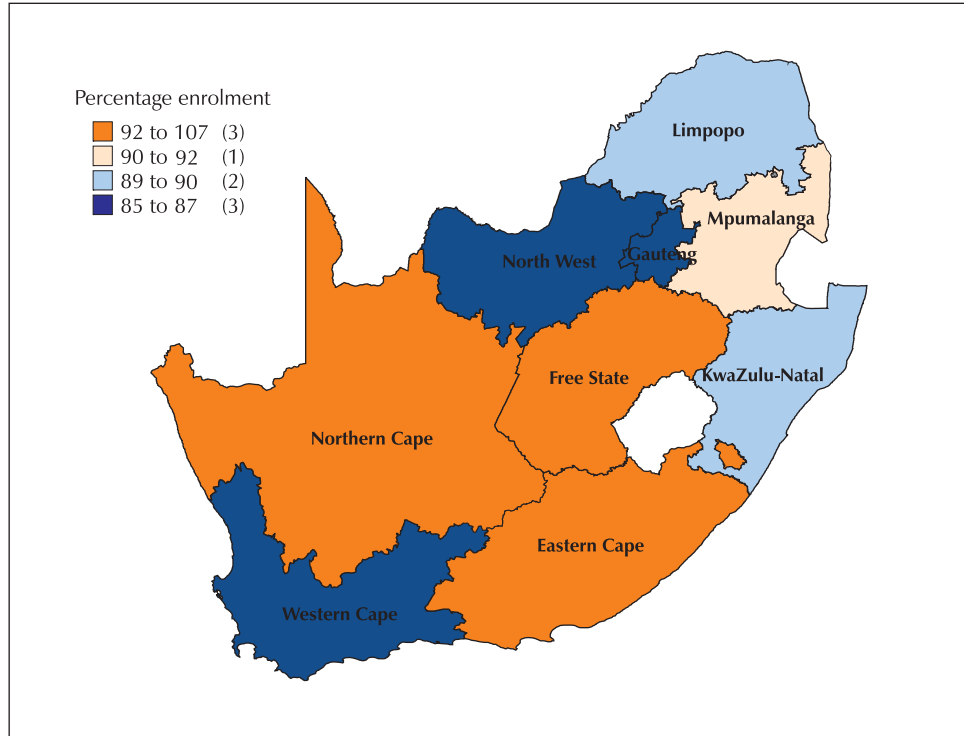
Apart from its role in crime prevention, education is a fundamental right. In the context of poverty, education funding policy is central to assuring that right. The first goal of education policy must therefore be to ensure that children have access to education. Education funding policy is key to ensuring access to education – and also key to the quality of education, as is discussed below.

CHILDREN'S RIGHT TO EDUCATION

The right to basic education in the South African constitution is a basic right, which unlike the rights to social security is not subject to the 'progressive realisation' and 'available resources' clauses. The right to basic education is subject only to the general limitations clause. The right is also available to everyone, not just to children. According to section 29(1) of the South African constitution: *'Everyone has the right (a) to a basic education, including adult basic education.'* Further education (which is not defined in the constitution) is, however, subject to progressive realisation and available resources. According to section 29(1)(b), everyone has the right 'to further education, which the state, through reasonable measures, must make progressively available and accessible'.

Article 28 of the UN Convention on the Rights of the Child provides that primary education should be available and free to all, while appropriate measures should be taken to make secondary education available and affordable to all.¹³⁵ The Millennium Development Goals include a commitment to achieving universal primary education by 2015.

Figure 2: Percentage enrolment of school-age children by province, 2004



Map created using data supplied in the Minister's Parliamentary Reply, November 2004.

EDUCATION FUNDING POLICY

The South African Schools Act¹³⁶ and the National Educational Policy Act¹³⁷ create a single system of education that regulates the funding of schools, school governance, disciplining of learners, and language and admission policies.¹³⁸

In terms of the South African Schools Act, school attendance is compulsory for all children between the ages of seven and 15 (unless the child has completed Grade 9).¹³⁹ Enrolment levels of school-age children in South Africa are relatively high (see Figure 2) by African and developing world standards. However, more than one million children of school-going age in South Africa are not enrolled at school.

Research (discussed further below) has shown that the fee-based school funding policy maintained after 1994 has been a significant barrier to education for children living in poverty. This is despite the fact that national policy provides for fee exemptions for children living in poverty.

Recently introduced policy now also provides for 'no-fee' schools; however, it has also been suggested that this policy is not adequately balanced against school funding norms and inherited inequities in capital infrastructure.

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WEAKNESSES IN EDUCATION FUNDING POLICY

- **Empirical evidence suggests that the requirement to pay fees operates as a significant barrier to public education for many children.**

Under the South African Schools Act, public schooling is funded from public revenue and is supplemented through school communities by charging fees or undertaking fundraising activities. The South African Schools Act also provides for a fee waiver for poor children, which is intended to ensure that they are not excluded from school. However, research has shown that the practice of charging school fees in public schools has led to the illegal exclusion of many poor children from these schools, and to an entrenchment of relative privilege in formerly white public schools.¹⁴⁰

Despite being legally prevented from excluding pupils on the basis of non-payment of fees (those unable to pay may apply for partial or full exemption), research conducted by the Centre for Applied Legal Studies,¹⁴¹ and independently by the Children’s Institute,¹⁴² shows that public schools regularly exclude pupils or discriminate against them on the basis of non-payment of fees or for not having school uniforms (which are compulsory in public schools). In November 2004, Minister of Education Naledi Pandor acknowledged the problem in a parliamentary reply:

[T]he exemption policy was not effective in certain instances and ... the policy was not being implemented in some schools. School principals were not informing parents of their exemption rights; and learners were being excluded from all or some of the school programmes, denied school reports, verbally abused, and textbooks were being withheld and attendance at school denied. Further, it was found that legal action, such as attachment of moveable and even immovable property, was being taken against parents without the school establishing if they (the parents) qualified for exemptions. In some cases parents had defaulted on small amounts of fees. The exemption policy was also not effective in regard to partial exemption. Schools refused to recognise the school education costs of other siblings. Moreover, in many cases additional costs were incurred by parents in regard to school uniform as well as other costs such as school excursions, textbooks, stationery and other school requisites. Often these other costs were not taken into account in the determination of exemptions.¹⁴³

This problem has led to a change in policy governing school funding and fee exemptions. To understand these recent changes it is necessary to discuss the prior situation. In the recent past, local school governing bodies (SGBs) made most of the decisions with regard to school fees, including the amount of fees to be charged. SGBs were also responsible for administering and controlling the use of fees for operating purposes – and for granting exemptions. Parent bodies were required to fully exempt parents whose income was less an 10 times the annual school fee (in other words, where the fee was equivalent to or more than a tenth

of income), and partially exempt those whose incomes were less than 30 times but more than 10 times the fee. Partial exemptions were granted at the discretion of the governing body.

However, if parental incomes are more than 30 times the fee (the fee is equivalent to or less than 3.3% of income), parents cannot qualify for any exemption. The regulations also provided for conditional exemptions, under which families can plead special circumstances either relating to a parent's ability to pay fees or ability to collect information about income.¹⁴⁴ Parents wishing to qualify for an exemption had to apply in writing, or in person if desired, and provide evidence of income, assets and liabilities, and other information requested by the SGBs.¹⁴⁵ Governing bodies had to render a decision within 21 days of the application, and if the governing body denied a request for exemption, parents had the right to appeal.¹⁴⁶

Although the exemption policy looked sound on paper, the exemption regulations did not work in practice. Some school principals were involved in exemption policy irregularities because they rely on school-user fees as their only form of discretionary income. The Children's Institute describes how this worked in practice:

Some principals who participated in the research were sympathetic to the poverty, sickness and hunger that prevented caregivers from paying fees, yet emphasised the necessity of obtaining school fees because they provide the only discretionary income the school has. This income is commonly used to maintain school buildings and services, pay electricity, water and telephone accounts and purchase equipment such as blackboards, chalk and paper. A principal of a school in Umzimkulu explained the dilemma they face: 'Our school relies on school fees for our own funds. We have electricity in the school but we must pay for electricity from our own funds. We cannot afford to run the school if no-one pays,' he said, a comment with which there was widespread agreement among principals across the research sites. The potential shortfall in discretionary funds thus appears to be at the centre of why many of the schools were aggressive in collecting fees.¹⁴⁷

Minister Pandor proposed changes to legislation to alleviate the problem in November 2004. She based her decision on the findings of the '2003 Review on the Resourcing, Financing and Costs of Education in Public Schools'. The review found that:

- parents unable to pay school fees were treated unfairly;
- schools came up with all kinds of 'hidden' expenses;
- schools discriminated against learners whose parents had not paid, or were unable to pay, school fees;

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- persons receiving grants on behalf of learners were not exempted;
- schools did not inform parents of their right to apply for exemption; and
- in some cases parents were taken to court unnecessarily and their property was seized because of the non-payment of school fees.¹⁴⁸

The review process and further consultation with various stakeholders culminated in the amendment of the South African Schools Act,¹⁴⁹ coupled with the new Amended Norms and Standards for School Funding¹⁵⁰ (the Amended Norms) and new Regulations Relating to the Exemption of Parents from Payment of School Fees.¹⁵¹

The Amended Norms will be implemented from 2007. In terms of these regulations, the Minister of Education will gazette the names of no-fee schools in each province. The national Department of Education allocates each school a poverty ranking, which is derived from national data on income levels, dependency ratios and literacy rates in the surrounding community. Overall, the policy aims to abolish school fees in the poorest schools for learners from Grade R to Grade 9.

A school is a no-fee school if it meets two conditions. First, it must fall within the poorest 'quintiles' (20%) of schools identified by the Minister of Education for exemption.¹⁵² In November 2004 the Minister spoke of the poorest 40% but it is not clear if 40% will be targeted in 2007. This will usually be the poorest 20%, but may include a portion of the next quintile as well. Second, the school must receive a more than minimum per learner allocation from the relevant provincial education department, which is termed a 'no-fee threshold'.¹⁵³ This is designed to ensure a minimum level of funding so that schools will not be disadvantaged by the removal of fee income in the absence of adequate provincial funding allocations. In 2007, the no-fee threshold is set at R554 per year, while the target per learner funding allocation for the poorest 20% of schools is set at R738.¹⁵⁴ In other words, a school in the poorest quintile which receives less than R544 per learner may continue to charge fees.

As the Amended Norms were not in force for the 2006 school year, a voluntary approach was followed: schools were requested by the provincial education departments to indicate if they wanted to be declared no-fee schools.¹⁵⁵ The latest data returns by provinces indicate that a total number of 7,687 schools with 2,556,550 learners chose to be no-fee schools in 2006.¹⁵⁶

Figure 3 (*next page*) shows the provincial variation in the difference between the number of learners in schools who volunteered to be a no-fee school in 2006, and the estimated number of learners who fall within the poorest 40% in that province.

Figure 3 shows that the Western Cape may already have exceeded its allocation while in other provinces many more learners will ostensibly be drawn

Figure 3: Difference between number of learners in voluntary no-fee schools during 2006, and estimated number of learners in poorest 40% by province

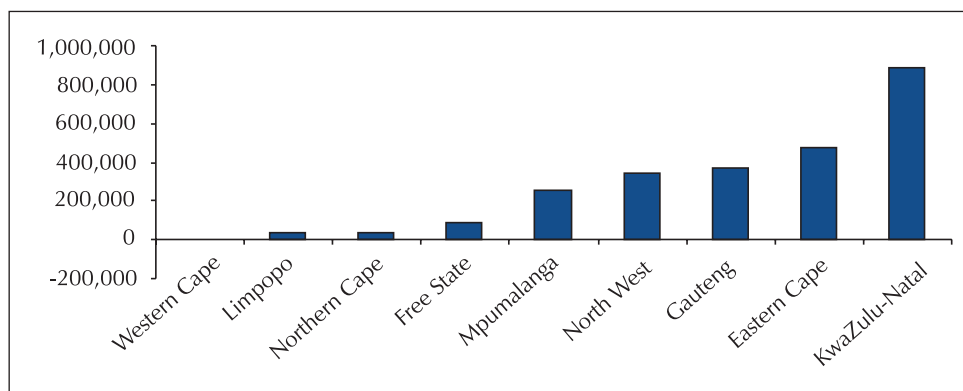


Chart created using data from Minister's Parliamentary Reply, 16 June 2006; Quintile data contained in the Amendment National Norms and Standards for School Funding, 2006 and learner data in 'Education Statistics at a Glance in South Africa 2004', published by the Department of Education.

into the no-fee regime in 2007. The provincial data on no-fee schools in 2006 is also mapped in Figure 4. The extent to which schools have voluntarily taken on 'no-fee status' may be an indication of the extent to which schools will be prepared to implement the no-fee policy. In this regard it is of concern that no schools were declared no-fee schools in North West Province and Gauteng during 2006.

