Proposal to draft a bill for the MEC
Welfare: subsidizing and monitoring welfare NGOs

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A PROPOSAL TO DRAFT A BILL FOR THE MEC WELFARE: SUBSIDIZING AND MONITORING WELFARE NGOs

FIRST ROUGH DRAFT OF A RESEARCH REPORT

1. This draft research report explains the desirability for drafting a seventh bill to add to the present bundle of six bills for the MEC, Welfare. The proposed bill will give the MEC power to make grants to community development organizations and to local governments. It will also require to use the MEC's long-dormant power to impose performance conditions on a subsidy to a welfare provider, and to monitor and control subsidized welfare providers and their programmes.

2. The problem arises in the context of a Welfare Department seeking to transform itself. The essence of the change lies in the shift from an older paradigm of welfare as providing grants-in-aid of the physically or socially disabled or vulnerable in an apartheid-ridden society, and the current paradigm, of developmental welfare in a democratic society. To begin those processes of transformation, the Department has in train six transformatory bills. In drafting these bills, two problems became evident: (1) they broke the envelope of the present laws authorizing funding of NGOs for welfare programmes; and (2) they demanded transformations in the functioning and probably the structure of many of the NGOs presently conducting welfare programmes subsidized by the Department. The bill here proposed will aim to address the MEC's role in dealing with these two problems through the provision of funds.

3. Following a problem-solving methodology, this Report first discusses the social problem and the problematic behaviours which comprise it that the new bill aims to address; second, the explanations for those problematic behaviours; and third, the kinds of provisions required in the proposed bill to alter those behaviours.

I. THE DUAL DIFFICULTIES: EXPANDED PROGRAMMES AND INADEQUATE CONTROLS

4. This section discusses (1) the three social problems at which the proposed bill aims: the MEC's constrained powers to make grants for topics that the new paradigm places on the welfare agenda, to make grants to local government, and to induce changes in welfare NGOs; and (2) identifies the MEC, local governments and welfare

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1 Concerning the aged, RSWIs, delegation to local government, street children, disabled access, and developmental welfare (or the economic empowerment of the poor and vulnerable).
NGOs as the role occupants whose behaviours constitute the difficulty.

A. THE SOCIAL PROBLEMS ADDRESSED

5. The first problem addressed concerns the necessity for new programmes relevant to the new, developmental welfare paradigm (for example, aiding emergent entrepreneurs and organizing community economically productive activities). At present, the Welfare Department carries out almost no activities in this area.

6. Second, the new welfare paradigm calls for maximum feasible devolution of welfare functions to local authorities. Inevitably, that will require some funding of those authorities by the Provincial department. That has not yet occurred on a significant scale. As the Provincial Department provides more funding to local authorities, however, it will need to ensure transparency, accountability and community participation in the decision-making process regarding their use.

7. Third, to carry out the new functions of welfare requires that the MEC exercise more supervision and control over the NGOs through which the MEC carries out the Department's mission. Existing NGOs have mostly conducted their programmes for many years. They continue to carry them out in the same way. For example, four years after the adoption of a democratic constitution, assistance to old age homes continues its apartheid-driven discrimination against black frail aged. In relative terms, it seems that a white older person has about sixty four times as much chance of having the State support him or her in a Welfare Department-supported NGO-operated shelter as does a black older person. Apparently, the responsible NGOs have not transformed themselves.

8. Legislation usually cannot directly address the superficial manifestations of the social problem that excited the demand for its enactment. Legislation can only address behaviours. As their first task, those proposing new legislation must translate the social problem as it appears on its surface into the behaviours that constitute it.

