



aidslaw
project

Centre for Applied Legal Studies (CALs)
University of the Witwatersrand
Private Bag 3, Wits 2050, South Africa
C/o DoceX 197 Johannesburg
Tel +27 11 717-8600 • Fax +27 11 403-2341
www.alp.org.za

REPORT OF THE COMMITTEE OF INQUIRY INTO A COMPREHENSIVE SYSTEM OF SOCIAL SECURITY FOR SOUTH AFRICA

JOINT SUBMISSION ON THE SOCIAL DEVELOPMENT ASPECTS OF THE REPORT
AIDS LAW PROJECT AND TREATMENT ACTION CAMPAIGN

4 June 2003

Endorsed by:
Sharon Ekambaram (on behalf of the AIDS Consortium)
The Rev Douglas Torr (on behalf of the Gauteng Basic Income Grant
(BIG) Coalition)

Drafted by the Law & Treatment Access Unit
AIDS Law Project

Centre for Applied Legal Studies
University of the Witwatersrand

Private Bag 3, WITS 2050

(011) 717-8627 (t)
(011) 403-2341 (f)

bergerj@law.wits.ac.za
hassanf@law.wits.ac.za
www.alp.org.za

Introduction

The AIDS Law Project (ALP) and the Treatment Action Campaign (TAC) welcome the Portfolio Committee on Social Development public hearings on the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Report). We recognise that, as a whole, the findings reached and the proposals made in the Report represent a rational and reasonable basis for the transformation of the social security system into one which gives full effect to the rights entrenched in the Constitution, in particular the rights to life, dignity, equality, and access to health care services and social security. In transforming social security, we too recognise the importance of ensuring “that those who are currently excluded are given a stake in the present, and that those who have benefited from past privileges promote a level of solidarity”.¹

In making this submission, we are mindful of the fact that the HIV/AIDS epidemic worsens—on a daily basis—the circumstances that give rise to the need for the transformation of the social security system. We recognise that the HIV/AIDS epidemic is—and will continue—to exacerbate poverty and inequality, placing unsustainable pressure on social service institutions and undermining medium to long-term economic growth and social development potential.

We therefore call on the Portfolio Committee on Social Development to engage both the Portfolio Committee on Health and the National Department of Health on the urgent need for an unequivocal commitment to, and development and implementation of, a comprehensive HIV/AIDS treatment programme in the public health care sector.² In our view, any social security system required to deal with the impact of the epidemic is—and will continue to be—undermined by the absence of significant health measures taken to ensure that people living with HIV/AIDS remain healthy and productive for as long as is reasonably possible.

Executive summary

In this submission, the ALP and TAC make the following findings and recommendations:

Recognising that—

- The concept of Comprehensive Social Protection, which includes a minimum package of benefits for all, will address the complexity and extent of South Africa’s social security needs by balancing our medium- and long-term developmental goals with our immediate needs;
- The right of access to social security is closely linked to other socio-economic rights;
- To discharge its constitutional obligations and ensure social and economic growth and development, the state must ensure that poor people have the ability to move (and remain) out of poverty;
- The existing social security system excludes (by law or in practice) significant categories of people in need and does not sufficiently account for vulnerability beyond children, the aged and the disabled;

¹ Report at 16-17.

² In this regard, see the Draft NEDLAC Framework Agreement on a National HIV/AIDS Prevention and Treatment Plan, included as an addendum to this submission.

- The application of the means test effectively precludes many eligible poor people from accessing existing grants;
- Any new social security system should not undermine traditional support mechanisms, but should rather support and strengthen existing informal social security;
- While there is no basis for making distinctions between citizens and permanent residents in the enjoyment of socio-economic rights, it may be justifiable and necessary in limited circumstances to make distinctions between different categories of non-citizens in the allocation of resources;
- Private forms of social security, such as long-term insurance, continue to exclude many vulnerable groups as a result of unfairly discriminatory policies and practices;
- The successful implementation of a comprehensive social security system is dependant on the existence of a well-resourced, empowered and independent statutory enforcement and monitoring body

The ALP and TAC recommend that—

- A Basic Income Grant (BIG), a universal entitlement granted without the ordinary requirement of satisfying a means test, must be made available to all on a progressive basis;
- While the BIG is being universally implemented, the existing grant system should be strengthened and extended, with eligibility for existing grants being broadened:
 - The child support grant (CSG) should be extended to 18;
 - Children in child-headed households should be able to access the CSG;
 - People living with HIV who are symptomatic or have AIDS should be able to access a disability grant;
 - Care-givers of all children with chronic diseases (including HIV/AIDS) must be able to access a care dependency grant (CDG);
 - The definition of disability (for purposes of accessing the disability grant) should be broadened to include all forms of disability; and
 - Access to CSGs and CDGs should not be dependent on a child's parent or care-giver being a South African citizen (or a permanent resident)
- Public works programmes that target real need (such as health care infrastructure) should be implemented;
- The means test should be abolished;
- South African citizenship or permanent residency should, in general, not be a requirement for accessing social grants;
- The private maintenance system should be strengthened;
- The private long-term insurance industry should be regulated appropriately, with legislative measures being taken to ensure that unfairly discriminatory policies and practices in the sector are eliminated;
- Unfair contracts should be regulated by legislation;
- Broker commissions should be reassessed;
- Social insurance, based on entitlements through contributory schemes, should be extended to include as many of the employed as possible; and
- An enforcement and monitoring body, to be set up to ensure the efficient and fair operation of the new social security system, should—

- Assist people in accessing grants;
- Act on behalf of people who have been unfairly or unlawfully denied grants; and
- Assume overall responsibility for co-ordinating and spearheading the implementation and continued monitoring of the new comprehensive social protection system.