The Amended Norms provide that orphans and children who have been abandoned by their parents are exempt from school fees.¹⁵⁷ An automatic exemption also applies to any learner for whom a poverty-linked social grant is paid.¹⁵⁸ This includes all social grants in respect of which a means test is applied.¹⁵⁹ The Amended Norms introduce principles regarding a new formula for fee exemptions, which will apply in schools where fees are charged.¹⁶⁰ The principles to be applied concern total exemption from fees: the number of learners for which fees are charged to a parent is not to be considered and the parents' income is the only relevant consideration.¹⁶¹ However, with respect to partial exemption, the additional burden of fees for more than one learner is to be taken into consideration.¹⁶² The new Fee Exemption Regulations, containing a new formula to apply these principles, were published in October 2006.¹⁶³

The new fee exemption regulations replace the exemptions formula which, to recap, provided for parents earning less than 10 times the school fee to be totally exempt from fees, while parents earning 10 to 30 times the total fee were partially exempt. Under the old regulations, the SGB had the discretion to apply equitable criteria to exemptions, but the new fee exemption regulations do not permit the governing body to exercise discretion. Instead, the new regulations use a formula referring to a quotient 'E', which adds together both the school fee and any additional monetary contributions required of parents, and divides that by the

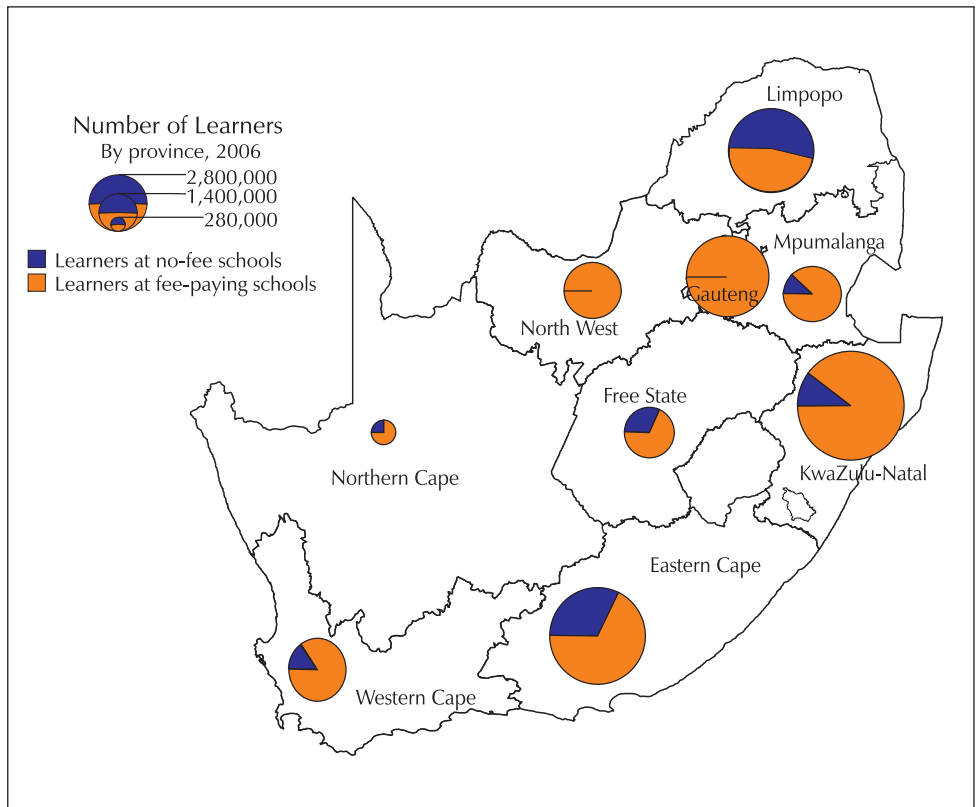
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income of the parents. Where parents earn less than 10 times the combined fee amount (or E is less than 10%), they are totally exempt from fees. For parents who earn between 10 and 50 times the combined fee amount, a sliding scale applies, which also takes into account the number of learners for whom the parent is financially responsible.

For example, parents who earn 30 times the combined fee amount (or for whom the combined fee amount represents 3.5% of their annual income) qualify for a 7% exemption for the first child and a 26% exemption for the second child in terms of the sliding scale, reproduced Table 2 (next page).

The fee exemption regulations were to be implemented on 1 January 2007, but were challenged in the Pietermaritzburg High Court in November 2006 on the basis that the viability of schools has been threatened.¹⁶⁴ An urgent application brought by 17 schools in KwaZulu-Natal sought to suspend the implementation of the regulations, pending action to set aside the regulations.¹⁶⁵ The schools' management object to the regulations because they remove SGB discretion and

Figure 4: Proportion of learners in 'voluntary' no-fee schools per province, 2006



Source: Map created using data supplied in Minister's Parliamentary reply, 19 June 2006 and data contained in 'Education Statistics at a Glance in South Africa 2004', published by the Department of Education.

Table 2: Sliding scale for partial fee exemptions

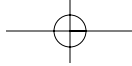
E=	Number of learners (%)									
	1	2	3	4	5	6	7	8	9	10
2.0	0	0	0	0	0	11	20	27	33	38
2.5	0	0	0	14	25	33	40	45	50	54
3.0	0	7	22	33	42	48	53	58	61	64
3.5	7	26	38	47	54	59	63	66	69	71
4.0	25	40	50	57	63	67	70	73	75	77
4.5	39	51	59	65	69	73	76	78	80	81
5.0	50	60	67	71	75	78	80	82	83	85
5.5	59	67	73	77	80	82	84	85	86	87
6.0	67	73	78	81	83	85	87	88	89	90
6.5	73	78	82	85	87	88	89	90	91	92
7.0	79	83	86	88	89	90	91	92	93	93
7.5	83	87	89	90	92	93	93	94	94	95
8.0	88	90	92	93	94	94	95	95	96	96
8.5	91	93	94	95	96	96	96	97	97	97
9.0	94	96	96	97	97	98	98	98	98	98
9.5	97	98	98	99	99	99	99	99	99	99
1.0	100	100	100	100	100	100	100	100	100	100

Source: Regulations relating to the exemption of parents from payment of school fees in public schools, GN 29311, 18 October 2006.

because they have had insufficient time to take into account likely changes to school income.¹⁶⁶ Furthermore, they believe that the regulations would affect the viability of schools.¹⁶⁷

The schools in question are high-fee schools charging in the region of R15,000 a year. The new formula implies that parents with a yearly income of as much as R375,000 would qualify for a 25% exemption for the first child and a 40% exemption for the second child in schools charging fees of that amount. In other words, the vast majority of parents would qualify for partial exemption, considerably reducing the fee income of these schools. Minister Pandor countered that such high fees are a burden on wealthier families, too. Judge Levinson declined to grant the application for suspension, arguing that the schools had adequate warning of regulation changes and that the order sought would have negatively impacted on the rights of many children.¹⁶⁸

The new exemption regulations also attempt to prevent the problem of illegal exclusions by providing for a number of oversight mechanisms, while funding allocation norms allow school principals to use funding allocation money for items that used to be only discretionary:



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In general, the school allocations are intended to cover non-personnel recurrent items and small capital items required by the school as well as normal repairs and maintenance to all the physical infrastructure of the school. Moreover, the school allocation is primarily and exclusively intended for the promotion of efficient and quality education in public ordinary schools.¹⁶⁹

However, the regulations go on to mention a wide range of consumables which schools may purchase with funding allocation money.

With respect to the oversight mechanism, parents still have to apply for exemption and provide supporting documentation. Principals will, however, have to ensure that every parent of a child in school has to sign a form indicating that they have been informed of the right to apply for exemption, and whether they intend to exert that right. One copy is to be given to the parent, one to the head of the provincial Department of Education, with the original remaining in the school.¹⁷⁰

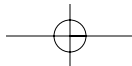
The school governing body is required to publish the exemption regulations in a prominent place in the school, and has to submit at the end of the first school term of each year a table indicating the number of applications for exemption and partial exemption and the number granted. Provincial education departments are furthermore obliged to develop measures to assist schools in applying the exemption formula. Whether these measures – in addition to the no-fee school measures – will solve the problem of illegal exclusions of poor children from schools is doubtful.

Principals and school officials who have been hostile to exemptions will continue to be hostile to exemptions, particularly in those schools which fall into the poorest quintile but have not reached the no-fee threshold of provincial allocations.

A child who is never enrolled in school because parents who cannot pay are simply turned away will not be helped by a form advising parents of their right to an exemption. Illiterate parents will also not benefit from the form mechanism where schools act in bad faith. The exemption for orphans and abandoned children unfairly discriminates against children who have parents. Automatic exemption for children for whom a social grant is paid requires proof of the grant, and again requires schools to act in good faith. And if the grant is withdrawn, parents are then doubly penalised.

Hall of the Children's Institute also points out that with respect to no-fee schools, spatial targeting of poverty may not cover many poor children who do not live in poor areas:

The spatial method of targeting (in which the school rankings are determined in relation to the level of poverty in the surrounding area) presupposes that all poor learners live in poor areas, and that learners



automatically come from the area physically surrounding the school. For many reasons ranging from logistical necessity to choices about quality of education, some poor children go to school in wards that are not rated amongst the poorest 40% of residential areas.¹⁷¹

Primary schools will be preferred as no-fee schools and secondary schools only where there are adequate funds.¹⁷² In most secondary schools, the problematic school fee exemption will remain the only mechanism for poor households with older children to be relieved of the burden of school fees.

- **Funding policy may be contributing to the continued inequalities in outcomes still present in the school system.**

Fiske and Ladd comment on the continued inequalities in an analysis of educational outcomes in South Africa:

Our analysis of these three outcomes measures – progress through school, course taking, and performance on Senior Certificate examinations – shows that South Africa still faces huge challenges in its efforts to provide black students with an adequate education. Although many black students currently enrolled in formerly white schools clearly have access to better education than was available to them during the apartheid period, their number remains a small proportion of the total. Unfortunately, none of the evidence presented in the previous section indicates much improvement in educational outcomes for the vast majority of previously disadvantaged students. Even in Western Cape, which boasts very high pass rates on the matriculation exam in comparison with other provinces, the students in the former black schools continue to exhibit very poor outcomes, whether measured as progress through school or as success on the matriculation exam.¹⁷³

A number of the graphs supporting Fiske’s analysis are reproduced here (*see figures 5 to 8*),¹⁷⁴ showing the low retention rates for black pupils, high repetition rates for black pupils, reduced number of students sitting for Grade 12 examinations, and the stagnant number of national passes.

Figure 5 shows the extent to which the enrolment of black and Coloured children in school in the Eastern Cape rapidly decreases after Grade 4. Noteworthy is the steep drop from Grade 6 to 7 (age 13 to age 14), and the further steep drop after Grade 8 among black and Coloured learners.

Figure 6 shows the high repetition rates for black and Coloured learners in the Western Cape, in comparison with formerly white schools. Repetition rates increase sharply after Grade 7. Grade 8 is the first year of secondary school; this may point to inadequate assessment at primary level.

Figure 7 shows the drop in the number of candidates sitting for the Grade 12 examination from 1998 to 2001. Consequently, despite the apparent improvement

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Figure 5: Learners, by grade and race, Eastern Cape, 2001

