

AIDS orphans and children's rights

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OPSOMMING

Vigs-weeskinders en kinderregte

Die verwoesting wat deur die Vigs-pandemie gesaai word, is nie beperk tot die direkte gevolge van die siekte vir die persone wat daaraan ly nie. Die stigma wat daaraan kleef, die onvermoë van die regering om op alle vlakke gepaste stappe te doen en die gemeenskap se gebrek aan betrokkenheid, vererger die gevolge daarvan. In ontwikkelende lande dra armoede ook by tot die totale verwoesting wat hierdie siekte meebring.

Vigs-weeskinders ly waarskynlik die heel ergste onder die gevolge van MIV/Vigs. In hierdie bydrae word die fundamentele regte en ook die regte wat in internasionale dokumente vir kinders bestaan, ontleed. Daar word aangetoon dat hierdie regte van vigs-weeskinders deurlopend geskend word. Hierdie kinders se regte kan weens verskeie redes ook nie eens in 'n breë familieverband ondervang word nie. Verder word toegegee dat dit ongewens is om kinders op 'n groot skaal in inrigtings te versorg.

In dié bydrae word moontlikhede ondersoek om die nadelige uitwerking van die siekte op hierdie kategorie besonder kwesbare kinders se regte te beperk. Die gevolgtrekking wat bereik word, is dat veel uitgebreider regerings- en gemeenskapsbetrokkenheid noodsaaklik is ten einde die regte van Vigs-weeskinders 'n werklikheid te maak.

1 INTRODUCTION

The generally accepted definition of an HIV/AIDS orphan is a person of fifteen years or younger whose mother has died of an HIV-related disease.¹ Currently definitions with an upper age limit of eighteen years also seem to be used extensively.²

At the Durban AIDS Conference in 2000³ the point was raised by a spokesperson for UNICEF that society has, for too long, disregarded the AIDS problem, thereby abetting this "most unpardonable of crimes" in which the lives of

1 Whiteside and Michael "AIDS and development" 1998 *Indicator SA* 15(3) 57; Roos *HIV/AIDS and children's rights* (LLM dissertation UP 2002) 70.

2 Giese, Meintjies, Croke and Chamberlain *Health and social services to address the needs of orphans and other vulnerable children in the context of HIV/AIDS* (2003) 17; Back, Michaels and Levine "A comparison of definitions of AIDS orphans and implications for policy development" <http://www.aegis.com/conferences/iac/1996/ThD4889.html> accessed 2005-11-21; *Children on the brink 2004 A joint report of new orphan estimates and a framework for action* (2004) 3.

3 13th International AIDS Conference 9–14 July 2000.

innumerable children have been lost.⁴ This article will focus on South Africa because there are more people infected with HIV in South Africa than in any other country in Africa.⁵ It was reported in 2005 that there were a total of 2 531 810 orphans in South Africa, with 455 970 of them being maternal orphans, 1 745 715 paternal orphans and 330 125 double orphans.⁶ However, as horrific as such and other similar statistics might be to describe this grave situation, the main concern is not about mere statistics but the serious tragedy (a tragedy that is, at least, containable if not totally preventable) of the disease and its effect on children.

2 THE SITUATION AT PRESENT

2.1 The reality of HIV/AIDS for destitute orphans

The effect of AIDS results in a change to the social landscape.⁷ Where in the past most orphans were cared for by the extended family,⁸ the projected decimation by AIDS indicates that most extended families will lose one or more breadwinners to AIDS, with the result that there will be less support available from the extended families, as such families will often be under severe economic stress and in greater need of external support.⁹

One of the sad consequences of HIV/AIDS is that an unnecessarily large number of orphans, from the lower economic levels, have to fend for themselves when they have lost their parents through this disease. AIDS orphans are stigmatised¹⁰ due to the unfounded belief that the disease can be contracted by mere proximity.¹¹ The beliefs of people, that AIDS has been introduced by negative elements to undermine society, are rife among the youth.¹² The stigma associated

4 Roos 70.

5 Giese *et al* 2.

6 Shisana, Rehle, Simbayi, Parker, Zuma, Bhana, Connolly, Jooste, Pillay *et al South African national HIV prevalence, HIV incidence, behaviour and communication survey, 2005* (2005) xxxv. Children who have lost both parents are defined as double orphans. There are 7,7 million double orphans in Sub-Saharan Africa. The number of double orphans is estimated to increase to 9 million by 2010, largely due to AIDS: Joint Report by UNAIDS, UNICEF and the US Agency for International Development (USAID) titled *Children on the brink 2004* 3-11. *Children on the brink 2000* estimated that by 2010 at least 44 million children will have lost one or both parents to all causes in the 34 countries most severely affected by the AIDS pandemic: <http://www.unicef.org/publications/files/cob-layout6-013.pdf> accessed 2005-11-24.

7 Roos 85.

8 Bandawe and Louw "The experience of family foster care in Malawi" 1997 *Child Welfare* 536; Roos 85.

9 Raufu "Generation without parents: Orphans and vulnerable children" 2000(13) *Aids Analysis Africa* 9; *Children on the brink 2004* 4 9 11.

10 For the concept "stigma", see Deacon with Stephey and Prosalendis *Understanding HIV/AIDS stigma: A theoretical and methodological analysis* (2005) 2 15-17; www.hsrepress.ac.za accessed 2006-02-07.

11 *Children on the brink 2004* 3. See Deacon *et al* 18 for a possible explanation: "[S]tigma is a fundamental emotional response to danger that helps people feel safer by projecting controllable risk, and therefore blame, onto outgroups. Stigmatisation thus helps to create a sense of control and immunity from danger at an individual and group level."

12 Richter and Swart-Kruger "AIDS-risk among street children and youth: Implications for intervention" 1995 *South African Journal of Psychology* 31; Roos 78 80.

with AIDS is particularly discerning, since stigmatising beliefs lead to discriminatory actions.¹³

Children orphaned because of AIDS are beset with enormous challenges, as it is usually the responsibility of the older child, even if that child is himself/herself very young, to look after the other siblings in a very unsympathetic environment.¹⁴ There were already 180 433 households headed by children in South Africa in 2005, and most of them were African.¹⁵ The opportunities for these children to escape from the disabling effects of having lost their parents and (most probably) themselves suffering from AIDS, are, at present, minimal. Support in the form of social assistance or of obtaining even a rudimentary formal education, for those in the lower economic levels, is, in many cases, sparse or non-existent.¹⁶

2.2 The plight of orphans: The pervasive impact of ignorance

In spite of efforts to educate others to be more understanding, the stigmatisation of those suffering from AIDS itself or its effects is still prevalent in an ignorant and unsympathetic society.¹⁷ One consequence is that many orphans are not told the cause of their parents' death and the children are therefore not necessarily guarding against falling into the same trap.¹⁸ It results in a vicious circle, as not only the disease, but also the ignorance surrounding it, is transferred to the next generation.