Focus of the submission

The ALP and TAC strongly endorse the principles underpinning the key findings and proposals made in the Report. In particular, we support the Report's promotion of the concept of Comprehensive Social Protection (CSP) which "seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development",³ recognising that high levels of unemployment, extreme poverty and inequality are significant barriers to sustainable growth.

In addition, we recognise that the existing social security system excludes (by law or in practice) significant categories of people in need, including:

- Children under nine who do not yet access the child support grant (CSG), despite being entitled to do so;
- All children over nine;⁴
- All children without primary caregivers;
- Child-headed households;
- People with chronic illnesses who do not meet strict medically-based criteria;
- 95% of unemployed people who are without access to Unemployment Insurance Fund (UIF) benefits; and
- Non-citizens (and children in their care).⁵

In short, a majority of poor people in South Africa do not access any form of social security grant.

We also agree with the Report's argument that any new social security system must not undermine traditional support mechanisms, but should rather support and strengthen existing informal social security. We agree that interventions and programmes are needed to bolster the overall ability of communities and informal social security systems to "cope with and manage increased levels of risk and hardship."⁶

We agree with the report that the HIV/AIDS epidemic is—and will continue—to exacerbate poverty and inequality, placing downward pressure on households and household incomes, placing unsustainable pressure on social services institutions (such as the public health sector) and undermining medium to long-term economic growth and social development potential.

³ Report at 41.

⁴ In terms of *Government Gazette* 24630 of 31 March 2003, all children under 11 will qualify for the CSG on 1 April 2004, with all children under 14 qualifying on 1 April 2005.

⁵ Insofar as permanent residents are concerned, Constitutional Court judgments in the cases of *Mahlaule and Others v Minister of Social Development and Others* (CCT12/03) and *Khosa and Others v Minister of Social Development and Others* (CCT13/03) will resolve the matter. The two matters were argued before the Constitutional Court on Friday, 30 May 2003. Judgment has been reserved.

⁶ Report at 75.

It is not our aim in this submission to deal comprehensively with all social development aspects of the Report. Instead, we deal with those aspects that we consider as central to any discussion on the conceptualisation and development of a comprehensive system of social security. In making this submission, we follow the broad structure of the Report.

Chapter 2: The Socio-economic context

The Report recognises that a key underlying principle of the old “social safety net” still remains, being the assumption that the employed are self-sufficient and that unemployment is a “temporary condition”. In reality, however, South Africa is characterised by a labour surplus economy with a high skills deficit at the lower end. The Report argues that it is unlikely that this will change in the foreseeable future, with full employment in the short to medium term not being a feasible scenario.

In addition, the report recognises that the particular demographics of South Africa raise further concerns. While social security benefit systems have internationally been based on inter-generational solidarity,⁷ the HIV/AIDS epidemic in South Africa is resulting in the rapid increase in the ratio of dependent age groups (children—many of whom orphaned—and the elderly) to the economically active population. Despite the average life expectancy at birth significantly reduced, South Africa is experiencing an increase in the real number of the old age population. In short, the HIV/AIDS epidemic is ensuring that there are fewer people to care for children and the elderly.

With this in mind, the Report argues that an “important consideration in the design of comprehensive social security for South Africa is the extent to which social security can promote prevention and mitigate the impacts of HIV/AIDS and other chronic illnesses.”⁸ The ALP and TAC support this finding on the understanding that the concept of “social security”, as recognised in section 27 of the Constitution and the Report, is significantly broader than a system of income transfers.

While recognising the crucial importance of social grants, we nevertheless believe that the efficacy of income transfers which are required to deal with the impact of the epidemic will be undermined by the absence of significant health (and other) measures taken to ensure that people living with HIV/AIDS remain healthy and productive for as long as is reasonably possible. In this regard, we cannot overemphasise the importance of the commitment to, and development and implementation of, a comprehensive HIV/AIDS treatment programme in the public health care sector.

In our view, the essence of a comprehensive social security system is its ability to address all aspects of poverty in an integrated fashion. Understanding poverty as “the inability of individuals, households or entire communities to command sufficient resources to satisfy a socially acceptable minimum standard of living”,⁹ the Report argues that policy interventions that seek to move people out (and remain out) of

⁷ These systems are coming under pressure with declining population growth and increasing numbers of older people.

⁸ Report at 19.

⁹ Report at 15.

poverty must address issues of vulnerability by targeting vulnerable individuals or groups.¹⁰

While the ALP and TAC support this finding, we would caution against the *inappropriate* targeting of vulnerable groups such as people living with HIV/AIDS. In the discussion in chapter 10 dealing with disability, for example, the Report argues that persons with disabilities who cannot provide for their basic needs should be eligible for a disability grant (DG),¹¹ expressly recognising that people with chronic illnesses (including HIV/AIDS) should qualify for DGs. In dealing with HIV/AIDS, however, we do not believe that HIV status in and of itself should be sufficient for accessing a DG. We oppose the grant of a benefit solely on the basis of HIV status, viewing such social assistance as unfairly discriminatory.

Nor do we believe that access to a DG should be limited in the way that it currently is, by requiring laboratory proof of a particular level of immune deficiency. This requirement is problematic for two reasons. First, limiting access to a DG to those with a particularly low CD4 count (a measure of the strength of the immune system) of 50 means that all people living with HIV/AIDS will already have experienced significant illness (such as severe and extended opportunistic infections) before they are able to access social assistance.¹² Second, the requirement of a laboratory test often excludes those who would indeed qualify for the DG because they are simply not able to access the CD4 count test. For many, the very process for determining eligibility becomes a barrier to access.