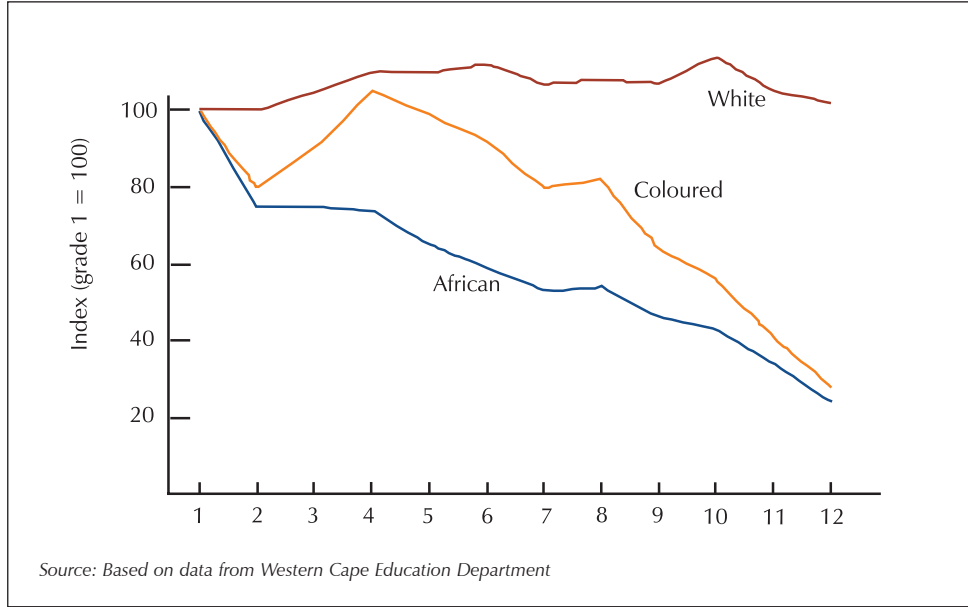


Figure 6: Repetition rates, by grade and by former department, Western Cape 2001

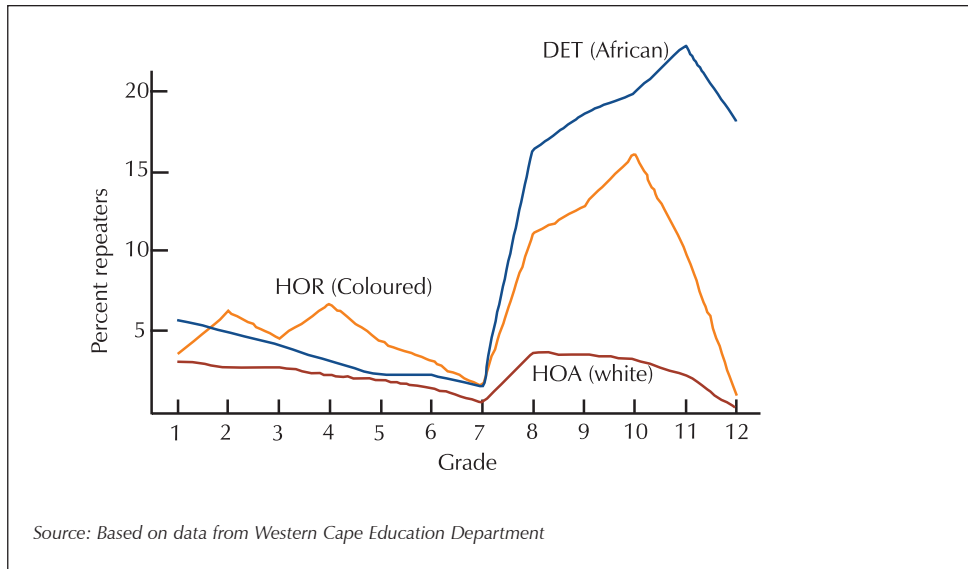


Figure 7: Senior Certificate candidates and passes, 1979–2001

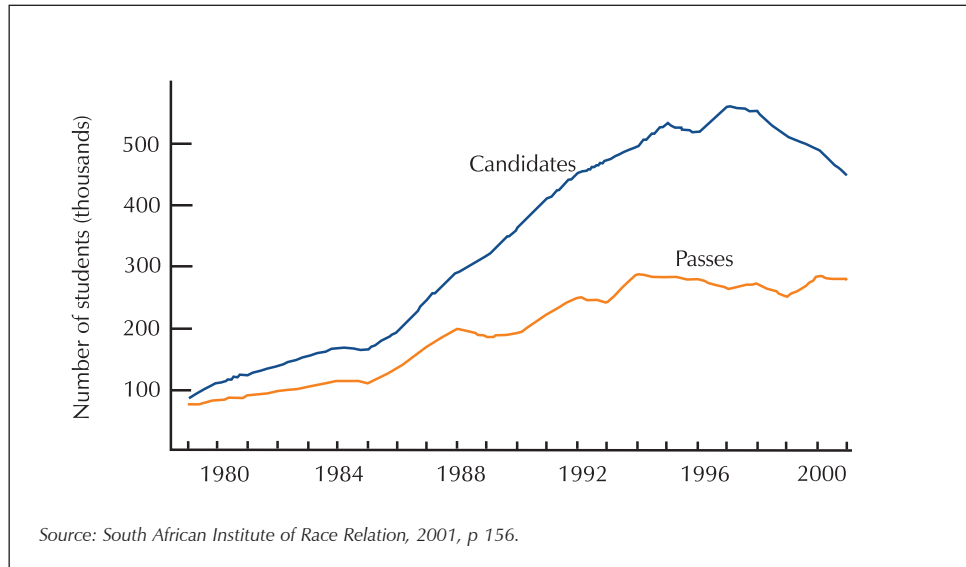
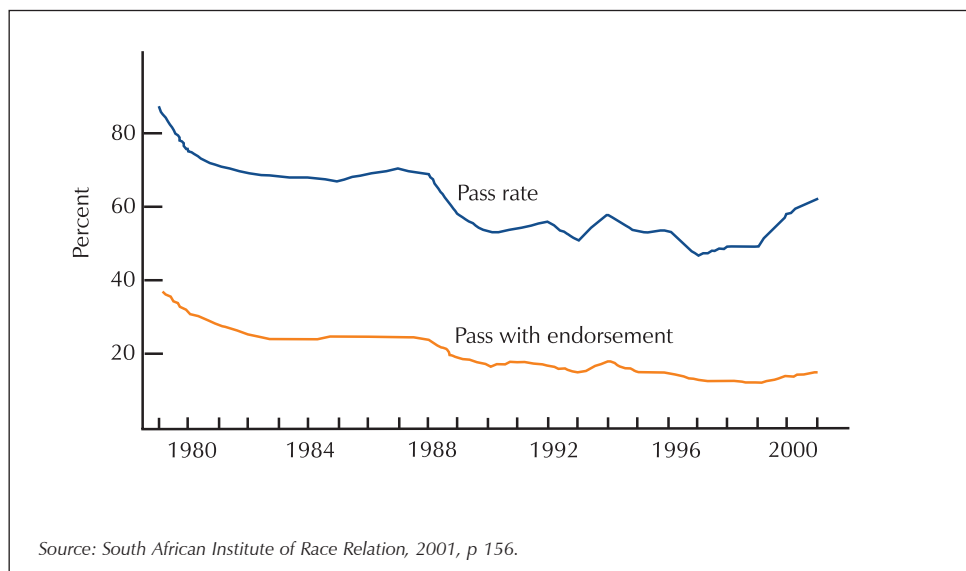


Figure 8: Senior Certificate pass rates, 1979-2001



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in the pass rate (the number of passes as a proportion of the number of candidates – see Figure 8), the net number of children passing the Senior Certificate examination by 2001 had not exceeded 1994 levels (i.e. just under 300,000 passes). However, in 2006 some 350,000 passed, indicating some increase from 2001 to 2005.¹⁷⁵

High-fee public schools charge fees to ensure adequate teacher numbers and facilities, ensuring better outcomes in these schools. The best public schools in South Africa charge fees which, in the past, were expected only in the private school sector. Currently, public schools in the wealthiest communities charge R10,000–R20,000 a year *per child*; many good public township schools charge R6,700 a year.¹⁷⁶

Given that the best schools are frequently located in formerly white or more privileged geographical areas, and public schools are only obliged to admit learners from within their defined geographical feeder areas, in order to ensure their continued income the high-fee public schools may use their discretion to admit learners from outside their feeder area only where their parents either do not qualify for or do not apply for exemption or partial exemption. Thus only wealthy parents or parents living in privileged areas where the best schools are located will continue to be able to access the best schools for their children.

Furthermore, no-fee schools are likely to remain the schools of poorest quality, and to be the only schools the poorest children can access. Indeed, it has been argued that the introduction of no-fee schools is likely to entrench rather than ameliorate the inequality exacerbated by education funding policy. Former Western Cape Education MEC Helen Zille commented that:

Poor children will be trapped in the weakest schools that continue to get weaker largely because of poor management and weak teaching. If there is one key lesson we have learnt in education in the past 10 years it is this: pouring money into badly managed, inefficient and incompetent schools does nothing to improve their quality.¹⁷⁷

Better schools which charge average to high fees may be forced to charge even higher fees as government funds are directed to poor and poorly performing schools, which may be unable to translate the funding into better schooling.

DISCUSSION

Education issues are of concern given that *quality* education, not just education, is a protective ‘resilience factor’ which operates to prevent offending by children. In addition, it should be reiterated that poor schooling is a risk factor for victimisation of children. The social crime prevention project is not helped by trapping the poorest children in the weakest, poorest schools – which, despite the best of intentions, appears to be what the current funding policy achieves.

School fee exemptions will not assist children in accessing better schools outside their areas that are charging ever higher fees, as the majority of poor children still live in poor communities which do not have good, high-fee schools in the immediate feeder area; and these children are unlikely to be preferred among applicants from outside the feeder areas. Thus, poor children may be guaranteed free access to local 'no-fee' schools, but the quality of education available at these schools is likely to remain not only unequal to that available at high-fee public schools, but of questionable quality. Furthermore, poor children may be able to apply for exemptions if their nearest school is not a no-fee school, but the problems accompanying such exemptions may not be relieved by the new oversight mechanisms and exemptions for CSG recipients. Moreover, children older than 14 will not benefit from the automatic exemption for CSG recipients. The inadequate education which the majority of poor children continue to receive remains one of the weakest links in terms of social crime prevention.

CHAPTER 5

Criminal justice and child protection policy

INTRODUCTION

What role does criminal justice policy itself play within social crime prevention? Criminal justice policy can be a crucial component of the safety of children who are living in social contexts that predispose them to both victimisation and offending.

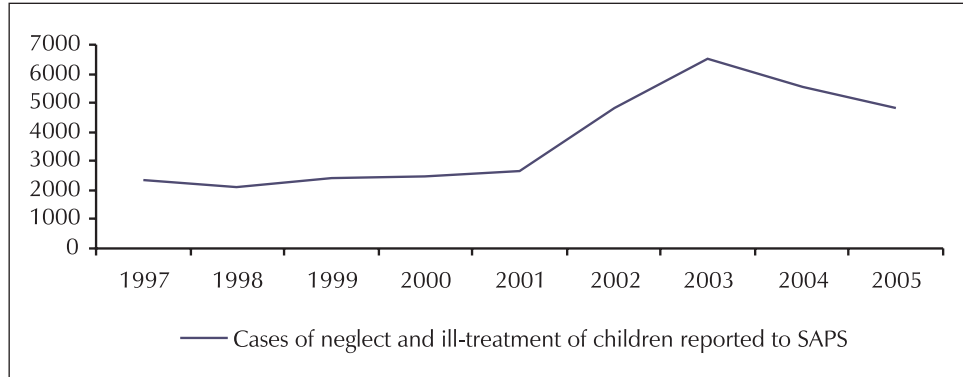
A system that can respond appropriately to the needs of children who have suffered criminal victimisation can prevent further harm where the victimisation is ongoing, and may also minimise any collateral secondary trauma. Appropriate response to children suffering violence and abuse is also relevant from a social crime prevention perspective because children suffering violence and abuse are generally acknowledged themselves to be at risk of becoming future offenders. Child protection policy is crucial to this endeavour.

A 2002 Childline study found that almost half (43%) of child callers to Childline identified a perpetrator who was under the age of 18.¹⁷⁸ Where children themselves break the law, overall harm can be minimised by approaching the child offender from a social crime prevention perspective. This involves acknowledging that all children exposed to the matrix of risk factors are at risk of offending. Appropriate social crime prevention responses to the child in conflict with the law would seek to prevent further offending while providing redress for the crime committed, rather than seeking only to punish or 'incapacitate' child offenders. Punitive approaches may lead only to more 'hardened' criminals.

Trauma and violence have been referred to as the 'silent' epidemic in older children as they represent two of the leading causes of death in children aged 5–18.¹⁷⁹ Violence is reported to be the second greatest cause of premature mortality in South Africa. Violence is linked to relative poverty because income inequality can be closely correlated with violent crime rates.¹⁸⁰ The implication of the relationship of inequality with violent crime is that while economic growth and social assistance may alleviate poverty, increasing inequality which accompanies growth may negatively influence rates of violent crime.

The overall trend of abuse among younger children is toward an increase, with

Figure 9: Cases of child abuse reported to SAPS 1997–2005



Source: South African Police Service Crime Data

some recent decrease (*see Figure 9*). Such decreases should not necessarily be viewed in a positive light as it may suggest a decrease in detection, reporting or accessibility of child protection services.

CHILDREN’S RIGHTS IN THE CRIMINAL JUSTICE SYSTEM

Children have special rights, both as victims and as perpetrators of crime, in terms of the UN Convention on the Rights of the Child and the South African constitution. Article 19 of the UN Convention obliges government to take all measures possible to protect children from violence and abuse,¹⁸¹ while Article 40 provides for special rights for children accused of crimes, indicating that imprisonment should be a measure of last resort.¹⁸² The South African constitution echoes Article 40 and provides special rights for children over and above those rights enjoyed by all detained persons. The cornerstone is that children should only be detained as a measure of last resort and must be kept separately from adults when so detained.¹⁸³ The constitution echoes Article 19 in placing an obligation on the state to protect children – that is, every child has the right ‘to be protected from maltreatment, neglect, abuse or degradation’.¹⁸⁴

CRIMINAL JUSTICE POLICY

In South Africa, there was a brief honeymoon period after 1994 in which social crime prevention was embraced by government and embodied in the National Crime Prevention Strategy of 1996. This document supported social crime prevention and sought to implement its principles within criminal justice policy. The rights of accused persons were assured, which marked a break with the apartheid past in which detention without trial was commonplace. However, faced with the reality of high crime levels, which were unlikely to respond to the

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social crime prevention approach in the short term, policy swung heavily toward a punitive 'tough on crime' approach. This was reflected not only in 'crackdowns' by the police but also in the criminal justice system, where changes to the punitive jurisdiction of the courts and changes to bail law made it more difficult for persons accused of serious crimes to succeed in bail applications.

The Child Justice Bill was developed over the years in which this broader change in criminal justice policy took place. The Child Justice Bill is designed to give effect to Article 40 of the UN Convention and section 28 of the South African constitution. In essence, the bill proceeds from a social crime prevention perspective.