The incidence of HIV/AIDS merely increases the vulnerability of children being exploited economically and sexually, while many more are left without basic education,¹⁹ nor are basic needs such as nutrition, clothing and housing adequately catered for.²⁰ They suffer the trauma of seeing their parents die of AIDS and often become "orphaned" several times over as members of their extended family and alternative caregivers also become infected.²¹ Although AIDS is not gender specific, it is, in particular, burdensome for women and girls, as they have to bear the brunt of caring for surviving family members.²² There is

13 Deacon *et al* 18–22 37–40 59.

14 Schmidt and Siebane "Home alone" Nov 2000 *Marie Claire* 52.

15 Shisana *et al* xxxvi.

16 The World Bank *Education and HIV/AIDS: A window of hope* (2002) 16 43 <http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/05/14/00009494602043004023371/Rendered/PDF/multi0page.pdf> accessed 2005-11-24.

17 Whiteside "The real challenges: the orphan generation and employment creation" 1999(10) *Aids Analysis Africa* 15; Roos 72.

18 Roos 72.

19 Roos 75 83–84; Giese *et al* 56; *Children on the brink 2004* 15–18. See also General Comment No 3 (2003) by the Committee on the Rights of the Child *HIV/AIDS and the Rights of the child* CRC/GC/2003/3 9.

20 Roos 75; Giese *et al* 49; *Children on the brink 2004* 15.

21 Forsyth "A pandemic out of control: The epidemiology of AIDS" in Geballe, Gruendel and Andiman (eds) *Forgotten children of the AIDS epidemic* (1995) 19 29; Giese *et al* 22 59; *Children on the brink 2004* 4 14-15.

22 The World Bank *Education and HIV/AIDS: A window of hope* (2002) 21 http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2002/05/14/000094946_02043004023371/Rendered/PDF/multi0page.pdf accessed 2005-11-24. See also General Comment No 3 (2003) by the Committee on the Rights of the Child *HIV/AIDS and the rights of the child* CRC/GC/2003/3 4; Shisana "How we know there is an HIV epidemic in South Africa" March 2006 *Equal Treatment* 7.

also a greater risk of infection for young people, especially adolescent girls,²³ in communities highly affected by HIV/AIDS and young people are becoming infected at younger ages.²⁴

Since facts about AIDS and its possible effects are withheld from those most closely involved, ignorance and even disbelief exists. A newspaper report used as an example of this is the story of Siphso, an AIDS orphan. He does not agree that AIDS is a reality and maintains that he has been having sex with girls in his village for the past four years, but here he is, still alive. Besides, he has a death certificate from the authorities confirming that his mother had merely succumbed to a stomach-ache.²⁵ Such an approach, that attempts to conceal the truth from children in an attempt to prevent them being stigmatised, is not conducive to a successful battle against HIV/AIDS and the prevalent ignorance about HIV/AIDS.²⁶

As a result of HIV/AIDS, countless destitute orphans are taking to the streets as a means of eking out an existence.²⁷ There are an estimated 15 000 street children in South Africa and while not all of them are orphaned, an appreciable number of them are on the streets because of the disruptive effect of AIDS.²⁸ Many street children become possible prey to the vicissitudes of AIDS because unrestrained sex for survival is practised.²⁹ These children become sexually active sooner than other children, having normal home lives, of the same age. It is apparent that ways have to be sought to reduce, or even eliminate, survival sex, thus diminishing exposure to potentially infectious diseases. Furthermore, it is manifestly clear that a life lived haphazardly by children on the streets cannot be condoned: Their well being, their health, their moral development and their very existence is put at risk. Social services finds it difficult, due to financial constraints and the large number of the needy, to provide the standard of care that would be adequate to address the needs of such children.³⁰

3 INTERNATIONAL AND CONSTITUTIONAL FRAMEWORK

3.1 The rights of orphans: Human rights instruments

In the sphere of human rights law, human rights instruments have been introduced at national, regional and international levels. For the purposes of this article, the provisions of these instruments have to be viewed against the reality of the position of children³¹ in the present-day world and particularly in South Africa. Examples of such instruments are the United Nations Convention on the Rights

23 Roos 78. Women are biologically more susceptible to HIV infection: Shisana *et al* xli 1.

24 *Children on the brink* 2004 14 18; Shisana *et al* xli.

25 Bailey "Truth about AIDS being hidden from children" *Independent on Saturday* 2000-09-23 8; Bailey "Stop lying about AIDS" *Sunday Tribune* 2000-09-24 2; Roos 78.

26 Roos 78.

27 "The implications of *Grootboom* for state responses to child-headed household" 2003(17) *Law, Democracy and Development* 113.

28 Roos 79.

29 Kruger and Richter "South African street children: At risk for AIDS?" 1996 *Africa Insight* 237; Roos 80.

30 Pudifin "HIV/AIDS in the public hospital" Oct/Nov 1995 *AIDS Analysis Africa* 3.

31 Viljoen "The African Charter on the Rights and Welfare of the Child" in Davel (ed) *Introduction to child law in South Africa* (2000) 214.

of the Child,³² the African Charter on the Rights and Welfare of the Child,³³ and Chapter 2 of the Constitution of the Republic of South Africa, 1996. Relevant details of these instruments are discussed below.

3 2 National and supra-national human rights instruments

3 2 1 *The United Nations Convention on the Rights of the Child*

Rights applicable to AIDS orphans, contained in this Convention, include the following:

- (a) The state must protect the rights of all children without discrimination of any kind.³⁴
- (b) The best interests of the child should be of primary concern in any action where a child is involved.³⁵
- (c) The state must ensure that all facilities responsible for the care and health of children conform to adequate standards.³⁶
- (d) Children should have access to information concerned with their moral well-being and physical and mental health.³⁷
- (e) The state must provide special protection and assistance to children deprived of a family environment.³⁸
- (f) In countries where adoption is allowed, the best interests of the child must be of paramount importance.³⁹
- (g) An appropriate standard of living adequate for a child's development is the primary responsibility of parents. The state should assist in nutrition, clothing and housing where the parents need support.⁴⁰
- (h) Children have a right to education.⁴¹ Basic education should be free and compulsory.⁴²

32 Hereinafter referred to as the Convention. The Convention came into force on 2 September 1990 after being ratified by 20 states. It is considered the most comprehensive international document on children's rights. It was ratified by South Africa in June 1995. For examples of other international human rights instruments implicitly or explicitly dealing with the rights of children, see the discussion by Viljoen in Davel *Introduction to child law in South Africa* 215–216.