In our view, eligibility for the DG should be based on a clinical evaluation, with all adults with HIV/AIDS who are either at Stage 3 or 4 of the illness (according to the World Health Organisation classification)—which includes those with symptomatic HIV infection as well as people with AIDS—being able to access the DG. This would mean that the DG covers those whose chronic illness is negatively affecting their capacity to work or discharge their social functions. It also means ensuring access to resources for those who are the stage of their illness where they have the possibility of staving off further progression to stage 4, meaning that further incapacity is avoided.¹³

In dealing with access to DGs for people living with HIV/AIDS, however, it is important to recognise that broad access to comprehensive treatment—including but not limited to highly active antiretroviral therapy (HAART)—would have a significant and direct impact on the need for DGs. For those who have access to comprehensive treatment and have reverted to stage 1 of the illness (asymptomatic

¹⁰ Such an argument is made with the understanding that “modest and sustained redistribution, even under conditions of relatively slow growth, does much more for the poorest of the poor ... than does fast “trickle down” ... growth”, recognising that the guarantee of a minimum level of consumption will allow people “to engage in the risk-taking behaviour so necessary to the generation of additional income.” (Report at 28)

¹¹ Implicit in this argument is the nexus between disability and the lack of ability to provide for basic needs.

¹² To place this in perspective, it is important to consider that the World Health Organisation guidelines indicate that all people with HIV/AIDS with a CD4 count of 200 or below should be receiving highly active antiretroviral therapy (HAART).

¹³ The issue of children living with HIV/AIDS raises different concerns and is dealt with separately in response to chapter 7 entitled “Protecting the Children”.

HIV infection), access to a DG would no longer be required. In addition, we believe that the sheer scale of the epidemic and the resultant need for social assistance points to the necessity for the training of grant evaluators to deal effectively and appropriately with HIV-related grants. Processes need to be expedited and simplified.

Non-citizens

The Report recognises that “there will probably be constitutional pressure to ensure all people (including illegal immigrants) have access to certain basic services (such as emergency healthcare), and full access to certain categories such as refugees.”¹⁴ While the ALP and TAC recognise that it may be justifiable and necessary in many cases to make distinctions between citizens and non-citizens in the allocation of resources,¹⁵ in our view, however, the nature of the intervention itself (and the problem it aims to resolve) may be such that no distinction at all would be possible. For example, a comprehensive response to a public health crisis such as HIV/AIDS would be impossible unless all prevention, treatment and care interventions are available to all people in the country.¹⁶

A further consideration to bear in mind is the nature of South African households, families and communities, and the complex links between South Africans and other Africans in the SADC region. This issue is most clearly illustrated by the fact that non-citizens who are ordinarily resident in the country cannot access child support grants (CSGs) for their South African children. This limitation is not only unreasonable but also clearly irrational and unfairly discriminatory as it draws a distinction between children on the basis of one or both of their parents’ or caregivers’ nationality, without regard for the impact on the children themselves.

Social insurance and the private sector

The Report notes that in the absence of publicly provided benefits, social security costs are passed onto employers. This invariably leads to an increase in non-wage costs that acts as a disincentive for direct employment and resulting in an increase in indirect employment, including casualisation. This takes place within a system where contribution-funded social insurance and regulated private schemes cover a relatively small part of the population. As more people fall out of the formal employment sector,¹⁷ the scope of the contribution base is undermined. In this context, it is no accident that profit-driven provision of social security takes place in the absence of cross-subsidies.

To avoid this type of “cherry picking”, which sees the private sector seeking to provide cover to those with high-income and low-risk, social insurance provision cannot be left to regulate itself. In our view, however, the regulation of the insurance industry cannot be done in the absence of ensuring that the private sector is not made to carry more or less than its appropriate share of the social security burden.

¹⁴ Report at 31.

¹⁵ We do not believe that any distinction should be made between citizens and permanent residents in the allocation of resources. We do not propose dealing with this matter because the Constitutional Court will largely resolve it in due course. In this regard, see above note 5.

¹⁶ In addition, this would require a common approach (and some degree of standardisation) within the SADC region.

¹⁷ The report also notes that even within the formal employment sector, some of most vulnerable workers remain excluded from the social insurance system.

Simply put, regulation must be accompanied by a strengthening of publicly provided social security, including social assistance.

Challenges identified by the Report

The Report raises a number of important socio-economic challenges facing the country, including the following:

- High unemployment and the loss of formal sector jobs reduces the incomes of the poor, who have historically supported other poor and unemployed people through remittances and intra-household transfers
- The State is vulnerable to constitutional challenge if it doesn't develop a comprehensive social security system
- The racially differentiated composition of public service users reinforces racial prejudice and undermines social solidarity
- The delivery of key social services is undermined by the inability of many poor people to pay for services
- The HIV/AIDS epidemic exacerbates poverty and inequality
- Insufficient social investment and social development backlogs are a primary barrier to the achievement of sustainable levels of economic growth and development

In our view, these identified challenges reinforce the urgent need for the transformation of the social security system in a rational, reasonable and programmatic manner. If left unattended, such problems will only get worse.

Chapter 3: Approach to a Comprehensive Social Security Provisioning

The Report recognises that the two-fold nature of the South African economy means that a comprehensive social security system must deal with two sets of needs:

- The poor, who are largely excluded from the formal economy; and
- The formally employed, who without protection against the contingencies of death, disability, ill health and retirement, can be reduced to destitution.¹⁸

In defining an appropriate concept of comprehensive social security for South Africa, the Report adopts the concept of social protection, which—

- Incorporates developmental strategies;
- Provides a coherent framework for integrating existing and proposed social and economic policy interventions; and
- Has the potential for integrating and linking private, public and community sector interventions and benefit systems.