According to most commentators, the Child Justice Bill is unlikely to be passed in the near future. However, Sloth-Nielsen argues that the courts have, in the absence of the passage of the Child Justice Bill, passed judgements which have helped to shape a child justice system that is more compliant with child rights overall.¹⁸⁵ She points to *S v Kwalase*¹⁸⁶ (principles relevant to sentencing of children), *S v Zuba*¹⁸⁷ (interdict to compel the establishment of a reform school in a province), and *S v Petersen*¹⁸⁸ (establishing the requirement of pre-sentence reports before sentencing children to a custodial sentence) in support of her opinion.

The Child Justice Bill's detailed provisions aim to: create the context for community and victim involvement; protect young people after arrest; provide diversion programmes that offer offenders different values and alternative role models; and provide for restorative justice for victims, offenders and the community.¹⁸⁹ 'Diversion' refers to the practice of referring an accused person away from the criminal justice system to an appropriate programme prior to conviction and sentencing, with withdrawal of the charge usually contingent on completion of the programme.

Reasons speculated for the abrupt hiatus in passing the Child Justice Bill include the cost to the state of implementing its provisions as well as the broader climate change discussed above. Given that the bill has been exhaustively discussed by child justice practitioners and that its status continues to be uncertain, its provisions will not be discussed in detail in this paper.¹⁹⁰ Instead, policy and law in relation to children in conflict with the law as it currently stands will be discussed.

The law currently states that police have a duty to notify parents and guardians when a child has been arrested¹⁹¹ and are obligated to notify a probation officer of every child's arrest. A child who has been arrested and charged with a crime not referred to in Part II¹⁹² or Part III¹⁹³ of Schedule 2 of the Criminal Procedure Act, may be released by a police official into the care of the child's parent or guardian, with a written warning in lieu of bail.¹⁹⁴ The police are also empowered to place a child in a place of safety or under the supervision of a probation officer or correctional official.¹⁹⁵ If a child is not released by the police, he or she can be held for 25 hours in police cells but must then be released into the

care of his or her parents or guardian.¹⁹⁶ Where this is not possible, the child may be held in a place of safety. Where there is no secure place of safety within a reasonable distance of the court and if the child is 14 years or older and is charged with an offence listed in a schedule of the Correctional Services Act, then the child may be sent to prison to await trial.¹⁹⁷

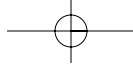
The magistrate may send a child to prison if the child is charged with any other offence, if the magistrate is convinced that the circumstances are serious enough to warrant such detention.¹⁹⁸ The law relating to bail also applies to children, so magistrates set bail for children who are imprisoned.¹⁹⁹ The magistrate makes decisions regarding placement of the child in a particular facility, and if a child is placed in prison he or she must be brought before the court every 14 days.²⁰⁰

The assessment of children by probation officers during the first 48 hours after arrest and prior to first appearance was general practice in many urban centres by 2001.²⁰¹ Pre-trial assessment of children became part of statutory law with the amendment to the Probation Services Act in 2002.²⁰² This act serves as an interim measure to facilitate the transformation of the child and youth care system (toward the Child Justice Bill) and provides, *inter alia* for:

- definitions of concepts also contained in the Child Justice Bill, such as ‘assessment’, ‘diversion’, ‘early intervention’, ‘family finder’, ‘home-based supervision’ and ‘restorative justice’;
- the introduction of assessment, support, referral and mediation services in respect of victims of crime;
- the establishment of restorative justice programmes and services as a part of appropriate sentencing options;
- the assessment of arrested children who have not been released from custody; and
- the establishment of a probation advisory committee to advise the minister on matters relating to probation services.²⁰³

The 2001 Interim National Protocol for the Management of Children Awaiting Trial is designed to ensure that law pertaining to child justice as it currently stands regarding children awaiting trial is implemented. The protocol is designed to ensure:

- effective inter-sectoral management of children who are charged with offences and who may need to be placed in a residential facility to await trial;
- appropriate placement of each child based on an individual assessment;



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- correct use of the different residential options available;
- the flow of information between the residential facilities and the court;
- that managers of facilities are assisted to keep the numbers in facilities manageable;
- that communities are made safer through appropriate placement of children, effective management of facilities and minimisation of absconding;
- that the situation of children in custody is effectively monitored; and
- that appropriate procedures are established to facilitate the implementation of the Child Justice Bill, once it is implemented.

All accused persons, including children, have a right to legal assistance in South Africa in cases 'where substantial injustice' would otherwise occur.²⁰⁴ Where a child or his or her family cannot afford to pay for the services of a lawyer, state-funded legal representation can be obtained through the Legal Aid Board. Although the percentage of children being legally represented has increased in recent years, it is estimated to comprise less than half of all cases appearing in court.²⁰⁵ After trial and conviction, children can be sentenced to imprisonment. Under the current law there is no limit regarding a minimum age for imprisonment of sentenced children, although children under 14 are imprisoned only infrequently.

WEAKNESSES IN CHILD JUSTICE POLICY

- **The more punitive criminal justice climate negatively impacts on children, despite child justice policy.**

The increasingly punitive approach of the criminal justice system has affected the manner in which children are dealt with within the criminal justice system. The national policy response to criminal justice has shifted from the crime prevention focus contained in the 1996 National Crime Prevention Strategy to the more punitive approach made obvious in legislation such as the minimum sentencing legislation,²⁰⁶ and the increase in the punitive jurisdiction of both the district court (from 12 months to three years) and the regional court (from 10 to 15 years).

This shift to a more punitive approach correlates with a steady rise in the number of persons aged 20 and under who are detained in prison (this number peaked in March 2003).²⁰⁷ Persons up to age 20 are relevant to the discussion on children because serious offences warranting imprisonment may take two to three years to be resolved in court. A person convicted and sentenced at age 20 is likely to have been under the age of 18 at the time the crime was committed. The trend

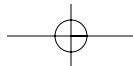
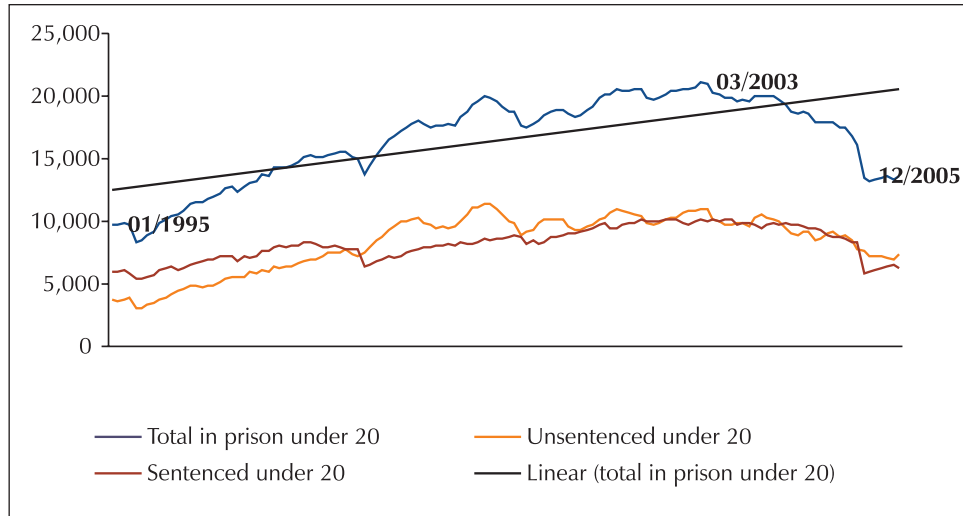


Figure 10: Persons under 20 in prison, January 1995–December 2005



Source: Department of Correctional Services

towards a more punitive approach is apparent despite the fact that the UN Convention and the South African constitution regard imprisonment as a measure of last resort. This trend is also contrary to the provisions of the protocol seeking to ensure that children are kept out of prison or other correctional care facilities.

Figure 10 shows the steady increase in the number of persons in prison aged under 20, which peaked in March 2003 at 21,070 people – more than double the number that were in prison in January 1995. In March 2003, approximately 1 in every 1,000 persons under 20 was in prison, given an estimated under-20 population of 20 million. However, if we take into account that a negligible number of prisoners is under the age of 15, then about 1 in every 250 persons in South Africa aged 15–20 was in prison at that time. If we further take into account that a similarly small number of these children are female, then 1 in every 125 males aged 15–20 was in prison in March 2003.

Reductions in prison numbers from June 2005 reflect the special remissions of sentences granted by the state president during that time and do not reflect any change in sentencing or bail practice. The number of persons under 20 in prison is now at about 15,000 – some 50% more than it was in 1995 – and is increasing at roughly the same rate as prior to the special remission. Including the special remissions, the trend shows that the number of persons under 20 in prison has been increasing at a rate of 62 prisoners a month.

Some of the blame for the increase in imprisonment of children lies with minimum sentencing legislation, which provides for minimum penalties ranging from five years to life imprisonment, for a range of offences. There may be a deviation from the prescribed minimum sentence in cases where there are

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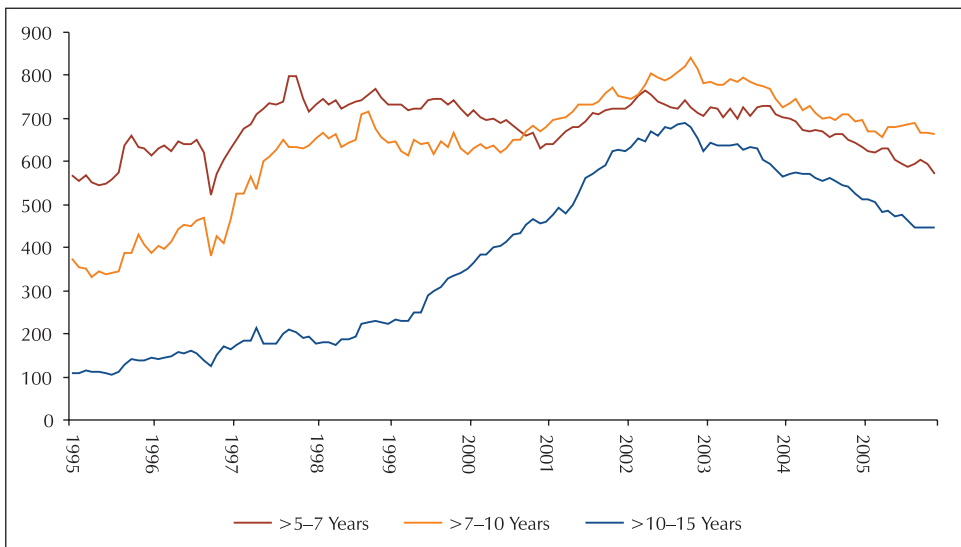
‘substantial and compelling circumstances’. The legislation indicates that prescribed minimum sentences do not apply if the accused was under the age of 16 at the time the offence was committed.²⁰⁸ The onus is on the state to prove beyond reasonable doubt the age of the accused where it is in dispute.²⁰⁹

However, the provision applicable to children aged 16–18 is less clear. This provision provides that where an accused convicted and sentenced in terms of section 51 is older than 16 but younger than 18 at the time the offence was committed, the court must enter the reasons for its decision (to apply the minimum sentence) on the record of proceedings.²¹⁰ The wording seems to imply that the application of minimum sentences for young offenders 16–18 is to be the exception rather than the rule. Considerable case law has subsequently developed on the question of whether minimum sentences apply to persons younger than 18, with very different approaches being followed in the provincial divisions.²¹¹

The Supreme Court of Appeal settled the question in *Brandt v S*²¹² in 2005. The Supreme Court held that it is at the court’s discretion to depart from the minimum sentence in the case of a person who was 16 or 17 years of age at the time of offence. The 16- or 17-year-old offender does not have to establish ‘substantial and compelling circumstances’, but the sentencing court should take into account that the legislature has ordinarily ordained the prescribed sentence for the offence in question.²¹³ The onus, however, remains on the prosecution to persuade the court that the minimum sentence should be imposed.²¹⁴

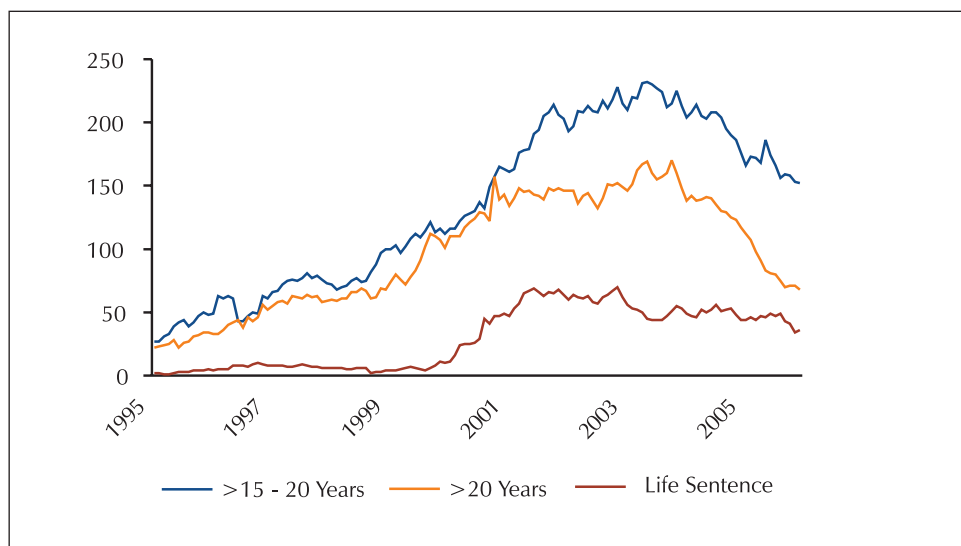
Nevertheless, differences in sentencing practice among the provincial divisions of the high court prior to the judgement in *Brandt v S* resulted, by June 2005, in

Figure 11: Persons under 20 in prison sentenced to 5–15 years, Jan 1995–Dec 2005



Source: Department of Correctional Services

Figure 12: Persons under 20 in prison sentenced to 15 years to life, Jan 1995–Dec 2005



Source: Department of Correctional Services

more than 30 children in prison in South Africa serving sentences of life imprisonment as a result of minimum sentencing.²¹⁵ Furthermore, there is evidence to suggest that the tariff for offences covered by minimum sentencing has been raised for all accused, including those who may have been children at the time of the offence.²¹⁶

In particular, there has been a sharp increase in the number of offenders in custody aged under 20 who are serving sentences of more than 10 years (see Figure 11). Ten years is the minimum sentence for rape, of which young offenders are frequently accused. Furthermore, the number of persons under 20 serving 15 years has increased six times in 10 years, from about 25 to about 150 (dropping from almost 250 after the special remissions). (See Figure 12.)