33 Hereinafter referred to as the Charter. The Charter came into force on 29 November 1999 after being ratified by the required 15 states. South Africa ratified the Charter on 7 January 2000. See also Davel "The African Charter on the Rights and Welfare of the Child, family law and children's rights" 2002 *De Jure* 281 282 where the point is made that not only did the Charter have to reconcile African cultural values, but it also had to provide guidance as to which African cultural practices and traditions should be abandoned and which had to be preserved to effectively protect the rights and welfare of children in Africa.

34 A 2(1). See also General Comment No 3 (2003) by the Committee on the Rights of the Child *HIV/AIDS and the rights of the child* CRC/GC/2003/3 3–4: States must take special precautions to guard against gender-based discrimination. See para 2 2 above.

35 A 3(1).

36 A 3(3).

37 A 17.

38 A 20(1). See a 20(2) that state parties have to ensure alternative care for such children.

39 A 21.

40 A 27.

41 A 28(1).

42 A 28(1)(a).

- (i) Every child has a right to social security.⁴³
- (j) Children have a right to preventive health care, sex education and family planning and education.⁴⁴
- (k) The state must protect children from sexual abuse or exploitation. The use of children in unlawful sexual activities or prostitution must be prevented.⁴⁵

When a state ratifies the Convention, it is legally bound to conform its administrative practices, policies and international relations to the requirements of the Convention.⁴⁶ States parties are obliged to report periodically to the Committee on the Rights of the Child through the Secretary General of the United Nations. These reports must comment on measures taken by the state to realise the rights recognised in the Convention.

The World Health Organisation (WH) sets out minimum care as: access to health care for marginalised and vulnerable groups, access to minimum essential food, access to basic shelter, housing, sanitation and supply of safe and potable water, and the provision of essential drugs.⁴⁷ In the case of economic and social rights, the state is only required to undertake such measures to the maximum extent of available resources.⁴⁸

The United Nations Committee has been “fairly critical” of South Africa’s non-compliance with many of the provisions of the Convention.⁴⁹ The Committee was concerned about the high incidence of single-parent and child-headed households, and insufficient support mechanisms provided for such families and the community.⁵⁰ In the Report on the State of the Nation’s Children 2001, a national integrated plan for children infected and affected by HIV/AIDS was set out.⁵¹ The South African cabinet allocated an amount of R450 million over a period of three years for the plan. The main components are community/home-based care, voluntary counselling and testing, life skills programmes and community outreach programmes.⁵² The guiding principle of home/community-based care is to care for children within their communities as far as possible. The

43 A 26.

44 A 24(f).

45 A 34.

46 Lopatka “An introduction to the United Nations Convention on the Rights of the Child” 1996 *Transnational Law and Contemporary Problems* vol 6 on WESTLAW datadasis accessed on 2005-11-22. Conflict between the Convention and national laws will require a statutory amendment of the conflicting law: Olivier “The status of international children’s rights instruments in South Africa” in Davel (ed) *Introduction to child law in South Africa* (2000) 198.

47 Nicholson “The right to health care, the best interests of the child, and AIDS in South Africa and Malawi” 2002 CILSA 360.

48 A 4 of the Convention. Consolidated Report “Protecting the children” *Transforming the present – Protecting the future* 56 http://www.sarpn.org.za/CountryPovertyPapers/South-Africa/March2002/Transforming_the_Present.pdf accessed 2005-11-22.

49 Committee on the Rights of the Child *Concluding observations of the Committee on the Rights of the Child: South Africa 23/02/2000* CRC/C/15/Add.122 (Concluding Observations/Comments). See also fn 48.

50 Committee on the Rights of the Child *Concluding observations of the Committee on the Rights of the Child: South Africa 23/02/2000* CRC/C/15/Add.122 (Concluding Observations/Comments) para 22.

51 National Programme of Action for Children in South Africa, The Presidency “Report on the State of the Nation’s Children” 2001 89.

52 *Ibid.*

provision of material support, psycho-social care and nutritional care is to be focussed on.

3 2 2 *The African Charter on the Rights and Welfare of the Child*

The Organisation of African Unity considered it expedient to develop an instrument specifically for children in Africa. The prevalence of disease, famine, droughts, floods and continued armed conflicts (both international and internal) have a disproportionate impact on the continent's children,⁵³ many of whom have been orphaned because of these catastrophic events. In its application the Charter deals with all aspects of children's rights, but the Charter, although indicating the priorities of Africa, does not affect the relevance or the status of the Convention.⁵⁴ The Charter codifies a comprehensive set of children's rights and even increases the level of protection for children in a number of important respects,⁵⁵ as will be explained below.

While the Charter echoes the provisions of the Convention, it is significant that the Charter places a significant emphasis on looking after the best interests of the child. In this context the Charter provides: "The best interests of the child must be *the* primary consideration in all actions concerning a child."⁵⁶ It is therefore not merely one of a number of important aspects to keep in mind.⁵⁷ The scope of the protection of child refugees is broader under the Charter, which allows for "internally displaced" children to qualify for refugee protection.⁵⁸ The causes of internal dislocation are not restricted and include a breakdown of the economic or social order.⁵⁹ Because of this wider interpretation of the causes (and therefore the consequences as well), we draw the following conclusion: The breakdown of social order is not merely an abstract concept where such breakdown affects the individual. Therefore any individual that is displaced, who also has his or her home life disrupted because of the death of one or both parents, qualifies under the scope of this protection.