Based on the United Nations Commission on Social Development understanding of social protection,¹⁹ the Report adopts the following definition of Comprehensive Social Protection (CSP):

¹⁸ The Report notes that this applies even to comparatively wealthy beneficiaries of the formal economy.

¹⁹ "The ultimate purpose of social protection is to increase capabilities and opportunities and, thereby, human development. While by its very nature social protection aims at providing at least minimum standards of well-being to people in dire circumstances enabling them to live with dignity, one should not overlook that social protection should not simply be seen as a residual policy function of assuring

“Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.

Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.”²⁰

Of crucial importance is the recognition that a “‘package’ of social protection interventions and measures” should be available, without a trade-off between certain basic requirements taking place.²¹ Such an approach allows for a balance between various measures focused on addressing the three main categories of poverty (income, services (capability) and asset poverty)²² as well as special needs (disability or child support), enabling poor people to be guaranteed some cash support and a basic level of service delivery, rather than creating a dependence on cash benefits or services alone.

The Report recognises that while the state is implementing its medium- to long-term social programmes, it has to address certain immediate issues by providing “temporary” relief for those who are particularly vulnerable. This is not only because the state is under a constitutional duty to do so,²³ but also because programmes dealing with asset and capability poverty will not be able to deal with “temporary relief for those most vulnerable”.²⁴ In our view, even with the best of intentions and a rollout as fast as the state is able to accomplish, too many poor people will fall through the cracks as they wait for services to reach them, do not have sufficient resources or the ability to access available services or their very basic needs (such as access to food) are not met by those services.²⁵

the welfare of the poorest – but as a foundation at a societal level for promoting social justice and social cohesion, developing human capabilities and promoting economic dynamism and creativity.” (Report at 40)

²⁰ Report at 41.

²¹ Report at 41.

²² The report sees measures aimed at dealing with income poverty as ensuring that people have adequate incomes throughout their lives—during childhood, working age and old age. It recognises that income poverty can be addressed through a range of measures, but that the CSP package should include at least one primary income transfer that ensures that all people have some income to mitigate or eradicate destitution and starvation. In this regard, see the comments on Chapter 5: Poverty, Social Assistance Grants and the Basic Income Grant.

Measures to address capability poverty include the provision of certain basic services that are crucial for a person to live and function in society—water, electricity, healthcare, education, food security, housing and transport. Measures to address asset poverty include access to “income-generating assets”, such as land, and social capital such as community infrastructure.

²³ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46; 2000 (11) BCLR 1169 (CC)

²⁴ Report at 43.

²⁵ In support of its approach, the Report refers to Constitutional Court jurisprudence recognising that by providing better social assistance, the state would experience less pressure on other socio-economic rights. In other words, the state would be able to buy time for the progressive realisation of other socio-economic rights by improving income transfers to the poor in the short term.

The ALP and TAC support this concept of comprehensive social protection. We believe that it not only addresses the complexity and extent of South Africa's social security needs, but that it does so in a manner which balances our medium- and long-term developmental goals with our immediate needs. Most importantly, it recognises the crucial role of the state in ensuring that poor people have the ability to move (and remain) out of poverty. In our work, we have seen how lack of access to a basic income limits access to existing services, and how lack of access to services (such as health care) results in the depletion of existing sources of income.

Determining the minimum requirements of a CSP package

While the Constitutional Court has rejected the legal concept of a "minimum core" for the purposes of adjudication in socio-economic rights claims, the report nevertheless argues that the constitutional obligations of the state should be translated into making available a minimum level or measure of provision to all. On first glance, this appears to be contradictory. Yet a closer reading of the Court's jurisprudence shows that this is not the case.

At the heart of the Court's rejection of the "minimum core" argument is a recognition that it is difficult for a court of law to determine—in the abstract—what minimum level of provision would be required by law *for all circumstances and in all cases*, given the range of factors that would have to be considered in each case, such as the difference between urban and rural areas, income, unemployment and the availability of land.

This does not mean, however, that in any particular matter—and on a particular set of facts—a court is precluded from determining that a particular benefit (or level of benefit) is constitutionally required. In such a case, the constitutional issue is not whether a particular minimum set of benefits is provided but rather whether it is reasonable, in the circumstances, to provide or deny the benefits in question.²⁶

While a court may not be able to determine—with sufficient certainty—what minimum level of provision should be provided in all circumstances, there is nothing stopping the state from adopting a policy approach that takes as its starting point a minimum set of social security benefits, even if a court is unwilling or unable to impose on the state such an approach. In our view, the arguments put forward in the Report for adopting a minimum package of benefits for all support a finding that such an approach is indeed the most rational and reasonable to take.²⁷

Affordability of a comprehensive social protection package

The Report recognises that South Africa's level of economic development is such that the country is able to afford the comprehensive social protection package proposed. Of greater importance, however, is the recognition of the high costs associated with not acting to improve social security, such as a failure to overcome barriers to social and economic development.

²⁶ In this regard, the judgment of the Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* (2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)) is instructive.

²⁷ See also "Chapter 6: Right to Social Security" in the South African Human Rights Commission's 4th *Annual Economic and Social Rights Report: 2000 – 2002*, available online at http://www.sahrc.org.za/esr_report_2000_2002.htm.