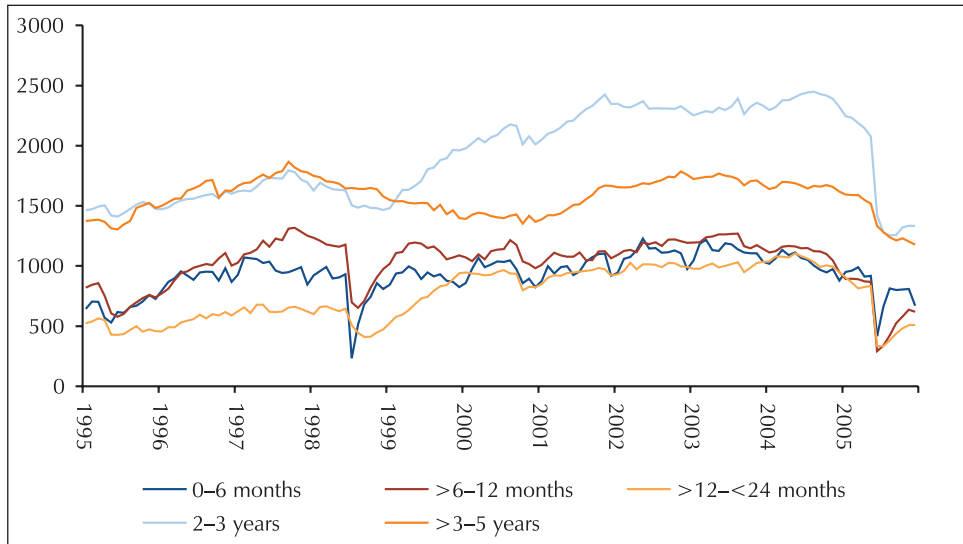
At the same time, there appears to be little or no change in the number of offenders aged under 20 serving sentences of two years or less. The increase in the two to three year category is most likely due to the increase in punitive jurisdiction of the district court from 12 months to three years. (See Figure 13.)

- **In the absence of the passage of the Child Justice Bill, there is a wide variation of treatment of children within the criminal justice system, which is inherently inequitable.**

There are currently only three one-stop child justice centres (Port Elizabeth, Bloemfontein and Port Nolloth), but in terms of the Integrated Justice System Strategic Plan²¹⁷ there should be one in each province by 2009. Draft policy and guidelines for one-stop centres are in the process of being finalised. In places

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Figure 13: Persons under 20 in prison sentenced for less than five years, Jan 1995–Dec 2005



Source: Department of Correctional Services

where ‘one-stop’ child justice centres have been established, many of the policies and practices (such as pre-trial assessment and diversion) contained in the Child Justice Bill are already in practice. However, in many other magisterial areas there is little or no special treatment provided for children. Better services for children are available in urban areas where diversion facilities are usually available.

Indeed, investigations undertaken by the Human Rights Commission summarised in a report presented to parliament in September 2004 outlined the following findings regarding children in the system:

- Some children are being kept in prisons because parents cannot afford bail.
- Some children are in prison and their parents/caregivers have not been informed.
- Many children are in custody as a result of poverty-driven crimes.
- Many of the unsentenced children and youth do not have legal representation.
- Many children’s rights in terms of education, recreation and food are seriously flouted.
- Some children experience intimidation and harassment from the authorities.

Table 3: Children arrested, assessed and diverted in Gauteng, 1999-2002

	1999	2000	2001	2002
Arrests	19 886	23 213	31 017	38 622
% Assessed of arrested	35.6	25.2	22.7	15.1
Assessment	7 085	5 856	7 049	5 823
Pre-trial reports	50	41	46	198
Pre-sentence report	2 212	2 127	2 259	2 928
Supervision	32	21	43	435
Number of children placed in diversion programmes delivered by the department	593	603	612	979
Number of children placed in diversion programme delivered by the role-players	2 289	2 324	2 359	7 549
Number of children placed in diversion programme delivered by the role-players but not funded by the department	138	166	243	442

Source: Department of Social Development, 2002.

Source: Gauteng Department of Social Development Strategic Plan, 2005-2010, p 69.

- Children and youth who are particularly vulnerable, for instance who have disabilities, are not adequately catered for.
- Not enough children are provided with the opportunity to be diverted out of the system.²¹⁸

In particular, the shortage of probation officers, assistant probation officers and diversion services as well as alternative correctional care facilities, negatively affects the likelihood of all children being dealt with expeditiously and appropriately within the criminal justice system.²¹⁹ Table 3 shows that only 15% of children arrested in Gauteng were assessed by probation officers, while only 22% were diverted.

- **Lack of appropriate diversion and alternative sentencing service providers.** The expansion of diversion and alternative sentencing of both children and adults is hampered by the lack of service providers as well as by the lack of such services offered within government departments. The largest diversion service provider in the country, the National Institute for the Prevention of Crime and Rehabilitation of Offenders (NICRO), provided diversion services to just under 14,000 young offenders nationally in conflict with the law in 2000/1. This figure increased to almost 18,000 in 2004/5.²²⁰ (These services are, however, not offered to children exclusively.) Yet in Gauteng alone, the number of children arrested in 2002 exceeded 38,000.²²¹

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CHILD PROTECTION POLICY

The government agencies responsible for protecting children from crimes are the South African Police Service (SAPS), the National Prosecuting Authority (NPA), social welfare services, and medico-legal services. A child is regarded as such until the age of 18 years and is therefore protected until that age under the Child Care Act of 1983. Categories of child abuse for the purposes of child protection policy include:

- physical abuse;
- sexual abuse;
- emotional abuse (this may take the form of failure to meet a child's need for affection, attention or stimulation, or constant verbal abuse, rejection, threats of violence or attempts to frighten the child); and
- neglect (continuous failure to protect a child from exposure to danger, cold, starvation; not carrying out important aspects of care).²²²

LEGISLATION

Child abuse is regarded as a crime as well as a situation necessitating protection, care and treatment of the child. Removal of a child who has been abused or is at risk of abuse is currently provided for in the Child Care Act (in the absence of the implementation of the Children's Act).²²³ The following professionals are obliged to report any suspicions of child abuse or ill treatment to the nearest social worker of the Department of Social Development: dentist; medical practitioner; nurse; social worker; teacher; any person employed by or managing a children's home or a place of care or shelter.²²⁴

A social worker (after receiving the notification) has to investigate the matter within 72 hours. An assessment must be made of the safety or resilient and risk factors regarding the child's situation.²²⁵ A children's court inquiry is then made to establish whether the child is in 'need of care' (see Chapter 1 on foster care grants for more on children in need of care). If it is established that the child is in need of care, then various options apply: supervision in the home; or placement in foster care, a children's home or elsewhere.²²⁶ Ultimately, parental rights may be terminated and the child may be adopted where this is considered to be in the best interests of the child.²²⁷

The Domestic Violence Act also makes it possible to exclude a known perpetrator of domestic violence from the child's home or other types of access.²²⁸ There is also extensive provision for the prosecution of perpetrators of child abuse through the criminal justice system.²²⁹ Many forms of child abuse amount to common law crimes such as assault, while statutory offences exist for other forms

of child abuse. Ill-treatment and abandonment are criminalised in section 50 of the Child Care Act, and section 50A criminalises the commercial sexual exploitation of children.²³⁰ Other forms of sexual behaviour with children are crimes in terms of the Sexual Offences Act.

The Criminal Procedure Act sets out procedures to be followed in cases of alleged abuse of children, with section 153 providing for protective measures to reduce trauma for child witnesses in criminal court proceedings.²³¹ This relates mainly to abandoning the requirement that proceedings take place in open court.²³² Children's court actions can be initiated independently or in tandem with criminal court proceedings.²³³

The Children's Act introduces various measures to protect children and promote their safety and well-being. These include the establishment and maintenance of a National Child Protection Register.²³⁴ Part A of the register will contain a record of abuse and/or neglect inflicted on specific children. This information will be used to protect these children from further abuse and/or neglect, and to ensure that appropriate services are provided for them. All convictions involving the abuse or deliberate neglect of a child, and all the findings of the children's court that hands down such convictions, will be recorded.

The purpose of Part B of the register is to have a record of persons who are unsuitable to work with children. The information in the register is used to protect children against abuse from these persons. No person whose name appears on the register may work with or have access to children, or be considered as an adoptive or foster parent. Access to the register is restricted and the information is available only when appropriate. Names may be removed from the register if an error has occurred.

POLICY

A unit was established in 1986 within the SAPS to prevent and combat crimes against children.²³⁵ The primary task of the Child Protection Unit is to render a sensitive service to the child victim. Subsequently, the SAPS expanded the service rendered to children to adult victims of family violence and sexual offences, which led to the establishment of the Family Violence, Child Protection and Sexual Offences (FCS) units.²³⁶

The first child protection unit to be transformed into a FCS unit was Braamfontein (Johannesburg), on 18 March 1996. The objective is to transform all child protection units and establish FCS units, depending on available resources and the occurrence of crimes policed by the FCS units. There are currently 32 child protection units and 13 FCS units in the main centres countrywide.²³⁷ Individual detectives who specialise in policing crimes against children also operate in the smaller centres. It is unclear whether the redeployment of individual detectives with FCS skills to local level will ultimately result in the eventual disbandment of

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the FCS units. Some critics fear such eventual disbandment will reduce the ability of the SAPS to deal sensitively with such crimes.

The current SAPS Strategic Plan 2005–2010 refers briefly to the ‘Crimes Against Women and Children Strategy’.²³⁸ Elements of the strategy include:

- an ‘anti-rape strategy’ which was to be further developed in 2005/6;
- implementation of the Domestic Violence Act, including the development of a training programme;
- Victim Empowerment Programme training, which focuses mainly on ‘giving members the necessary skills to handle all victims of crime in a sensitive manner when, for instance, they take down statements, including intimate accounts of violence’;²³⁹
- the Youth Crime Prevention Capacity Building Programme, which aims ‘to equip SAPS members with the necessary skills to recognize and assist young people who are at risk of turning to crime or of becoming victims of crime’;²⁴⁰
- the Prevention of Violence Programme, which appears to refer only to programmes run by other entities, such as the Moral Regeneration Programme, run by the Deputy President’s Office;
- ‘reactive measures’, which ‘entails the steps taken by the investigating officer on receiving a sexual offences case’;²⁴¹ and
- the Conversations with Women Initiative, which ‘explains the rights of women who are victims of crimes and the service that the SAPS will provide in order to minimize the impact of the crime’.²⁴²

This strategy forms part of the overall National Crime Combating Strategy, which is being implemented in two phases: Phase 1 involves the stabilising of crime over the period 2001–2003; and Phase 2 involves the normalising of crime over the period 2004–2010.²⁴³ Although there is debate about whether Phase 1 has been achieved, Phase 2 is currently in progress. Elements of Phase 2 include:

- phasing out of the commando system;
- introducing sector policing and a revised SAPS reservist system ‘tailor-made to the specific crime-prevention and combating needs of various communities’. Sector policing involves the geographical demarcation of a police station area into manageable sectors, taking into account ‘crime administration blocks’, the geographical size of areas, topographical features, community resources, crime

types and patterns. Sector commanders are appointed for each sector and reservists will participate in each sector. Strategies and projects will be developed to address specific crime problems in each sector;

- operationalisation of the National Rapid Deployment Unit, consisting of 500 members; and
- transformation of SAPS Public Order units into Area Crime Combating units in 43 SAPS area offices which have a personnel strength of more than 5,500 members. The units are deployed in accordance with crime patterns and available tactical intelligence within the areas, but across police station boundaries.²⁴⁴

The Sexual Offences and Community Affairs (SOCA) Unit of the NPA was established in October 1999.²⁴⁵ The SOCA unit focuses on violent and indecent offences committed against women and children, as well as on family violence, child support and child justice. The unit ensures that these cases are prioritised, monitors the quality of delivery, and makes sure that victims and witnesses receive decent treatment in courts.²⁴⁶

The Department of Justice and Constitutional Development had by July 2003 established 40 specialised sexual offences courts countrywide and is pursuing a programme of providing facilities in courts where child witnesses, especially in child abuse cases, can testify in a friendly and secure environment without the risk of being intimidated.²⁴⁷ New child-witness rooms have one-way glass partitions adjacent to the courtrooms. Where it is impossible to provide such rooms in existing buildings, other rooms away from the courts are utilised by providing a closed-circuit television link. The department reported that by 2001 some 35 rooms had been provided with one-way glass partitioning, while 178 closed-circuit television systems had been installed, and 20 sexual offences courts were 'blueprint compliant'. A further 20 regional courts were dedicated to hearing mainly sexual offences cases.²⁴⁸

WEAKNESSES IN CHILD PROTECTION POLICY

- **A flood of kinship-care applications for foster care grants is leading to the collapse of the social welfare child protection system.**

Dr Jackie Loffel believes that the child protection system is in danger of collapse:

The country has no prospect of having sufficient social workers or children's courts in the foreseeable future to manage the massive numbers of orphans and vulnerable children who are in permanent kinship care, via court-ordered foster care. Attempts to do so are causing a collapse of the child protection system as well as serious gaps in the broader service network.²⁴⁹

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- **There is no specific policy in the criminal justice sector for dealing with child victims of crime who are not victims of child abuse or of sexual offences.**

The 2005 CJCP youth victimisation study found that the victimisation rate (the proportion of people who said they had been a victim of crime in the past 12 months) of persons aged 12–22 was almost double (about 104 of every 250) that of adults in South Africa (about 57 of every 250).²⁵⁰ Furthermore, more than three-quarters of those in the youth victimisation study who said they had been a victim of crime in the past year said the crime involved an element of violence, such as assault, sexual assault, robbery or car hijacking.²⁵¹ The child protection system is, however, geared toward responding primarily to child abuse and child sexual abuse in particular, and not necessarily crimes such as robbery.