The following articles of the Charter describe rights relevant to orphans that should be protected:

- (a) Every child should be able to enjoy the rights guaranteed in this Charter, including the right not to be discriminated against.⁶⁰
- (b) The best interests of the child must be *the* primary consideration in all actions concerning a child.⁶¹
- (c) Every child has a right to life.⁶² The state must reduce the infant and child mortality rate.⁶³ The state has to ensure the survival, protection and

53 Viljoen in Davel (ed) *Introduction to child law in South Africa* 215.

54 Arts "The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *African J Int Comp Law* 139.

55 Davel 2002 *De Jure* 282-283.

56 A 4.

57 Viljoen "Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child" 1998 *CILSA* 199.

58 A 23(4).

59 Davel 2002 *De Jure* 283.

60 A 3.

61 A 4.

62 A 5(1).

development of the child to the maximum extent possible.⁶⁴ Primarily, health care, adequate nutrition and proper health care for expectant and nursing mothers must be ensured.⁶⁵

- (c) Every child has the right to free basic education, which should be compulsory.⁶⁶ The education shall be directed towards the promotion of the child's understanding of primary health care.⁶⁷
- (e) It is primarily a parent's responsibility to ensure that the living conditions of a child are appropriate.⁶⁸ The state must support this, particularly with regard to nutrition, health, education, clothing and housing.⁶⁹
- (f) The state shall protect and support the family unit.⁷⁰
- (g) A child who is deprived of a family environment must be provided with alternative family care by the state.⁷¹
- (h) The state must protect all children from sexual exploitation and abuse.⁷²

State parties to the Charter are obliged to submit a report to the African Committee of Experts on the Rights and Welfare of the Child within two years after accession or ratification by the State party.⁷³ Unfortunately, South Africa has not submitted a report yet and it is, as yet, unclear how persuasive these provisions will be in the courts.⁷⁴

3 2 3 *The Bill of Rights in the South African Constitution*

HIV/AIDS impacts so heavily on the lives of children, that it affects all their fundamental rights – civil, political, economic, social and cultural.⁷⁵ The Bill of Rights guarantees fundamental rights for all children and the sections that are most significant for this research will be highlighted.

Section 27(1) of the Constitution provides, as far as applicable for present purposes:

“Everyone has the right to have access⁷⁶ to –

- (a) health care services, including reproductive health care;⁷⁷

63 A 14(2)(a).

64 A 5(2).

65 A 14.

66 A 11(1) read with a 11(3)(a).

67 A 11(2)(h).

68 A 20(1).

69 A 20(2).

70 A 18(1).

71 A 25. A 25(2)(a) provides further that state parties shall ensure “that a child who is parentless . . . or who in his or her best interest cannot be brought up or allowed to remain in that environment shall be provided with alternative family care, which could include . . . foster placement, or placement in suitable institutions for the care of children”.

72 A 27.

73 A 43.

74 Lloyd “The third ordinary session of the African Committee of Experts on the Rights and Welfare of the Child” 2004 (4) *African Human Rights LJ* 139.

75 General Comment No 3 (2003) CROC *HIV/AIDS and the rights of the child* CRC/GC/2003/3 2–3.

76 Note that s 27(1) deals with a “right to access” and s 28(1) with a right to care, basic health care, social services, etc. Children's entitlements to basic nutrition, shelter, basic health care services and social services are not “access” entitlements, but are direct entitlements to the provision of the goods in question: Bekink and Brand in Davel (ed) *Introduction to child law in South Africa* 169 188.

- (b) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”⁷⁸

Section 27 provides the following in the next subsection:⁷⁹ “The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights.”⁸⁰

It is to be noted that the state is also enjoined to take such other measures as is feasible to provide assistance, and not merely to pass legislation.

Subsection 28(1) of the Constitution⁸¹ provides that:

“Every child has the right –

- (a) . . .
- (b) to family care or parental care or to appropriate alternative care when removed from the family environment;⁸²
- (c) to basic nutrition, shelter, basic health care services and social services;⁸³
- (d) to be protected from maltreatment, neglect, abuse or degradation.”

However, of pre-eminent import is subsection 28(2), which is the encapsulation of all these rights, providing that “a child’s best interests are of paramount importance in every matter concerning the child”.⁸⁴

It has been mentioned⁸⁵ that the stigmatising beliefs relating to AIDS cause discriminating actions, and it is therefore appropriate to mention that the Constitution prohibits unfair discrimination, directly or indirectly, by the state and by any person other than the state.⁸⁶

The South African Constitution provides for the common law presumption that a court must give preference when interpreting any legislation in compliance

77 It is clear that everyone, even those suffering from AIDS, is constitutionally allowed this access.

78 S 27(1)(c). As the Constitution does not limit “dependant” only to parent-child relationships, there is a rebuttable assumption that younger sibling orphans are the dependants of an older brother or sister who is caring for them.

79 S 27(2).

80 Note that there is no similar provision in s 28.

81 S 28 sets out a range of rights which provide protection for children that is additional to the protection they are given by the remainder of the Bill of Rights: De Waal, Currie and Erasmus *The Bill of Rights handbook* (2001) 456.

82 There is no indication that “removal from the family” does not include being orphaned. Zaai and Matthias opine that a child is in need of care or alternative care “when his or her present familial environment or other living circumstances are not appropriate to his or her developmental needs” (“Child in need of alternative care” in Davel (ed) *Introduction to child law in South Africa* (2000) 116).

83 The relationship between children’s entitlements in terms of s 28 and everyone’s entitlements in terms of s 27 is of crucial importance: Bekink and Brand in Davel (ed) *Introduction to child law in South Africa* 187. The child’s entitlements in s 28(1) are the very minimum a child requires in order to subsist; compare “basic nutrition” in s 28(1)(c) to “sufficient food and water” in s 27(1)(b).

84 Note the very limited role that the Constitution has played, eg the case discussed in para 4 1 below and the total absence of any reference to international law in that decision.

85 In para 2 1 above. See Andiman “Medical aspects of AIDS. What do children witness?” in Geballe, Gruendel and Andiman (eds) 32 43.

86 S 9(3) and 9(4).

with international law⁸⁷ and when the Bill of Rights⁸⁸ is interpreted, a court, tribunal, or forum must also consider international law.⁸⁹

4 POSSIBLE SOLUTIONS FOR AIDS ORPHANS

The World Health Organisation (WHO) acknowledged the growing health disparities between the rich and poor as follows:

“Never have so many had such broad and advanced access to health care. But never have so many been denied access to health. The developing world carries 90% of the disease burden, yet poorer countries have access to only 10% of the resources that go to health.”⁹⁰

Historically health care services in South Africa have been skewed especially in terms of race. HIV/AIDS primarily affects the previously disadvantaged.⁹¹ A variety of options, attempting to cope with the complex problems facing children affected by AIDS, are explored below.

4.1 Introduction

Part of the plight of South African children suffering due to the effects of AIDS, is that, until recently, the state was not visibly doing much to assist in addressing and alleviating the problems of those in dire need. The most telling example of this was brought home in the matter of *Minister of Health v Treatment Action Campaign*,⁹² where the case had to go to the Constitutional Court before a satisfactory decision in humane terms could be obtained. The issue was whether the state had taken “reasonable legislative and other measures within their available resources to achieve the progressive realisation of the right to health care services”.⁹³ The state established eighteen pilot sites where Nevirapine was made available to prevent mother-to-child transmission (MTCT) of HIV/AIDS.⁹⁴ The applicants wanted Nevirapine to be available to all pregnant women with HIV giving birth in public health institutions, where it was medically indicated. Furthermore, they wanted government to implement an effective, comprehensive and progressive programme for the prevention of MTCT country-wide, including the provision of voluntary counselling and testing, and the provision of formula milk for feeding. “Perhaps the most dramatic change will follow the ‘lifesaving’ ruling of Chaskalson CJ”⁹⁵ when he delivered the ruling of the court in this case.