The reports further recognise that the parameters of affordability might be artificially constrained by economic policies that seek to reduce public spending (in relative terms), noting that fiscal policies have resulted in a declining real per capita spending. This in turn has seen public institutions struggle to reduce costs while at the same time increase access to social protection.

While we recognise the importance of increased efficiencies and welcome an increase in social spending in the recent budget, the ALP and TAC nevertheless note with concern that—particularly insofar as health care services are concerned—the last few years have seen a decline in real public spending accompanied by increasing commercialisation of key services. As the Report notes, this has pushed many people into the regulated private market.²⁸ In our experience, it has also pushed many poor people into the grey area between the public and private health care sectors, where they are forced to make out-of-pocket expenditure on health care products and services that are not generally—if at all—available in the public sector.

Means testing

The Report stresses the importance of seeing social assistance and the system of taxation as a whole, arguing that the “most efficient and developmentally most effective and fairest way forward is to abolish all means tests and to recover the costs through increases in tax.”²⁹ It sees the means test as primarily responsible for low take up rates, with only a small proportion of those entitled to existing benefits being able to access them, as well as intensifying the “welfare-trap”, which sees the creation of disincentives to work as a result of a fear of losing the benefit. In addition, the report highlights that in a country such as South Africa where incomes fluctuate, it is also very difficult and complicated to apply the means test. In short, the Report reaches the conclusion that the proper and fair application of the means test is a “generally impossible task within the available institutional capacity”.³⁰

The ALP and TAC support the call for either the abolition of the means test, or at minimum, the adoption of alternative simpler forms of tests. Insofar as income (and not special needs) is concerned, it is our view that the means test is counterproductive in that—to some extent—it creates incentives for reliance on “welfare”. What is needed is a system that permits and creates incentives to reduce reliance on social grants, while at the same time ensuring that basic needs are met.³¹ This cannot take place in a context where there is a fear of losing social assistance. In addition, the use of means testing almost inevitably results in layers of bureaucracy and inefficiency, as well as potentially opening up the system to abuse.

Mandatory cover for the formally employed

Of those countries at comparable levels of development, South Africa is unusual in not mandating social insurance cover. With this in mind, the Report supports the

²⁸ In this regard, our concern is not that more people are accessing social services through the regulated private market but that the level and extent of services and benefits offered to such people is insufficient.

²⁹ Report at 47.

³⁰ Report at 45.

³¹ In this regard, see the comments on Chapter 5: Poverty, Social Assistance Grants and the Basic Income Grant.

introduction of some level of mandatory insurance cover for all participants in the formal sector (and their dependants). At the same time, the Report questions the justifiability of tax breaks (correctly understood as subsidies) to private sector providers, recognising that they do not appear to be based on any clear rational or equitable basis. In our view, the policy objective inherent in mandatory social insurance (which seeks to ease the social assistance burden on the public sector) is severely undermined by the continuation of such public subsidies for private benefits.

While recommending that an unambiguous and manageable dividing line be developed between those for whom cover should be compulsory and those who could voluntarily contribute to social insurance, the Report does not seek to provide such a dividing line. The ALP and TAC believe that such a dividing line may be more appropriately drawn between a minimum level of social security benefits requiring mandatory cover and an optional voluntary level of benefits over and above this minimum level.³²

Chapter 4: Constitutional Framework for Social Security in South Africa

The report recognises that a range of other “social security relevant fundamental rights”, including access to sufficient food and water and health care services, back the constitutional right of access to social security.³³ Together, these rights are understood as guaranteeing adequate social protection. The ALP and TAC welcome this important recognition of the interrelationship between the various constitutionally entrenched socio-economic rights. In our view, social security has for too long been understood as the provision of a safety net only.

Understanding the complex relationships between various socio-economic rights—and the constitutional obligations of the state in respect of all these rights—permits and mandates an approach to social security that recognises, for example, the impact of health policies on the provision of social assistance. As the HIV/AIDS epidemic clearly shows, gaps in health policy increase the burden on social development programmes, as the state is forced to deal with increasing inability to work (as a result of ill health) and a rising number of orphaned children, often associated with child-headed households.

In detailing the extent of the state’s positive constitutional obligations in respect of the right of access to social security, the Report notes that these obligations do not necessarily always entail the actual provision of goods and services. Instead, they require the state to develop and implement an appropriate legal framework that facilitates access to right in question. Implicit in this finding is that there will be circumstances where such access will only be able to be facilitated by the direct provision of goods and services.

With this in mind, the Report further recognises that “the social security concept does not merely cover measures of a public nature” and that in a country such as South Africa, it may be necessary to adopt an approach that recognises “all instruments available to society for guaranteeing social security” as a way of utilising limited

³² In essence, such a divide underpins the proposals contained in the Satchwell Report on the restructuring of the Road Accident Fund (RAF).

³³ Report at 50.

resources.³⁴ In the result, the Report sees the state as being required by the Constitution to protect vulnerable groups and to protect against third-party violations of these rights.

As a practical example, the Report cites pensions, medical insurance and unemployment insurance legislation as having to ensure that they sufficiently protect individuals against discrimination in acquiring benefits. In our view, a key area in which the state could do more is in developing and implementing an appropriate regulatory framework dealing with the long-term insurance industry as a source of private social security.³⁵ In our experience, unfairly discriminatory policies and practices in this sector deny people living with HIV/AIDS access to housing (by denying life assurance policies necessary for accessing home loans), and the right to die and be buried with dignity (by repudiating funeral benefit policies).