B. WHOSE AND WHAT BEHAVIOURS?

9. These dual problems arise out of the behaviours of three social actors. At present, the MEC subsidizes some welfare activities, but precious few developmental ones -- despite the present

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2 This figure is approximate. At present, in absolute terms, the Department supports 16 white old people in government-supported shelters as blacks. With four times as many blacks as whites in Gauteng, relatively a white older person's chances of entering a home with governmental assistance is 64 times (i.e., 16 x 4) that of a black older persons' chance. That does not factor in the fact that at present the level of funding for white older persons in shelters runs about twice or more the level of funding for black older persons in shelters.
transformational thrust of welfare policy. Local authorities have not undertaken new welfare responsibilities. Despite exhortation of NGOs by the MEC, they have a long ways to go towards transformation.

10. Welfare policy points towards developmental welfare, with all its implications for pointing welfare towards helping its clients into productive economic activity, and towards decentralized delegation of welfare functions to regional and local units. That policy points towards the transformation of the NGOs who carry out welfare functions by operating specific programmes. These policies, however, remain largely embedded in White Papers and other policy documents. Thus far, they apparently have had little effect on the ground. Why the gap between policy and action?

II. EXPLANATIONS

11. Law that addresses only the superficial manifestations of a social problem tends merely to poultice symptoms. Competent legislation attempts so far as possible to address the causes of the behaviours that comprise that problem. Why these problematic behaviours of the MEC, local authorities and NGOs that conduct welfare programmes?

A. THE LAW AS EXPLANATION

12. A new law always changes old laws. New laws arise to change the causes of socially problematic behaviours. It follows that one of the 'causes' of the problematic behaviours here at issue must consist of the existing legal framework within which the three role occupants function.

13. Two of the behaviours involved -- the MEC's failure to fund developmental activities, and to subsidize local government welfare functions, find partial explanations in the Social Assistance Act, 1992, as amended, section 5. As we understand it, that section constitutes the source of MEC's power to make grants to the welfare organizations that carry out welfare programmes. That section, however, limits the MEC's power to make grants for welfare purposes, both with respect of the purpose of the grant, and to what sorts of recipients.

14. First, section 5 limits grants to seven areas. These all reflect the older paradigm of welfare as a device for supplying a safety net for people who without subsidization or actual, physical care cannot live in the society. Without straining the sense of the words, on their face none direct the MEC or even permit the MEC to make grants that look to aid people disabled only by poverty.

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3 "The Minister may...out of moneys appropriated by the Provincial Legislature concerned for that purpose, make financial awards to" (i) family care; (ii) care of the aged; (iii) social security; (iv) care of the disabled; (v) alcohol and drug dependency; (vi) care of the offender; and (vii) the care of mentally or psychiatrically disabled persons.
So far as appears, the MEC cannot make a grant to help emergent entrepreneurs, or to help organize poor people into group enterprises. Without that power, developmental welfare policies may die-aborning.\(^4\)

15. Second, section 5 limits the possible grantees of funds to 'welfare organizations,' defined as a welfare organization registered or deemed registered in terms of the National Welfare Act, 1978. That would seem to exclude a local government. Although the Constitution permits the delegation of provincial welfare responsibilities to local governments, the Constitution is not self-enabling. In the face of section 5, it seems at least questionable whether the MEC today has power to grant a subsidy for welfare purposes to a local authority.

16. The third behaviour involved -- the failure of NGOs to transform their structures and processes -- also find a partial explanation in the surrounding legal framework. Section 5 of the Social Assistance Act, 1992, as amended, empowers the MEC to make grants to welfare organizations. Nothing in that forbids the MEC from making those subsidies on conditions. Moreover, if the Head of Department believes that a beneficiary "misspends his grant" or for any reason that the HOD "deems expedient", section 8 empowers the HOD to "suspend payment" of the grant, or pay it over to some other person on behalf of the grant's beneficiaries. The regulations made under the Act reinforce that power.\(^5\)

17. The MEC, therefore, has considerable power to discipline NGOs. No law, however, empowers the MEC to demand changes in the structure, process or methods of work of an NGO, save at the time of making the grant. New law or subsidiary legislation requiring performance subsidies and empowering the MEC to impose those changes upon a welfare provider may resolve the problem.