87 S 233.

88 Chapter 2 of the Constitution.

89 S 39(1)(b). International law is a safety net furthering the protection of individuals. When one legal system differs from another, the system providing the better protection of rights is to be followed. See Olivier “The status of international children’s rights instruments in South Africa” in Davel (ed) *Introduction to child law in South Africa* 197 200.

90 Pillay “Tracking South Africa’s progress on health care rights: are we any closer to achieving the goal?” 2003 *Law Democracy and Development* 56.

91 Ngwenya “Access to health care as a fundamental right: The scope and limits of section 27 of the Constitution” 2000 (25) *Journal of Juridical Science* 1 4.

92 2002 10 BCLR 1033 (CC) hereafter “the TAC case”. Also available as CCT 8/02 <http://www.concourt.gov.za/cases/2002/tacsum.shtml>.

93 *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 356 (T) 358.

94 In developed countries MTCT of HIV has been virtually eliminated due to antroviral medicines: Clayden “Reducing mother-to-child transmission to zero” March 2006 *Equal Treatment* 14.

95 Davel 2002 *De Jure* 290.

On the first main issue the court found that the government policy restricting the availability of Nevirapine was unconstitutional.⁹⁶ On the second main issue the court declared that sections 27(1) and (2)⁹⁷ of the Constitution required the government to devise and implement, within its available resources, a comprehensive and co-ordinated programme to progressively realise the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.

The broad principles, when applied to health rights, as explained in *Treatment Action Campaign*⁹⁸ are the following: There must be a comprehensive programme which may include national framework legislation, and which, in turn, must be supported by appropriate, well directed policies and programmes that can facilitate the right of access to health care services. These programmes must specifically cater for the needs of the most desperate.⁹⁹

On 17 April 2002, the South African cabinet declared that the state would begin to provide the package of care that is needed for HIV-positive pregnant women to prevent MTCT.¹⁰⁰ In a way this pre-empted the outcome of the Constitutional Court judgment. Since the judgment, the government has provided provinces with guidelines to implement MTCT prevention programmes. Each province is responsible for a prevention programme which government will monitor. The government, however, is still responsible for ensuring that the different provinces comply with the constitutional requirements.¹⁰¹ This judgment brings South Africa closer to the standards for children's rights as required by our Constitution and international instruments.¹⁰²

The Treatment Action Campaign (TAC) has since embarked on a new mission, which is to force government to "make an irreversible and unequivocal commitment to a public sector anti-retroviral programme".¹⁰³ On 22 August 2003 the Ministry of Health announced a task team to develop a detailed operational plan on an anti-retroviral programme available to all.¹⁰⁴ Once treatment is available to all, the orphans' issues, as well as the standard of living of all children affected by AIDS, will dramatically improve.

4.2 Government's role

The main question concerning affordable care for AIDS orphans is: Who should be held responsible for providing it? A survey by Hackland indicated that there is a widespread expectation that government should be answerable for seeking a practicable solution to this problem.¹⁰⁵ In *Grootboom* Yacoob J stated that where

96 In a unanimous judgment the Constitutional Court set aside the orders made by the high court in *Treatment Action Campaign v Minister of Health* 2002 4 BCLR 357 (T).

97 See par 3 2 3 above.

98 And in *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

99 Pillay 2003 *Law Democracy and Development* 63.

100 De Vos "So much to do, so little done: The right of access to anti-retroviral drugs post *Grootboom*" 2003 *Law Democracy and Development* 98.

101 *Ibid.*

102 Davel 2002 *De Jure* 290–291.

103 Bisseker "Embarrassing government: Questions and answers" *Financial Mail* vol 170 issue 12 2003-03-28 18.

104 Haywood "A people centred ARV programme" <http://www.tac.co.za> accessed 2003-09-30.

105 "Children affected by HIV/AIDS and affordable care: Results of a survey" in McKerrow, Smart and Snyman (eds) *AIDS, orphans and affordable care* (1996) 19; Roos 86.

parental care is lacking, the obligation to provide alternative care in terms of section 28 of the Constitution falls to the state.¹⁰⁶ It is obvious that children who have been orphaned by AIDS qualify as children in need of alternative care according to *Grootboom* and section 28(1)(b) of the Constitution.¹⁰⁷

The current social security system is fragmented, limited in coverage and non-comprehensive. Many groups of children are not covered, or cannot access any assistance. These include children with AIDS, street children, children in child-headed households and children without adult supervision.¹⁰⁸ There is thus no social grant intended specifically for the care of AIDS orphans or children who are HIV/AIDS infected. The foster care grant, child support grant and care dependency grant can be applied for, although in many cases none of these will be appropriate.¹⁰⁹

The main aim of the HIV/AIDS national policy for public schools and further education and training institutions, is to prevent discrimination against AIDS sufferers, increase awareness and prevent the spread of HIV. Pre-teens and young teenagers are particular focus groups for education programmes for the prevention of HIV infection.¹¹⁰

The HIV/AIDS and STDs directorate published HIV/AIDS policy guidelines on the feeding of the infants of HIV positive mothers.¹¹¹ The risk of HIV transmission through breastfeeding is acknowledged, as well as the need to educate, counsel and support women and families in this regard. Currently free access to health care is only available for children under the age of six years.¹¹² The possibility of extending free basic health care up to the age of eighteen years for HIV positive children, or children orphaned by AIDS, should be investigated.¹¹³

4.2.1 Foster care

For their own well-being, as well as for the fabric of society as a whole, children ought not to grow up in institutions.¹¹⁴ Children belong in a home.¹¹⁵ Unfortunately, poor communities cannot absorb HIV/AIDS orphans in extended family structures without external support.¹¹⁶ Motale reports that between January and August 2000 the Johannesburg Child Welfare Society dealt with 81 cases of abandoned children, eleven of whom were HIV-positive. The society is appealing to members of the public to become adoptive or foster parents to help

106 *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) 1204 para 77.