Chapter 5: Poverty, Social Assistance Grants and the Basic Income Grant

The Report argues that poor people are often not able to access certain publicly provided services (such as healthcare and education) because they do not have sufficient income for transport, food and basic clothing. While it recognises that the provision of such services is essential in ensuring sustained human development and economic growth, the Report notes that in the context of South Africa's high levels of poverty and in the absence of immediate relief, the state's capability poverty alleviation programmes are seriously undermined. In this regard, direct social assistance is seen as being the only measure that can address the issue of poverty limiting access to existing services.

In addition, the Report notes that despite "considerable progress in some aspects ... current measures do not adequately contribute to a minimum package of goods, services and benefits."³⁶ Of particular concern is the finding that the current programme of grants is "considerably high cost relative to its level of social effectiveness."³⁷ So too is the finding that for the average poor household without a pension-eligible member, social assistance programmes currently have a negligible impact.³⁸

In our view, the current system of grants does not sufficiently account for vulnerability beyond children, the aged and the disabled. It appears to be premised on the outdated and discredited notion of social assistance as simply the provision of a safety net, failing to recognise the extent, nature and causes of widespread poverty and unemployment. It further fails to consider that the non-recognition of the working-age poor as a vulnerable group has a particularly negative impact on families, households and communities. For example, poverty pushes many young women into sexual relationships with older men, as it does many women of all ages

³⁴ Report at 50.

³⁵ In the absence—or during the implementation—of a comprehensive social security system, the regulation of the private sector becomes all the more important.

³⁶ Report at 57.

³⁷ Report at 60.

³⁸ The Report notes that with a full uptake of current programmes, a significant but nevertheless insufficient reduction in the poverty gap can be achieved. It records that even where current programmes have resulted in a significant reduction in the poverty gap, this is not evenly distributed. For example, the reduction in the poverty gap in "skip generation" households (children and grandparents only) is almost eight times that of households with only working-age adults.

into commercial sex work. In this way, lack of access to a basic income further renders poor women vulnerable to HIV infection.

Basic Income Grant

The Report recognises that the extent and nature of unemployment in South Africa requires the expansion of the social safety net, for it is not only children, the aged and the disabled who need protection. In our view, the need for an expansion of social assistance programmes is underscored by the fact that of the vulnerable, those with the greatest potential to contribute to the development of the economy are denied this opportunity because they are too poor.

By providing poor people with a minimum level of support, the Report believes that they will be enabled to take risks needed to break out of the poverty cycle. In the result, it argues that the “most effective means of reducing destitution and poverty is to provide some minimum support in the form of a social assistance grant”, to be set “at a level that would address destitution in the medium term and absolute poverty in the long term.”³⁹ Such a basic income grant (BIG) would favour larger households that on average are poorer than smaller ones, allowing for the pooling of income.

The ALP and TAC strongly endorse the call for the introduction of a BIG that is a universal entitlement granted without the ordinary requirement of satisfying a means test.⁴⁰ The absence of a means test would go a significant way towards ensuring that those who need the grant are able to access it. A universally granted BIG would not only eliminate many of the practical obstacles to accessing social assistance, but would also eliminate many of the indignities associated with accessing current grants. No longer will poor people have to prove how poor they are to be able to access social assistance. In addition, it would also avoid any of the disincentives to work inherent in other social assistance systems.⁴¹

The Report notes that conditions for the immediate implementation of a BIG do not yet exist, arguing that current institutional arrangements are inadequate and cannot be used for new and expansive measures. It further argues that new institutional arrangements and measures must first be put in place so as to ensure that the appropriate capacity and institutional arrangements exist for effective implementation.

While such capacity is being developed and the necessary infrastructure being put in place, the Report recommends the need to take immediate steps to expand certain poverty relief and de facto schemes, so that those who are eligible to access such benefits will indeed access them. In this regard, the ALP and TAC support the recommendations made throughout the Report that eligibility for existing grants be broadened, such as extending the CSG to 18, ensuring that child-headed households

³⁹ Report at 60.

⁴⁰ Those who access the grant in the absence of need will “pay back” the grant in the form of income tax.

⁴¹ We are unable, however, to unconditionally support the Report’s qualification that there be no overlap between different grants, with the BIG meant for those in need who currently are not receiving any social assistance. In our view, the type of grant (pension v disability, for example) already accessed would be relevant in determining whether or not there should be any overlap.

are able to access the CSG, and broadening the definition of disability for purposes of accessing the DG.

In our view, this phased approach to the introduction of a BIG would go some way towards satisfying the constitutional requirements of a reasonable plan to realise progressively the right of access to social security. The approach is in line with the Constitutional Court decision in the *TAC* case, which found that a reasonable plan must make use of existing capacity to expand current programmes, and must build new capacity to roll out new programmes.

Chapter 6: Employment and Unemployment

The Report argues that the “principle of social insurance, based on entitlements through contributory schemes, should where feasible, be extended to include as many of the employed as possible.”⁴² The ALP and TAC support this proposal on the understanding that to the extent that contributory schemes (and for that matter the private sector) are able to carry their share of burden and thereby free up resources for the public sector, they must be empowered to do so. Our support, however, is conditional on the existence of adequate regulation to ensure that particularly vulnerable groups (such as people living with HIV/AIDS) are not subjected to unfair discrimination.

Unemployment insurance

The report notes that the problem with the concept of unemployment insurance (and the UIF) is that unemployment in South Africa “is more structural than cyclical”.⁴³ As a result, the limitation of UIF benefits (available for only six months) means that the system is unable to deal with unemployment of this type. In our view, this problem can be slightly alleviated by the introduction of the BIG.