- **No specific policy or protocol is designed for the situation where children are perpetrators of abuse of children.**

A 2002 Childline study found that almost half (43%) of child callers to Childline identified a perpetrator who was under the age of 18.²⁵² This situation is one which calls for a specialised response from the perspectives of the victims and perpetrators. Unfortunately, this need has not been recognised in the policy framework. This is particularly relevant given that the minimum sentence for child rape is life imprisonment, which has raised the sentence tariff for this offence even though minimums do not technically apply to children (see Chapter 4).

- **‘Tertiary’ trauma for child victims of rape.**

In cases of child rape where a minimum sentence is prescribed, the legislation requires a referral to the high court where evidence may be heard again, leading to tertiary trauma, particularly in the case of child witnesses who are frequently called to re-testify.

- **Lack of enforceable multidisciplinary policies.**

The proper and expeditious management of sexual offences against children requires the coordination of the SAPS, the NPA, social welfare services, medico-legal services and civil society.²⁵³ The present policy and protocols are not consistently implemented. Gallinetti argues that this is because these policies are not legally enforceable and there is no accountability for non-implementation.²⁵⁴

- **Police discretion too wide.**

SAPS members retain discretion to determine whether or not to proceed with a reported case. This results in cases both not being recorded by the police or not investigated. Gallinetti argues that police discretion should be removed and should be replaced by a review system to identify false reports.²⁵⁵

- **Lack of formal communication between criminal bail processes concerning crimes against children and welfare proceedings in the children’s court.**

Gallinetti contends that currently there is no formal communication and it is consequently possible for orders made by the two courts to contradict each other.²⁵⁶

- **Cautionary rules in South African evidentiary law.**

Courts still have discretion to apply cautionary rules to children, single witnesses and complainants in sexual offence cases.²⁵⁷ Such cautionary rules direct presiding officers to treat the evidence of such witnesses with caution. This obviously has the potential to triply prejudice children in sexual offence cases. Gallinetti points out that the South African Law Reform Commission has recommended the abolition of the rules against children and complainants in sexual offence cases.²⁵⁸

- **Aggressive cross-examination of child witnesses.**

While there are ethical and evidential rules against aggressive cross-examination of child witnesses, there are no such legislative provisions. Gallinetti argues that lack of awareness of existing rules by presiding officers and prosecutors results in children not being protected.

- **Conflation of the needs of adult victims of sexual offences and child victims may mean that child victims are not adequately catered for among players in the criminal justice system.**

DISCUSSION

The crisis in child protection and criminal justice for children is a reflection of the crisis in the broader criminal justice system and the huge pressure placed on the system by the continuing high level of crime in South Africa. This crime level is in itself a function of the matrix of risk factors identified in social crime prevention analysis.

Indeed the reliance on 'old order' crime prevention may in fact be exacerbating the problems currently being experienced. The reluctance to pass the Child Justice Bill is but one symptom of this problem. The rising number of children since 1998 who are sentenced to longer terms of imprisonment will over the coming decades result in an increasing number of relatively young, prison-hardened persons being released from prison. Indeed, each month more than 20,000 prisoners are released from prison in South Africa.²⁵⁹ In the absence of widespread rehabilitation programmes within prisons and marked change in social conditions into which they are released, such persons remain at risk of being drawn into crime.

At the same time, young children continue to remain at risk from crime and abuse, and the system appears to be responding inadequately to these needs as well. This again is a function of pressure on the system and competing priorities.

CHAPTER 6

Conclusion and recommendations

- The social crime prevention project in South Africa is faced with huge challenges.
- Consider a child born into poverty (approximately 66% of all children in South Africa are living in poverty):²⁶⁰ the child support grant, currently at R190, is immediately available to the child's caregiver and the take-up rate of the CSG is currently estimated at 84%.²⁶¹ However, if the child is disabled or in need of chronic care, the care dependency grant is only available from age one. The infant mortality rate (the number of children younger than one who die) was almost 6% in 2000.²⁶² Based on this rate, almost 10% of children born will die before age five.²⁶³
- If a child is identified as being 'in need of care', a foster care placement and foster care grant may be arranged. However, this two-step process is likely to take months. Children who are abused or neglected may also slip through the cracks due to the increasing demand for the FCG. In the three years from 2004–2006, the number of FCG recipients increased by almost 40%.²⁶⁴
- About 18% of children have lost one or both parents.²⁶⁵
- Some 10% of children will be underweight – hungry and malnourished – up to the age of nine.²⁶⁶ If they are sick, they will probably have to travel long distances to access health care. Going to hospital will most likely require them to produce documentation about income to avoid having to pay.
- At age seven, the child may enter either a no-fee school or apply for fee exemption. About 4% of children of school-going age are not enrolled in school.²⁶⁷ Due to the geographical spread of good schools, it is likely that the school will be one offering poor quality education.

MAJOR GAPS IN POLICIES RELEVANT TO CHILD SAFETY				RECOMMENDATIONS
<p style="text-align: center;">POVERTY ALLEVIATION</p> <p>CSG (Child Support Grant)</p> <ul style="list-style-type: none"> - exclusion of children over 14 - caregivers under 16 unable to access CSG for children in their care - limited access for non-biological children - not keeping pace with inflation - flawed CSG means test - burdensome documentation requirements <p>FCG (Foster Care Grant)</p> <ul style="list-style-type: none"> - non-biological children get monetary preference - no support for informal fostering or 'social parenting' - foster care process is lengthy - demands for FCG are exhausting the social welfare child protection system - HIV/Aids-driven pressure overburdening foster system <p>CDG (Care Dependency Grant)</p> <ul style="list-style-type: none"> - only available from age 1 - children with chronic illnesses (e.g. HIV/Aids) or mild disabilities not eligible - lack of clear and appropriate definitions - inconsistent application - means test problems 	<p style="text-align: center;">HEALTH</p> <ul style="list-style-type: none"> - poor and deteriorating overall health of children - primary health care services unable to meet current demand - access to health care is problematic (transport, medicines, medical staff) - free health care policy not applied consistently - free health care access limited by burdensome documentation - focus on free primary care caused neglect of preventative care - focus on comprehensive primary health care undercut child health care - no overarching child health policy covering all government departments - lack of multi-disciplinary understanding that health is influenced by housing and access to water and sanitation 	<p style="text-align: center;">EDUCATION</p> <ul style="list-style-type: none"> - fee payment requirement is a barrier to public education - education funding policy can lead to exclusions, drop-outs, and trapping poor children in the weakest schools - school fee exemptions are available but are resisted by many schools - no-fee schools unlikely at secondary level 	<p style="text-align: center;">CRIMINAL JUSTICE</p> <p>Child Protection Policy</p> <ul style="list-style-type: none"> - no policy for child victims of non-sexual, non-abuse crimes - no policy for children who abuse children - aggressive cross-examination of child witnesses not prevented - no distinction between adult and child victims of sexual offences <p>Child Justice Policy</p> <ul style="list-style-type: none"> - 'tough on crime' approach negatively impacts on children - punitive approaches exacerbate conditions leading to crime - varying treatment of children in inequitable criminal justice system - lack of diversion and alternative sentencing service providers - children as victims not adequately protected - children being imprisoned for longer - children over 16 face possible life in prison 	<ul style="list-style-type: none"> - Reform current kinship care policy for FCG - Adjust CSG means test - Expand CSG eligibility to all children under 18 - Create a comprehensive child health policy - Rethink school funding - Reassess school no-fee and exemption policies - Implement pilot projects to transform under-performing schools - Pass Child Justice Bill - Increase the number of probation officers and social workers - Expand diversion programmes - Develop a policy for situations where children are perpetrators of crimes against children

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- At secondary school level (age 13), school fees increase. At age 14, the CSG is no longer available to the caregiver of the child. School fee exemptions may be available but will probably be resisted by schools. No-fee schools are likely not to be available at secondary level. The child may drop out, repeat or attend irregularly.
- From age 16, children who commit and are found guilty of serious crimes may have a sentence of life imprisonment imposed upon them. Children guilty of any crime have only a 1 in 5 chance of being diverted, based on Gauteng data.²⁶⁸ About 1 in 250 young men aged 15–20 are currently in prison.²⁶⁹

Given the matrix of social risk factors South Africa’s children are exposed to – poverty, disrupted families, poor health conditions and poor schooling – it is no surprise that children are at risk from both victimisation and offending perspectives. The current policy framework falls short of meeting the challenges posed by these risk factors.

RECOMMENDATIONS

From the above analysis, the most urgent tasks required for government to improve child safety from a crime prevention perspective are the following:

- Reform the current kinship care policy in relation to FCG, which is overburdening the social welfare child protection system.
- Extend the CSG through adjustment (or abolition) of the means test and expansion of eligibility to all children under 18.
- Develop a comprehensive child health policy, which includes obligations to take child health indicators into account at all levels of government.
- Rethink school funding, no-fee and exemption policies to ensure the poorest children are not trapped in the worst schools.
- Implement pilot projects aimed at finding solutions which succeed in transforming poorly performing schools.
- Pass the Child Justice Bill while increasing the number of probation officers and social workers, and expanding diversion programmes to ensure at least one service provider in every court.
- Develop a policy for situations where children are perpetrators of crimes against children.

Any move towards the above is likely in itself to generate a policy environment which is far more conducive to the safety and well-being of children in South Africa than the current scenario, and concomitantly significantly contribute to the objectives of any social crime prevention initiatives as they pertain to children.