107 See para 3.2.3 above.

108 Guthrie in Olivier *et al Introduction to social security* (2004) 343-359.

109 *National programme of action for children in South Africa, The Presidency* "Report on the State of the Nation's Children" (2001) 92.

110 *National policy on HIV/AIDS, for learners and educators in public schools, and students and educators in further education and training institutions* GN 1926 of 1999 GG 20372 of 1999-08-10.

111 *National programme of action for children in South Africa, The Presidency* "Report on the State of the Nation's Children" (2001) 90.

112 S 4(3) of the National Health Act 61 of 2003.

113 *National programme of action for children in South Africa, The Presidency* "Report on the State of the Nation's Children" (2001) 91.

114 *Children on the brink* 2004 15.

115 Mason "Adopting children is no job for sissies" *Mail & Guardian* 2000-09-01 30.

116 Motale "Cruel fate for babies" *City Press* 2000-09-24 2.

care for these children during the time needed to complete administrative procedures before permanent placements can be made.¹¹⁷ It was estimated at a workshop held in Cape Town in 2000, that four out of five families in South Africa would have to take in a child unrelated to them to cope with the number of AIDS orphans.¹¹⁸ This is an improbable scenario, thus alternative forms of family care should be investigated.

Currently the Child Care Act 74 of 1983 defines foster care in terms of a foster child or foster parent. It is any child who has been placed in the custody of a foster parent, which is any person, except a parent or guardian, in whose custody a child has been placed in terms of chapter 3 or 6 of this Act, or section 209 of the Criminal Procedure Act 51 of 1977.¹¹⁹ Section 15(b) of the Child Care Act states that a child can be placed in the custody of a suitable foster parent designated by the court.¹²⁰ Thus a child can only be placed in foster care by means of an order made by the Children's Court.

The majority of children in substitute family care in South Africa do, in all likelihood, not go through a Children's Court enquiry, but are simply absorbed into the extended family system. These foster parents are therefore unable to access the foster care grant of R500 per month.¹²¹ The previous limitation of the child support grant to children aged less than seven years, as well as the above-mentioned situation, may have created an incentive to place children in formal foster care with relatives.¹²² This means that an already overburdened system has to cope with a potentially large number of unnecessary cases.

The care dependency grant of R700 per month¹²³ currently only caters for a child between the ages of one and eighteen years who requires and receives permanent home care due to his or her severe mental or physical disability.¹²⁴ By definition most children infected with HIV will be precluded from this grant, unless they are in the final stages of this debilitating disease. Therefore currently neither the foster care grant nor the care dependency grant sufficiently covers children affected by AIDS in need of financial assistance.

In order to address this problem, the South African Law Reform Commission¹²⁵ recommended that foster care placements with persons unrelated to the child should be supported through a non-means-tested foster care grant, as is currently the case. Should a universal grant be introduced, this would be an additional source of support. Children who require formal protective services and

117 *Ibid.* Also see Roos 86–87.

118 South African Law Commission Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 713.

119 Definitions of Child Care Act 74 of 1983.

120 S 15(b) of the Child Care Act 74 of 1983. See s 156(1)(e) of the Children's Act 38 of 2005.

121 S 2(e) of the Social Assistance Act 59 of 1992. See Clark "The duty of the state to support children in need" 2000 *SALJ* 345 356; Myburgh in Strydom *et al Essential social security law* (2001) 174; Guthrie in Olivier *et al* 357.

122 South African Law Commission Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 716.

123 S 2(g) of the Social Assistance Act 59 of 1992.

124 S 1 of the Social Assistance Act 59 of 1992; Myburgh in Strydom *et al* 174–175; Guthrie in Olivier *et al* 356–357.

125 South African Law Commission Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 769.

are placed with relatives by means of a court order, should qualify for the same foster care grant for the same amount. In cases of children with special needs, the foster care grant should be supplemented by an allowance. Relatives caring for children on an informal basis may approach the court to formally place the children in their care. However, the court would have to find the child in need of care. Measures to facilitate the fostering of children with special needs should be considered, such as tax rebates, free health services and education for both the biological children as well as children in their foster care.¹²⁶

Many of the South African Law Reform Commission's recommendations have not been adhered to. Financial limitations are probably the main reason. The Commission recommended that in cases of informal care by relatives, a non-means-tested universal grant or a specific grant for the purpose be granted. However, the Children's Act¹²⁷ does not make provision for this. Nonetheless, other measures have been adopted and will have a positive effect on HIV/AIDS relief. The child support grant was introduced in 1997 as a poverty alleviating mechanism, and aims to help care-givers to provide for the basic needs of the child.¹²⁸ This grant replaced the state maintenance grant which was limited along racial lines. The child support grant targets the poorest families by means-testing.¹²⁹ The age limit for the eligibility of child support grants has been raised from 1 April 2003 to nine years of age, for the period 1 April 2004 to 31 March 2005 to eleven years and after 1 April 2005 to fourteen years.¹³⁰ Furthermore, a person shall be eligible for a child support grant in respect of all his or her own children, as long as some of the children are not his or her biological or legally adopted children. He or she shall be entitled to such grant in respect of a maximum of six children.¹³¹ This regulation could provide enormous relief for people fostering AIDS orphans. It would also alleviate the situation where adopted or biological children are neglected because of the extra costs incurred with the fostering of a child. If a person already receives another grant for the child concerned he or she would, however, not be entitled to the child support grant as well.¹³²

The Social Assistance Act 59 of 1992 states that the Minister for Welfare and Population Development may, after consultation with the Minister of Finance in the National Government, make regulations as to the determination of the amount of a grant to be paid in any particular case.¹³³ The question arises as to whether "any particular case" refers to a specific person in need of a grant or to a particular group of individuals who are affected by a situation. It seems, however, that a child in special circumstances who is in need of care could potentially receive a higher grant than in normal circumstances.

126 *Ibid.*

127 38 of 2005. The current Act contains only matters that have to be dealt with in terms of s 75 of the Constitution (functional area of national legislative competence). This Act was approved by Parliament during December 2005, and was signed by the President on 2006-06-08. As soon as the current Act is promulgated, an amendment Bill containing the matters which apply to the provincial government will be introduced.