Public works programmes

Endorsing the proposal that as many jobs as possible be created through public works programmes, the Report recognises that such programmes, by their nature, do not offer long term viable employment opportunities for the “unskilled structurally unemployed”.⁴⁴ We agree that in and of themselves, public works programmes cannot reach sufficiently large numbers in the same way that a BIG can. In our view, however, the introduction of a BIG and the implementation of a public works programme should not be seen as mutually exclusive. In addition, we believe that the type and nature of public works programme must take into consideration public needs such as health care and educational infrastructure.

Chapter 7: Protecting the Children

As a general measure, the Report recommends the immediate extension of the CSG to all children under 18. In addition, it recognises the need to expand access to the CSG to children who are being denied access to such grants not because of their age but rather because of the nationality of their parents or care givers or because they do not have parents or adult care givers. In our view, there is no rational or reasonable basis for denying these children access to the CSG.

⁴² Report at 71.

⁴³ Report at 71.

⁴⁴ Report at 73.

Immediate steps need to be taken to enable children in child-headed households to be able to access the CSG, possibly with the assistance of CBOs or NGOs. We believe that the mechanism chosen must ensure that those who are most in need are actually reached. The status quo simply ensures that the most vulnerable of all are rendered even more vulnerable because of the absence of a parent or care giver.

Children living with HIV/AIDS

Children living with HIV/AIDS seldom qualify for a disability grant until they get so sick that they might require permanent home care. If such children are older than nine (to be raised to 11 by April 2004 and 14 by April 2005), they are not able to access the CSG. If they are being cared for on an informal basis (as is often the case with children orphaned by HIV/AIDS), their caregivers cannot access foster care grants. The Report recommends that these issues can be resolved by ensuring that—

- The CSG covers all children (up to 18);
- All children have access to free health care services; and
- A mechanism is developed to allow for “informal carers” to access foster care grants.

While the ALP and TAC do not believe that all poor people living with HIV/AIDS should automatically be eligible for a disability grant,⁴⁵ we note that the issue of care dependency grants (CDGs) and children living with HIV/AIDS (or other chronic illnesses) must be dealt with differently. This is because the progression of HIV disease in children is much quicker and its impact more severe in the early years following infection. By the time that such children get sufficiently ill to access a CDG, it is usually too late. We do note, however, that with access to comprehensive treatment for HIV/AIDS, the need for CDGs will be significantly reduced.

Adoption and fostering

While the financially needy can access foster care grants,⁴⁶ they receive no financial support if they choose to adopt instead. The Report recognises this as a clear disincentive to adopt which has a negative impact on permanency planning. In a recent report, the South African Law Commission has recommended the introduction of an adoption subsidy, which the Report finds problematic in that it treats adoptive parents differently from biological parents. In this regard, we agree with the Report that a universal CSG may satisfy the need for an adoption grant.

Private maintenance

The ALP and TAC support the need to strengthen the private maintenance system. This is in line with an approach that recognises the relationship between private and public social security, ensuring that public resources are directed to those who are vulnerable as a result of need and not because a parent is not taking responsibility when he or she has the means to do so. Strengthening the private maintenance system will reduce the need for accessing public social assistance.

Chapter 8: Health

⁴⁵ See the discussion on chapter 10 (disability) below.

⁴⁶ The Report also recommends that interim foster care payments be made while court processes are pending.

The ALP and TAC made a separate submission on this chapter (and its associated research report) in June 2002. A copy of our submission to the department of Health is included as an addendum to this submission.

Chapter 9: Retirement and Insurance

Compulsory retirement benefits

The Report recommends that all formal sector employees (including casual and part-time workers) be required to contribute a prescribed minimum percentage of their incomes to a retirement savings fund, which would also include such benefits as survivor's and disability cover. Recognising that compulsory contributions won't have the desired effect if benefits are withdrawn upon a change of employment, the Report argues that pension benefits be transferred to a new fund if the member remains in formal sector employment. This means that such benefits would be available to deal with unemployment.

The Report notes that if such compulsory benefits were introduced, a strong argument could be made that the Road Accident Fund (RAF) and various forms of compulsory coverage for employment accidents could be abolished, as they would be rendered redundant. While the ALP and TAC support the introduction of compulsory retirement benefits, we do not understand how this would eliminate totally the need for the RAF, as its benefits are not limited to the formally employed.⁴⁷

Consumer protection issues

Noting that South Africa's private pension and insurance sectors are estimated to be the largest in the world relative to gross national product, the Report recognises that "[p]owerful vested interests control the insurance and related industries."⁴⁸ With this in mind, we once again reaffirm our support for the appropriate regulation of the private sector. In particular, we support the state taking legislative measures to ensure that unfair discrimination in this industry is eliminated. In our view, the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 are important but inadequate to deal with the nature and extent of the problem.⁴⁹

While recognising that insurance agents must make it clear that they are selling policies and not giving advice, the report nevertheless recommends that they continue to receive payment on a commission basis. In our experience, the payment of commission is often directly responsible for the abuse of vulnerable consumers. In many cases that have been brought to our attention, poor families are unable to claim benefits or to bury their loved ones because policies are repudiated after the beneficiary's death. In our view, the payment of commission results in the inappropriate issuing of such policies and the causing of unnecessary pain and hardship.

Unfair Clauses Act

⁴⁷ This argument assumes that the benefits of the retirement savings fund would be limited to the formally employed. If we are incorrect in making this assumption, our argument in this regard falls away.

⁴⁸ Report at 97.

⁴⁹ To strengthen the provisions of the Equality Act, we support the express recognition of HIV/AIDS status as a prohibited ground of non-discrimination.