Endnotes

- 1 Leoschut L & Burton P, *How Rich the Rewards? Results of the 2005 National Youth Victimization Study*, CJCP Monograph Series, 1, Centre for Justice and Crime Prevention, Cape Town, 2006.
- 2 Convention on the Rights of the Child: Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990.
- 3 Article 3(2): 'States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.'
- 4 Leoschut & Burton, op cit.
- 5 Palmary I, *Social Crime Prevention in South Africa's Major Cities*, Centre for the Study of Violence and Reconciliation, Johannesburg, 2001.
- 6 Ibid.
- 7 Ibid.
- 8 Ibid.
- 9 Ibid.
- 10 Ibid.
- 11 Ibid.
- 12 International Centre for the Prevention of Crime (ICPC), *Crime Prevention Digest*, <<http://www.crime-prevention-intl.org/english/prevention/index/pres.html>>, 1997, pp 20-21, quoted in Palmary, ibid.
- 13 Palmary, op cit.
- 14 Ibid.
- 15 ICPC, op cit.
- 16 Palmary op.cit
- 17 Frank C, *Protecting our Children and Youth: How Social Service Delivery Can Prevent Crime*, ISS Monograph Series, Institute for Security Studies, Pretoria, 2005.
- 18 Section 28(3) Constitution of the Republic of South Africa Act 108 of 1996 defines 'children' in the context of their constitutional rights contained in s28, as persons under the age of 18.
- 19 28. Children.– (1) Every child has the right –
 - (a) to a name and a nationality from birth;
 - (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
 - (c) to basic nutrition, shelter, basic health care services and social services;
 - (d) to be protected from maltreatment, neglect, abuse or degradation;
 - (e) to be protected from exploitative labour practices;
 - (f) not to be required or permitted to perform work or provide services that –
 - (i) are inappropriate for a person of that child's age; or
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;

- (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child’s age;
 - (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
 - (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
2. A child’s best interests are of paramount importance in every matter concerning the child.
 3. In this section ‘child’ means a person under the age of 18 years.
- 20 This is illustrated by the existence of the Alliance for Children’s Entitlement to Social Security (ACCESS), which is an alliance of almost 1000 children’s sector organisations that are advocating for social security for all children in order to realise children’s rights.
- 21 Calculated by Debbie Budlender for the *South African Child Gauge 2006* Monson, J, Hall K, Smith C & Shung-King M (eds), *South African Child Gauge 2006*, Children’s Institute, University of Cape Town, Cape Town, 2006.
- 22 ‘Article 26: 1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.
2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.’
- 23 Constitution of the Republic of South Africa Act 108 of 1996.
- 24 Section 27 (1)(c): ‘Everyone has the right to have access to social security including, if they are unable to support themselves and their dependants, appropriate social assistance.’; Section 27 (2): ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.’
- 25 GNR.162 of 22 February 2005: Regulations in terms of the Social Assistance Act, 2004 (Act No. 3 of 2004).
- 26 South African Government, Strategic Plan 2006-2009, Department of Social Development, p 64.
- 27 List in Schedule 3A of the Public Finance Management Act No 1 of 1999. Entities in this Schedule are termed ‘National Public Entities’. Various accounting requirements relating to reporting to the national executive apply to such entities.
- 28 Strategic Plan 2006-2009, op cit, p 65.
- 29 Ibid.
- 30 However, by the time of writing, the 2004 Act and regulations, despite having commenced, had not been fully implemented. In addition, Chapter 4 of the 2004 Act,

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- which provides for the establishment of an Inspectorate for Social Assistance whose general function is to combat the abuse of social assistance, had not yet commenced, although the remainder of the act commenced on 31 March.
- 31 Strategic Plan 2006-2009, op cit, p 68.
- 32 Hall K, Support only for doubly poor kids, *Business Day*, 15 June 2006.
- 33 Regulation 16, Government Notice No. R.418 of 31 March 1998, as amended by Government Notice No. R.813 of 25 June 1999 and Government Notice No. R. 1233 of 23 November 2001.
- 34 Ibid.
- 35 Hall, op cit.
- 36 Government Notice 294 of 31 March 2006, *Government Gazette* 28672.
- 37 Regulation 10 GNR.162 of 22 February 2005: Regulations in terms of the Social Assistance Act, 2004 (Act No. 3 of 2004).
- 38 Section 1 of the Social Assistance Act defines a primary caregiver as a person older than 16.
- 39 Regulation 4(1)(b) GNR.162, op cit.
- 40 Budlender D, Rosa S & Hall K, *At All costs? Applying the Means Test for the Child Support Grant*, Children's Institute & the Centre for Actuarial Research, University of Cape Town, Cape Town, 2005, p See an excellent summary of this work in Hall, op cit.
- 41 Ibid.
- 42 Ibid.
- 43 The cost is estimated at R18.77 per applicant. See Budlender et al, op cit, p 32.
- 44 Ibid, p 40.
- 45 Rosa S, Leatt A & Hall K, Does the means justify the end? Targeting the child support grant, in Leatt A & Rosa S (eds), *Towards a Means to Live: Targeting Poverty Alleviation to Make Children's Rights Real*, Children's Institute, University of Cape Town, Cape Town, 2005, p 21.
- 46 Leatt A, *Grants for Children: A Brief Look at the Eligibility and Take-up of the Child Support Grant and Other Cash Grants*, Children's Institute Working Paper, 5, University of Cape Town, Cape Town, 2005, p 11.
- 47 For all grants, a valid identity document for the applicant and spouse is required plus proof of marital status, plus birth certificate for the child (Regulation 10) in the case of children's grants.
- 48 Section 1, Social Assistance Act 13 of 2004.
- 49 Strategic Plan 2006-2009, op cit, p 68.
- 50 Section 14, Child Care Act No 74 of 1983.
- 51 Act 96 of 1996: Prior to amendment by Act 96, section 14(4)(b) read:
 '(b)the child has a parent or a guardian or is in the custody of a person who is unable or unfit to have the custody of the child, in that he –
 (i) is mentally ill to such a degree that he is unable to provide for the physical, mental or social well-being of the child;
 (ii) has assaulted or ill-treated the child or allowed him to be assaulted or ill-treated;
 (iii) has caused or conduced to the seduction, abduction or prostitution of the child or the commission by the child of immoral acts;
 (iv) displays habits and behaviour which may seriously injure the physical, mental or social well-being of the child;
 (v) fails to maintain the child adequately;
 (vi) maintains the child in contravention of section 10;
 (vii) neglects the child or allows him to be neglected;
 (viii)cannot control the child properly so as to ensure proper behaviour such

- as regular school attendance;
 - (ix) has abandoned the child; or
 - (x) has no visible means of support.
- 52 The Children’s Act provides that a child is ‘in need of care and protection’ if the child has been abandoned or orphaned and is without any visible means of support, or if the child:
- displays behaviour which cannot be controlled by the parent or care-giver;
 - lives or works on the streets or begs for a living;
 - is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency;
 - has been exploited or lives in circumstances that expose the child to exploitation;
 - lives in or is exposed to circumstances which may seriously harm that child’s physical, mental or social well-being;
 - may be at risk if returned to the custody of the parent, guardian or care-giver of the child as there is reason to believe that he or she will live in or be exposed to circumstances which may seriously harm the physical, mental or social well-being of the child;
 - is in a state of physical or mental neglect; or
 - is being maltreated, abused, deliberately neglected or degraded by a parent, a care-giver, a person who has parental responsibilities and rights or a family member of the child or by a person under whose control the child is.
- 53 Section 156(1)(e)(i) Children’s Act 38 of 2005
- 54 Regulation 5 GNR.162 of 22 February 2005: Regulations in terms of the Social Assistance Act, 2004 (Act No. 3 of 2004).
- 55 Ibid.
- 56 Regulation 5(3) GNR.162, *ibid*, read with the current amount.
- 57 Regulation 29(1).
- 58 Section 16, Child Care Act 74 of 1983.
- 59 Section 159(1)(a), Children’s Act 38 of 2005.
- 60 Regulation 32(5)(c) GNR.162, *op cit*.
- 61 Regulation 32(5)(d)(iii) GNR.162, *op cit*.
- 62 Section 159(3) Children’s Act 38 of 2005.
- 63 Meintjies H, Budlender D, Giese S & Johnson L, *Children ‘In Need of Care’ or In Need of Cash? Questioning Social Security Provisions For Orphans in the Context of the South African AIDS pandemic*, joint working paper, Children’s Institute and Centre for Actuarial Research, University of Cape Town, Cape Town, December 2003, p 29.
- 64 *Ibid*, p 6.
- 65 Quoted in Meintjies et al, *ibid*.
- 66 Meintjies et al, *ibid*.
- 67 *Ibid*, p 7.
- 68 *Ibid*, p 15.
- 69 *Ibid*, p 13.
- 70 *Ibid*, p 15.
- 71 *Ibid*, p 22.
- 72 *Ibid*, p 25.
- 73 *Ibid*, p 29.
- 74 Regulation 6(1) GNR.162, *op cit*.
- 75 Section 7(a), Social Assistance Act No 13 of 2004.
- 76 Regulation 6(1)(a) GNR.162, *op cit*.

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- 77 Strategic Plan 2006-2009, op cit, p 68.
- 78 Regulation 30 GNR.162, op cit.
- 79 Guthrie T, Sait W, et al, *Social Security Policy Options for People with Disabilities in South Africa*, prepared by the Child Health Policy Unit & South African Federal Council on Disability for the Committee of Inquiry into a Comprehensive Social Security System, Cape Town, March 2001, pp 94-96.
- 80 Ibid.
- 81 Ibid.
- 82 Ibid.
- 83 Ibid.
- 84 Ibid.
- 85 Creamer K, *The Impact of South Africa's Evolving Jurisprudence on Socio-economic Rights on Budget Analysis*, IDASA Occasional Paper, Cape Town, December 2002.
- 86 Ibid.
- 87 Budlender G, in Creamer, *ibid*, p 31.
- 88 Ibid.
- 89 *Khosa & others v Minister, Social Development & others; Mahlaule & another v Minister, Social Development & others* [2005] JOL 12540 (CC)
- 90 Khosa, op cit at 86.
- 91 Ibid, at 62.
- 92 Ibid, 56.
- 93 ACCESS Submission to the Department of Social Development on the Regulations in terms of the Social Assistance Act, 2004 (Act No.13 of 2004) 14 March 2005, p 6.
- 94 Social Development 2006 Estimates of National Expenditure, vote 18, p 399.
- 95 Actuarial Society of South Africa, *ASSA2003 Aids and Demographic Model*, quoted in Children's Institute, Children Count (2005) Indicator: HIV prevalence among children, Cape Town, 2005.
- 96 Solarsh G & Goga A, Chapter 8: Child health, in *South African Health Review*, Health Systems Trust, Durban, p 123.
- 97 Ibid, p 113.
- 98 Article 3: 'All actions concerning children should take full account of their best interests. The State is to provide adequate care when parents or others responsible fail to do so.'

Article 6: 'Every child has the inherent right to life and Parties shall ensure to the maximum extent possible the survival and development of the child.'

Article 20: 'The state must provide special protection for children deprived of their family environment and ensure that appropriate alternative family care or institutional placement is made available to them, taking into account the child's cultural background.'

Article 24(1): 'States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.'

Article 24(2): 'States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

- (a) to diminish infant and child mortality;
- (b) to ensure the provision of necessary medical assistance and health care to all

- children with emphasis on the development of primary health care;
- (c) to combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution;
 - (d) to ensure appropriate pre-natal and post-natal health care for mothers;
 - (e) to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;
 - (f) to develop preventive health care, guidance for parents and family planning education and services.'
- 99 Other relevant provisions of the Reconstruction and Development Programme (RDP) include the following:

'2.12.6.2 There must be a programme to improve maternal and child health through access to quality antenatal, delivery and postnatal services for all women. This must include better transport facilities and in-service training programmes for midwives and for traditional birth attendants. Targets must include 90 per cent of pregnant women receiving antenatal care and 75 per cent of deliveries being supervised and carried out under hygienic conditions within two years. By 1999, 90 per cent of deliveries should be supervised. These services must be free at government facilities by the third year of the RDP. In addition, there should be established the right to six months paid maternity leave and 10 days paternity leave.'

'2.12.6.3 Preventive and promotive health programmes for children must be improved. Breast-feeding must be encouraged and promoted, and the code of ethics on breast-milk substitutes enforced. A more effective, expanded programme of immunisation must achieve a coverage of 90 per cent within three years. Polio and neonatal tetanus can be eradicated within two years.'

- 100 Reconstruction and Development Programme Item 2.12.6.1
- 101 Section 4(3)(a), National Health Act 61 of 2003.
- 102 Section 4(3)(b), National Health Act 61 of 2003.
- 103 Section 4(3)(c), National Health Act 61 of 2003.
- 104 Annexure H.
- 105 Ibid.
- 106 Ibid.
- 107 Ibid.
- 108 Ibid.
- 109 Section 29(1)(o), Medical Schemes Act 131 of 1998 read with Regulation 8 GNR.1262 of 20 October 1999 as amended.
- 110 Uniform Patient Fee Schedule 2005.
- 111 Ibid.
- 112 Ibid.
- 113 Solarsh & Goga, op cit, have however identified the following as key policies, strategies and guidelines relating to child health in South Africa, developed (or in draft form) by the Department of Health. This is not a comprehensive list.
 - Policy Guidelines for the Management and Prevention of Genetic Disorders, Birth Defects, and Disabilities

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- National Health Policy Guidelines for Improved Mental Health in South Africa
- Policy Guidelines for Child and Adolescent Mental Health
- National Rehabilitation Policy
- Child Health Policy and Implementation Guidelines
- Infant and Young Child Feeding Policy
- Policy Framework for Non-communicable Chronic Conditions in Children
- National Policy Framework for Child Abuse
- Comprehensive Primary Health Care Package and Norms and Standards
- District Hospital Service Package for South Africa
- SA Breastfeeding Guidelines for Health Workers
- Guidelines for Nutrition Interventions at Health Facilities to Manage and Prevent Child Malnutrition
- PMTCT Protocol for Pilot Sites
- Expanded Programme on Immunisation (South Africa) - Immunisation Schedule and Fact Sheets
- Integrated Management of Childhood Illness Strategy: Case Management Guidelines
- National Guidelines on Palliative Care for Children
- HIV/AIDS/STD Strategic Plan of the National Department of Health
- Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa
- Management of Diabetes Type I in children (<18 years) at hospital level
- Management of Asthma in Children
- National Guidelines on Primary Prevention and Prophylaxis of Rheumatic Fever and Rheumatic Heart Disease for Health Professionals at primary level
- Maternal and Neonatal Strategy
- Guidelines for Health Care Providers Managing Suspected Child Abuse, Neglect and Exploitation

114 Monson et al, op cit, p 52.

115 Ibid, p 55.

116 Ibid, p 52.

117 Ibid, p 55.

118 Ibid, pp 54-55.

119 Ibid, p 53.

120 Ibid.

121 Ibid.

122 Ibid, p 52.

123 Ibid.

124 Shung-King M, Children's right to health: Do they get what was promised?, *Critical Health Perspectives* 5, People's Health Movement of South Africa, 2005, p 2.