128 Guthrie in Olivier *et al* 356.

129 *Ibid.*

130 Reg 3(1)(a)(i), (ii) and (iii) of Regulation GN 7619 in GG 24630 of 2003-03-31.

131 Reg 3(1)(b) of Regulation GN 7619 vol 453 in GG 24630 of 2003-03-31.

132 Reg 24(2)(c) of Regulation GN no 7619 vol 453 in GG 24630 of 2003-03-31.

133 S 19(1)(b)(ii) of the Social Assistance Act 59 of 1992.

An initiative by the Durban Children's Society trains foster mothers to care for AIDS orphans. This form of family care is also defined as cluster foster care, or community foster care. Mchunu, a foster mother, runs a haven for six children in Chesterville. She receives a monthly grant of R370 from the Department of Welfare for each child and the Durban Children's Society provides assistance with school fees.¹³⁴ This amount is now R500 per child per month. This model provides for a family environment where orphans in general can be looked after. Traditional welfare organisations and churches generally provide the houses. A provincial department of social development, a designated child protection organisation or a municipality, monitors projects such as these.¹³⁵

A study done on foster families in New York indicated that over half the HIV-positive children placed with foster families were adopted or are in the process of being adopted.¹³⁶ It is recommended that HIV-positive children be placed with foster families, rather than in institutions, since foster family placements could in some cases lead to adoption.

4.2.2 Adoption

Adoption is generally a very effective way of dealing with AIDS orphans.¹³⁷ However, two important issues have to be addressed. Firstly, both HIV-positive and HIV-negative children will need someone to care for them.¹³⁸ According to the Center for Disease Control and Prevention in the United States of America, prospective foster or adoptive parents should know both the diagnosis and prognosis of the health of a child that they intend to take into foster care or adopt.¹³⁹ Currently the Child Care Act¹⁴⁰ does not specifically deal with testing of children for AIDS or any other disease. However, the Children's Act specifically addresses the issue of HIV/AIDS testing.¹⁴¹ It states that a child may only be tested for HIV if it is in his or her best interest or if a health worker or any other person may have contracted HIV due to contact with any substance from the child's body which might cause HIV infection.¹⁴² Consent for a HIV test on a child may be given by the child if he or she is twelve years or older, or under the age of twelve years and understands the benefits, risks, and social implications of such a test.¹⁴³ If the child is under the age of twelve years, consent can be given

134 Qwabe "A chance to be normal" *Sunday Tribune* 2000-09-24 20. Also see Roos 87.

135 S 1 of the Children's Act 38 of 2005.

136 Gurdin, Wiznia and Canepa "Adoption as a life plan for HIV-positive children" <http://ww2.aegis.org/conferences/iac/1990/ThD128.html> accessed 2005-11-23. This programme proved to have a high success rate and the reasons given are the innovative recruitment techniques to find suitable foster families, intensive provision of supportive services to these families, and the "relatively generous monthly foster care stipend" established by the State of New York.

137 Gurdin, Wiznia and Canepa at the 6th International AIDS Conference, San Francisco, California 20-23 June 1990: "Adoption as a life plan for HIV-positive children" <http://ww2.aegis.org/conferences/iac/1990/ThD128.html> accessed 2005-11-24; Roos 88.

138 Merkel-Holguin "Children who lose their parents to HIV/AIDS: Agency guidelines for adoptive and kinship placement" <http://ww1.aegis.org/pubs/books/1996/bk966574.html> accessed 2005-11-23.

139 "Medical issues related to caring for HIV-infected children in and out of the home" http://www.aegis.com/pubs/cdc_fact_sheets/1993/cdc93184.html accessed 2005-11-30.

140 74 of 1983.

141 S 130 of the Children's Act 38 of 2005.

142 S 130(1).

143 S 130(2)(a).

by the parent, the provincial head of social development, a designated child protection organisation arranging the placement of the child, the superintendent or person in charge of a hospital, a children's court if consent is unreasonably withheld or if the parent or care-giver is incapable of giving consent.¹⁴⁴ Section 131¹⁴⁵ states that if testing is done for adoption or foster care purposes, the state must pay the cost of such tests where circumstances permit.

The second problem relates to cultural differences in respect of adoption. The South African welfare system was developed in the late nineteenth and early twentieth centuries in order to accommodate the welfare needs of the poor-white population.¹⁴⁶ Similar needs of the black population were taken into account for the first time after the 1994 election, when priority was given to devising a new welfare policy. The emphasis is now on the family and community care rather than institutional or "vulnerable" children.¹⁴⁷ Legal adoption was developed mainly for the benefit of the white population. The South African National Council for Child and Family Welfare accredits adoption agencies and sets the standards for practice. Currently only nine agencies and a few private social workers are accredited.¹⁴⁸ Many non-accredited agencies also offer adoption services. However, the existing adoption system lacks cohesion and co-ordination.¹⁴⁹

According to Harber, there are three main reasons why adoption was not promoted within the black community. Firstly, adoption was not necessary because orphans were looked after by the extended family system. This assumption is only partly correct, because there have always been children requiring care outside their extended families. This situation will worsen with the advent of AIDS. Secondly, the Western approach to adoption involves an acknowledgement by the adopting parents that adoptive parenthood is different from natural parenthood. This entails acknowledging feelings about infertility. In African societies the problem of childlessness has traditionally been based on secrecy.¹⁵⁰ Thirdly, children are being adopted into an extended and not a nuclear family. In the former, emphasis is placed on the importance of blood ties and the sharing of common ancestors.¹⁵¹

"Nevertheless, 'tradition' and 'culture' are not static concepts, and studies of family support systems in South Africa suggest that forces of social change, such as urban mobility, may be impacting on family structures to make them more fluid."¹⁵²

Around 1998 adoption across the colour boundary became operational in South Africa. According to Van Delft¹⁵³ cross-cultural adoptions are still very controversial. Most of these children get adopted into white families because there are not enough white babies available for adoption. White couples who want to

144 S 130(2).

145 Children's Act 38 of 2005.

146 Harber "Transforming adoption in the 'new' South Africa in response to the HIV/AIDS epidemic" 1999 *Adoption and Fostering* 6; Roos 88.

147 Harber 1999 *Adoption and Fostering* 8.

148 Roos 89.

149 Harber 1999 *Adoption and Fostering* 9; Roos 89.

150 Harber 1999 *Adoption and Fostering* 10; Roos 89.

151 Under such circumstances it is more difficult to admit an outsider to the extended family: Harber 1999 *Adoption and Fostering* 10.

152 *Ibid.*

153 From the Department of Social Work at Unisa. See Roos 90–91.

adopt a black baby are prepared by social workers for parenthood. Unfortunately discrimination is still present and these children and their new parents need to be able to cope with any possible situation effectively.¹⁵⁴ If adoption is to become one of the methods to combat the AIDS orphans' issue, ways will have to be found to combine Western and African child care methodologies.