We strongly support the call that unfair contracts are dealt with by the introduction of an Unfair Clauses Act.

Chapter 10: Disability

The Report notes that not only does poverty increase vulnerability to disability, but also that disability itself increases vulnerability to poverty. This is because people with disabilities face additional hurdles to accessing basic services (such as transport), education, employment and health care. In addition, their disabilities usually require additional resources that may be sorely needed elsewhere (for their or their families other needs). In this regard, it is important to note the Report's finding that there is a "need to put in place measures to address the growing threat of disabling disease."⁵⁰

We welcome the Report's broad concept of disability,⁵¹ which can be adapted to suit each particular benefit. As the Report notes, we should not define beneficiaries according to their disability, but rather the provisioning of benefits should be in response to actual need. We note with concern, however, that the Report recommends that "incapacity" to work should not be the basis for eligibility, arguing that in the case of people with disabilities, a lack of employment is often due to prejudice in workplace instead. In our view, these matters are better dealt with by the proper monitoring and implementation of employment legislation such as the Employment Equity Act and the Skills Development Act, and not by the expansion of the reach of the disability grant.

Regarding the issue of means testing (as opposed to universal provisioning), we agree with the Report that the issue is complex but that limited resources mean "some form of targeting measure" is inevitable.⁵² In our view, the DG can be distinguished from the BIG in that in respect of the latter, grants paid to those who are not in need can be claimed back through the general tax system, whereas actual disability cannot be determined in any way other than means testing of some form or another.

Chapter 12: Coverage Against Employment Injuries and Diseases

In relation to the issue of coverage against employment injuries and diseases, a matter closely linked to disability, it is worth repeating our position that to the extent that the private sector can carry its share of the burden, it must do so. In this regard, we note with concern various cases where claims lodged in respect of employment-related accidents involving workers who were living with HIV/AIDS have been dismissed on the basis that the death was HIV-related. The ALP and TAC believe that unless employment-related injuries and diseases are adequately dealt with through the private sector and/or a statutory contributory fund, an increasingly unsustainable burden will have to be carried by health care services and social assistance (such as disability grants).

Chapter 13: Institutional Framework

⁵⁰ Report at 102.

⁵¹ This broad concept of disability includes the following four main categories: physical, mental, sensory and intellectual disabilities.

⁵² Report at 104.

The report recognises three key organisational and institutional arrangements for the provision of social security – public sector provision, social insurance organisations and regulated private markets. We agree that while all three have important roles to play, markets cannot be expected to lead the transformation process. With this in mind, the Report speaks of the need to build the capacity of the state and its public sector institutions as an essential starting point, with the chosen structure of delivery to follow “chosen strategic functions and priorities set by the South African developmental state”.⁵³

Regarding private sector markets, the Report notes that “legislation typically has to be introduced enforcing minimum solidarity and cross-subsidisation requirements. Without these protections, reliance on the private market will be undermined through unilateral decisions made by the market to exclude certain groups from cover.”⁵⁴ As this submission has made clear, our experience shows just how vulnerable groups (such as people living with HIV/AIDS) have indeed been excluded. We therefore have no hesitation in supporting the Report’s call for legislation to ensure “minimum solidarity and cross-subsidisation requirements”, as has been introduced in other areas such as the medical schemes industry.⁵⁵

Our comments regarding the proposed structures for ensuring access to social security are somewhat limited. In our view, the key question to ask in the adoption of any structure is whether it will be able to ensure that people actually access their social assistance benefits. With this in mind, we propose a structure that takes the form of an independent statutory Commission (along the lines of the Competition Commission or various Human Rights Commissions outside of South Africa) that is empowered and sufficiently resourced to act on behalf of people who have not been able to access grants.⁵⁶

This can be done in two ways, either by ensuring that they have the necessary documentation or complete the necessary procedures for accessing grants, or by investigating and challenging (where appropriate) a refusal of grant. Such an institutional set-up would require a specialised court or tribunal that would have exclusive jurisdiction to hear the dispute in question. In order to lessen the burden on—and demand for the resources of—the proposed Commission, we recommend that in certain cases, such as class or public interest actions brought by not-for-profit organisations, the requirements to engage the Commission be waived. In this way, the Commission can concentrate on supporting those who do not have access to the support of public interest organisations.

In addition, we recognise a crucial role for this Commission in the implementation and continued monitoring of the comprehensive social protection system. While we agree with the Report that implementation and monitoring should be carried out by a range of key role-players (including government departments, external auditors, the South African Human Rights Commission, those most affected by the programmes

⁵³ Report at 119.

⁵⁴ Report at 121.

⁵⁵ See the Medical Schemes Act, 131 of 1998.

⁵⁶ Our submission is based on the recognition that all social security claims should ultimately be resolved by a single investigative and adjudicative system that will be composed of a number of different parts.

and a broad range of sectors and stakeholders), we are nevertheless of the opinion that the overall responsibility for co-ordinating and spearheading this process should lie with the proposed Commission.

Conclusion

The ALP and TAC thank the Portfolio Committee on Social Development for the opportunity to contribute towards the consideration of the Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Report). As our submission shows, we strongly endorse the Report as a whole, supporting almost all the findings reached and the proposals made.

We take this opportunity to congratulate the Committee on completing a challenging task with commitment, purpose and resolve. We recognise that the Report represents the finest traditions of academic excellence, political commitment and collaborative work. We trust that the Committee's expertise has been—and will continue to be—available to the Portfolio Committee and the Department of Social development in their evaluation of the Report.

4 June 2003

**AIDS Law Project
Treatment Action Campaign**