125 Ibid.

126 Ibid.

127 Section 5, Children's Act 38 of 2005.

128 Shung-King, op cit, p 2.

129 Ibid, p 4.

130 Ibid.

131 Monson et al, op cit, p 55.

132 Ibid.

133 Ibid.

134 See the following sources: Cowen E L, Psychological wellness: Some hopes for the future, in Cicchetti D, Rappaport J, Sandler I & Weissberg RP (eds), *The Promotion of*

Wellness in Children and Adolescents, CA, Sage, Thousand Oaks, California, 2000; Glanz M & Johnson (eds), *Resilience and Development: Positive Life Adaptations*, Plenum, New York, 1999; Luthar SS, Cicchetti D & Becker B, The construct of resilience: A critical evaluation and guidelines for future work, *Child Development*, 71, 2000; Masten A.S, Resilience in individual development: Successful adaptation despite risk and adversity, in Wang M Gordon E (eds), *Risk and Resilience in Inner City America: Challenges and Prospects*, Lawrence Erlbaum, Hillsdale, N. J, 1994, pp 3-25; Masten AS & Coatsworth, 1998, referred to in Masten A, *Children Who Overcome Adversity to Succeed in Life*, 2006, available at <www.extension.umn.edu>.

135 Article 28: '1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) make primary education compulsory and available free to all;
- (b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) make educational and vocational information and guidance available and accessible to all children;
- (e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy.'

136 The South African Schools Act 84 of 1996.

137 National Education Policy Act 27 of 1996.

138 Veriava F, Free to learn: A discussion paper on the school fee exemption policy, in Leatt A & Rosa S (eds), *Towards a Means to Live: Targeting Poverty Alleviation to Make Children's Rights Real*, Children's Institute, University of Cape Town, 2005, p 2.

139 Section 3, South African Schools Act 84 of 1996.

140 Roithmayr D, *The Constitutionality of School Fees in Public Education*, Centre for Applied Legal Studies (CALs), University of the Witwatersrand, September 2002.

141 Ibid.

142 Giese S, Meintjies H, Croke R & Chamberlain, R, *The Role of Schools in Addressing the Needs of Children Made Vulnerable in the Context of HIV and AIDS*, Children's Institute, University of Cape Town, July 2003.

143 Minister of Education, Parliamentary Reply, 10 November 2004.

144 Roithmayr, op cit, p 7.

145 Ibid.

146 Ibid.

147 Giese et al, op cit.

148 The 2003 Review on the Resourcing, Financing and Costs of Education in Public Schools.

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- 149 Education Laws Amendment Act, No. 24 of 2005.
- 150 Amended National Norms and Standards for School Funding GN 29179, 31 August 2006.
- 151 GN 1052, *Government Gazette* No. 29311 of 18 October 2006.
- 152 Para 156(a), Amended Norms.
- 153 Para 156(b), Amended Norms.
- 154 Para 109, Amended Norms.
- 155 Minister's Parliamentary Reply, 19 June 2006 Q704 NA.
- 156 Ibid.
- 157 Para 165, Amended Norms.
- 158 Para 166, Amended Norms.
- 159 Para 166, Amended Norms.
- 160 Para 169, Amended Norms.
- 161 Para 169(a), Amended Norms.
- 162 Para 169(b), Amended Norms.
- 163 GN 29311, *Regulations relating to the exemption of parents from payment of school fees in public schools*, 18 October 2006.
- 164 *Natal Witness*, 9 November 2006.
- 165 Ibid.
- 166 Ibid.
- 167 Ibid.
- 168 *Natal Mercury*, 27 November 2006
- 169 Regulation 95, Amended National Norms and Standards for School Funding.
- 170 Regulation 3, Fee Exemption Regulations.
- 171 Monson et al, op cit.
- 172 Hindle, D. Department of Education
- 173 Fiske EB & Ladd HF, *Elusive Equity: Education Reform in Post-Apartheid South Africa*, Human Sciences Research Council (HSRC), South Africa/Nexus, 2005, chapter 9.
- 174 Figures 5 to 8 are reproduced from Fiske & Ladd, op cit.
- 175 Statement by Naledi Pandor, Minister of Education, on the release of the 2006 senior certificate examination results, Parliament 28 December 2006.
- 176 Roithmayer, op cit.
- 177 News24, <www.news24.com>, 14 August 2005.
- 178 Van Niekerk J, Childline Submission to Parliament on Sexual Abuse of Children, March 2002.
- 179 Shung-King, op cit.
- 180 See Fajnzylber P, Lederman D & Loayza N, Inequality and violent crime, *The Journal of Law and Economics*, 45, 2002, pp 1-39; and Kelly M, Inequality and crime, *The Review of Economics and Statistics*, 82(4), November 2000, pp 530-539.
- 181 'Article 19: 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.'

182 'Article 40: 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

- (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
- (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) to be presumed innocent until proven guilty according to law;
 - (ii) to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
 - (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
 - (iv) not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
 - (v) if considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
 - (vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used;
 - (vii) to have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'

183 '28. Children. - (1) Every child has the right -
 (g) not to be detained except as a measure of last resort, in which case, in addition

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- to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -
- (i) kept separately from detained persons over the age of 18 years; and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age;
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict."
- 184 Section 27(1)(d) Constitution of the Republic of South Africa Act 108 of 1996.
- 185 See Sloth-Nielsen J, *Developing a child justice system through judicial practice, Article 40 7(4)*, December 2005.
- 186 *S v Kwalase [2000] JOL 7128 (C)*.
- 187 *S v Zuba and 23 Similar Cases [2004] 1 All SA 438 (E)*.
- 188 *S v Petersen 2001 (1) SACR 16 (SCA)*.
- 189 Pinnock D, *Mail & Guardian*, 3 October 2006.
- 190 For more on the Child Justice Bill see inter alia discussion in various editions of *Article 40*.
- 191 Section 74, Criminal Procedure Act 51 of 1977.
- 192 'Murder; Rape; Robbery; Assault, when a dangerous wound is inflicted; Arson; Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence; Theft, whether under the common law or a statutory provision; Receiving stolen property knowing it to have been stolen; Fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds R2 500; Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones; Any offence under any law relating to the illicit -
- (a) possession of -
 - (i) dagga exceeding 115 grams; or
 - (ii) any other dependence-producing drugs; or
 - (b) conveyance or supply of dependence-producing drugs; Any offence relating to the coinage; Any conspiracy, incitement or attempt to commit any offence referred to in this Part.'
- 193 'Sedition; Public violence; Arson; Murder; Kidnapping; Childstealing; Robbery; Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence; contravention of the provisions of sections 1 and 1A of the Intimidation Act, 1982 (Act No. 72 of 1982); Any conspiracy, incitement or attempt to commit any of the above-mentioned offences; Treason.'
- 194 Section 72(a) and (b) Criminal Procedure Act 51 of 1977.
- 195 Section 71 Criminal Procedure Act 51 of 1977.
- 196 Interim National Protocol for the Management of Children Awaiting Trial.
- 197 Ibid.
- 198 Ibid.
- 199 Ibid.
- 200 Ibid.
- 201 *Child Justice Bill Synopsis 2003*, Centre for Child Law, University of Pretoria, February 2003.
- 202 Probation Services Amendment Act 35 of 2002
- 203 Ibid.
- 204 Section 35(3)(f) and (g) Constitution of the Republic of South Africa Act 108 of 1996.

- 205 Inter-sectoral Committee on Child Justice 2002.
- 206 Criminal Law Amendment Act 105 of 1997.
- 207 Persons aged under 20 as those of that age group were likely to have been under the age of 18 at the time the alleged crime was committed, and furthermore this is the most easily available data category obtainable from the Department of Correctional Services.
- 208 Section 51(6) Act 105 of 1997.
- 209 Section 51(7) Act 105 of 1997.
- 210 Section 51(3)(b) Act 105 of 1997.
- 211 See *S v Mofokeng and another* 1999 (1) SACR 502 (W); *S v Nkosi* 2002 (1) SACR 135 (W); *S v Blaauw* 2001 (2) SACR 255; *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1 (T); *S v K and Another* (case no. SS 50/99) unreported judgement delivered on 27 January 2000; *S v Daniels and others* case no. RC 75/01 unreported judgement delivered by the Cape High Court on 7 May 2001.
- 212 *Brandt v S* [2005] 2 All SA 1 (SCA).
- 213 Ibid, at para 24.
- 214 Ibid, at para 23.
- 215 Research by Anne Skelton reported in the *Pretoria News*, 14 June 2005.
- 216 See Redpath J & O' Donovan M, *The Impact of Minimum Sentencing in South Africa*, Open Society Foundation, 2006.
- 217 <<http://www.info.gov.za/aboutgovt/justice/system.htm>>
- 218 Commissioner Charlotte McClain-Nhlapo, Briefing to the Parliamentary Portfolio Committee on Correctional Services, Cape Town, 7 September 2004.
- 219 Mbambo B, *Diversion: A Central Feature of the New Child Justice System*, ISS Monograph 111, Institute for Security Studies, Pretoria, February 2005, Chapter 7.
- 220 Muntingh L, *The Effectiveness of Diversion Programmes: A Longitudinal Analysis of Cases*, NICRO, Cape Town, May 2001.
- 221 Gauteng Department of Social Development Strategic Plan, 2005-2010, p 64 available at <<http://www.gautengonline.gov.za/bin/SocialDevelopmentFiveYearStrategicAndPerformancePlan.pdf>>
- 222 SAPS website, www.saps.gov.za
- 223 Section 11, Child Care Act 74 of 1983.
- 224 Section 42 Child Care Act 74 of 1983.
- 225 South African Law Reform Commission Report on the Review of the Child Care Act, (Project 110), Chapter 9, p 101, available at <<http://www.law.wits.ac.za/salc/salc.html>>.
- 226 Ibid.
- 227 The Children's Act also provides guidelines for the identification of children in need of care and protection. These include children who have been abandoned or orphaned; those who display uncontrollable behaviour; those addicted to a dependence-producing substance; and those who live in circumstances which may seriously harm their physical, mental or social well-being, or is in a state of physical or mental neglect. A child who is a victim of child labour, or who lives in a child-headed household may be in need of care and protection and must be referred to a social worker for further investigation and assistance.

The Children's Act makes provision for the removal of a child to temporary safe care if, following an investigation, it is so ordered by the children's court. Such removal of children from their homes and families is, however, a measure of last resort. Wherever possible the child should remain in familiar surroundings and, to this end, provision is made that an alleged offender may be removed from the home or place where the child resides, rather than removing the child.

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- A child may be adopted if this is in the best interests of the child, if the child is adoptable, and if the provisions of the act are followed. A child is adoptable if he or she is an orphan with no guardian or caregiver who is willing to adopt the child; if the child's parent or guardian has abused or deliberately neglected the child; or if the child is in need of a permanent alternative placement.
- 228 South African Law Reform Commission Report, op cit, p 103.
- 229 Ibid. p 105.
- 230 Ibid, p 107.
- 231 Ibid.
- 232 Ibid.
- 233 Ibid.
- 234 Section 111, Children's Act 38 of 2005
- 235 SAPS website <http://www.saps.gov.za/org_profiles/core_function_components/fcs/establish.htm>
- 236 Ibid.
- 237 Ibid.
- 238 SAPS Strategic Plan 2005-2010, p 39, available at <www.saps.gov.za>.
- 239 Ibid.
- 240 Ibid, p 40.
- 241 Ibid, p 41.
- 242 Ibid.
- 243 Ibid, p 35.
- 244 Ibid, pp5-36.
- 245 NPA webiste <www.npa.gov.za>
- 246 Ibid.
- 247 DOJ&CD website <www.doj.gov.za>
- 248 Ibid.
- 249 Loffel J, The use of the statutory foster care system to support long term kinship care: impact on the social welfare system and the social work profession, National Welfare Social Services & Development Forum (NWSSDF) promotional email in respect of NWSSDF Discussion Paper, January 2007.
- 250 Leoschut & Burton, op cit, p 79.
- 251 Ibid, p 46
- 252 Van Niekerk, op cit.
- 253 Gallinetti J. Section III: Legal and policy responses: Chapter 10: Legal definitions and practices in child sexual abuse in sexual abuse of young children in Southern Africa, in Richter L, Dawes A, Higson-Smith C (eds), *The Sexual Abuse of Young Children in Southern Africa: In Search of Solutions*, HSRC Press, Pretoria, 2004, p 217.
- 254 Ibid.
- 255 Ibid, p 218.
- 256 Ibid, p 219.
- 257 *S v Jackson 1998 (1) SACR 470 SCA*.
- 258 Gallinetti, op cit.
- 259 Department of Correctional Services 2005 release data.
- 260 *Children Count 2006*, Children's Institute, University of Cape Town, 2006 <www.childrencount.ci.org>.
- 261 Ibid.
- 262 Ibid.
- 263 Ibid.
- 264 Ibid.
- 265 Ibid.

- 266 Ibid.
- 267 Ibid.
- 268 See Chapter 4 of this publication.
- 269 Ibid.