The South African Law Commission had to concede that racial prejudice was still alive in South Africa, but that it should not be tolerated.¹⁵⁵ The Commission therefore decided not to exclude trans-racial adoptions provided the adoption is in the best interests of the child. Section 231(3) of the Act¹⁵⁶ provides that regard shall be had to the cultural background of the child concerned and of the prospective adoptive parents. The Children's Act does not specifically address trans-cultural or trans-racial adoptions. Section 230 simply states that a child may be adopted provided that the adoption is in the best interest of the child, the child is adoptable and the provisions of the chapter are complied with.

Section 18(4)(a) of the Child Care Act 74 of 1983 states that an applicant for adoption should possess adequate means to maintain and educate the child. This section has been omitted from the Children's Act.¹⁵⁷ Section 231(5) of this act now states that any person who adopts a child may apply for means-tested social assistance where applicable. The Commission recommended that an adoption grant be paid to adoptive parents subject to a means test.¹⁵⁸ The recommendation was not followed in terms of an adoption grant. However, section 231(5) could accommodate parents who might need financial assistance. Section 231(4) also accentuates this position by stating that a person may not be disqualified from adopting a child based on his or her financial status.

4.2.3 Housing subsidies

The co-ordinator of the Durban Street Children Forum reports that approximately one hundred children are abandoned on Durban's streets every month. Shelters and homes for the children are at present overcrowded.¹⁵⁹ The only funding that the organisation receives from the Department of Welfare amounts to R4,50 per street child per day, compared to the R75 per child per day at the Westville prison. Government is considering housing subsidies for persons under 21 in an effort to keep children off the streets, or providing housing blocks instead of freestanding units to facilitate better support of orphans by caregivers.¹⁶⁰

Local government is technically responsible for providing homeless children with housing. In KwaZulu-Natal the Department of Housing granted R2,5 million to two different homes for abandoned and AIDS babies, God's Golden Acre in Cato Ridge and Lily of the Valley in Eston. These two cluster homes provide

154 Van Eeden "'n Baba asseblief – Wit, Swart of Bruin" *Rapport* 2001-02-25 14; Roos 91.

155 South African Law Commission Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 219.

156 38 of 2005.

157 38 of 2005.

158 South African Law Commission Discussion Paper 103 Project 110 *Review of the Child Care Act* (2002) 232.

159 Munusamy "Grim future for untold thousands of orphans" *Sunday Times* 2000-07-09 1; Roos 91.

160 "South African Orphans: South Africa Looking at Housing Subsidies for AIDS Orphans" *Agence France-Presse* <http://www.aegis.org/news/afp/2000/af000844.html> accessed 2005-11-23.

housing for about 200 children, with caregivers for each unit.¹⁶¹ It is proposed that local government should become more involved in the potential care of orphans as well as housing issues.

4.3 Society's role

4.3.1 *The extended family*

Mason and Wood estimate that the present adult population, aged between 16 and 45, will shrink by almost 40% over the next sixteen years; while the numbers of children will be reduced by just less than 20% and the aged by approximately 8%.¹⁶² This implies fewer persons to act as providers for the economically non-productive, that is to say the children and the aged members of the family: Less providers, more dependants.¹⁶³ Instead of providing institutions for destitute children, the more practical and useful solution would be to provide adequate support for families. Assistance of this nature benefits the community as a whole, as children grow up in a family environment, have a sustainable lifestyle and are exposed to their culture and traditions. The presence of a concerned extended family can minimize adverse health and socio-economic effects that many destitute children, such as orphans, may experience. Building a sound, civil society through the provision of sufficient resources is one of the most effective interventions in addressing HIV.¹⁶⁴

4.3.2 *Community-based organisations*

The Thandanani Association, a small Pietermaritzburg-based non-governmental organisation launched the AIDS Orphan Project. The Project has three main objectives:

- (a) to improve awareness of the needs of children affected by HIV/AIDS;
- (b) to emphasize the message that the state will not be able to provide for their needs; and
- (c) to foster a spirit of self-reliance.

These objectives were to be achieved by childcare committees. All the members elected to these committees were elderly women who were providing care to children separated from their parents. Most of these women were extremely poor and a number of them had expectations that the project would provide them with material assistance. Once it became clear that there would not be any, the initial interest began to dwindle. One fieldworker said: "Whatever we try to do, when people think of orphans, they think of handouts."¹⁶⁵ The third objective was therefore more difficult to achieve than was expected. The childcare committees

161 Radebe "AIDS orphans to be given shelter" *The Citizen* 2000-10-07 4; Roos 91-92.

162 Roos 92.

163 *Ibid.*

164 Flemming "The next generation and AIDS" 1994 *AIDS Analysis Africa* 3; Loudon "Grappling with the social consequences of HIV and AIDS" 1997 *Positive Outlook* vol 4(3) 6; Whiteside "The real challenges: The orphan generation and employment creation" 1999 *AIDS Analysis Africa* vol 10(4) 14. See General Comment No 3 (2003) by CROC *HIV/AIDS and the Rights of the Child* CRC/GC/2003/3 10.

165 Harber "AIDS orphans pilot offers some hard lessons" Oct/Nov 1998 *Children-First* 23; Roos 94.

struggled with fundraising ventures, but decided to concentrate on community actions and then achieved some success.¹⁶⁶

Community-based childcare centres are becoming more common in a number of countries, and should be considered as a possible solution. These centres provide children with food, access to health care and a place to learn and play. Home visits by community volunteers to elderly caregivers or children themselves, can help them cope and promote good care and health practices.¹⁶⁷

Since stigma and discrimination have often been identified as primary barriers to effective HIV prevention, as well as to the provision of treatment, care and support, this problem should also be addressed.¹⁶⁸ Community-based intervention is also the most effective type of intervention to address the stigmatisation associated with AIDS. It is linked to skills-building, counselling and social interaction programmes.¹⁶⁹

5 CONCLUSION

The future of every society lies in its children. The manner in which the AIDS orphan crisis is dealt with will have an incalculable effect on every aspect of the welfare of society. Society, as a whole, has to address the problem manifestly and effectively. An orphan who cannot be accommodated in the extended family should not be left to his or her own devices. Such a child should be adopted, or placed in foster care, or put into some community-based childcare facility. The grants support system must be modified so that funds reach all AIDS orphans. The Provincial Housing Departments must take the needs of AIDS orphans into consideration when housing policies are established. Finally, community involvement is absolutely essential in realising the rights of AIDS orphans.

166 Harber *idem* 24; Roos 94.

167 *Children on the brink 2004* 19–20 22.

168 Shisana *et al* *South African national HIV prevalence, HIV incidence, behaviour and communications survey* (2005) HSRC xxxiv.

169 Deacon *et al* 80–81.