18. Finally, no law or subsidiary legislation affirmatively requires or empowers the MEC to undertake either of these three tasks. Without such a law, whether the MEC pursues the developmental welfare paradigm, or makes a grant to a local government, or seeks transformation in how an NGO functions, remains up to the individual MEC.

B. NON-LEGAL EXPLANATIONS

19. The Law of the Reproduction of Institutions\(^6\) holds that absent

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\(^4\) Read strictly, section 5 does not authorise some programmes that the welfare department has carried on for years. For example, nothing in section 5 authorises grants specifically for creches, or for street children. (It does permit grants for 'family care'). Nothing permits the MEC to make grants specifically in aid of women.

\(^5\) Regulations N. R. 373, 1 March 1996, sec. 41.

\(^6\) See Ann Seldon and Robert B. Seldon, State and Law in the Development Process (Macmillan, 1994), Ch. 2.
an initiating change undertaken by government, institutions ineluctably change over time, but not necessarily down the road towards which government policies point. Actors behave by making choices within an arena of legal and non-legal, subjective and objective constraints and resources: The law, an actor's opportunity and capacity to behave in a particular way, knowledge of the applicable law, incentives, process for deciding how to behave, and ideology. Those factors make some actions possible or easier, and others impossible or more difficulty. One can explain behaviours of each set of the relevant social actors -- the MECs, the local government authorities, and the NGOs -- by explicating the non-legal factors that shape them. The proposed bill can only seek to change those three sets of problematic behaviours by changing those causal factors. By the same token, unless the bill's provisions do successfully change those causal factors, that the actors' behaviours will not likely change.

20. In Gauteng, to date, whatever else has changed, most of the relevant elements in the legal and non-legal environment within which the MEC, local authorities and NGOs deal with subsidies have not changed. In this initial draft, suffice it to say that, as a result of the democratic elections, governmental policies, and the ideology of the MEC, some officials in Welfare, and some local councillors have changed; their ideology has stimulated their efforts to seek change in the framework which funnelled welfare along lines determined by the old paradigm. That includes changes in all the constraints and resources that determine the behaviours of people in the welfare community. Assuming the Department agrees to proceed with the bill, this report ultimately will have to examine all the possible categories of non-legal factors (ie the ROCCIPI checklist) to ensure it identifies all the causal factors that have influenced all the three sets of actors' behaviours. In the solution section, then, it will have to show that the proposed bill's provisions logically really do seem likely to alter or eliminate the causes identified. Based on the research reports already prepared for the other six bills, however, the proposed bill would probably include the following provisions.

III. THE PROPOSED BILL

21. The MEC has already set in train six bills aiming at transformation of the welfare sector. Two of the new bills will resolve two of the three social problems earlier identified. The projected Economic Empowerment of the Poor Act will give the MEC the authority that he needs to engage in certain development-related activities. The Delegation of Welfare Functions to Local Authorities will give him power to disburse funds to local authorities; the Regional Social Welfare Institutes Act, power to

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1 We note that the Social Assistance Act, Section 5, constitutes a national law. To the extent that section 5 may constrain the MEC to making grants in accordance with the new paradigm, the national Act may require amendment. We suggest that the MEC take legal advice from a South African-qualified lawyer on the issue, whether the new provincial legislation now in draft requires amending the national Act.
do so to RSWIs. Together with the other six bills, these will make a long step towards transforming the institutional framework within which the former regime imprisoned the old welfare regulatory regime.

22. These six bills, however, leave unsolved the social problems involving the MEC's authority over most welfare NGOs' structure, processes and methods of work. The new Aged persons Act will empower him to induce transformations in a NGO, as will the Street Children Shelters Act. The MEC needs, however, a broader, more general power to address the problems of transformation in NGOs besides those engaged in operating street shelters and programmes for assistance to the aged.

23. For lack of time, we do not canvass alternative possible solutions here. Instead, we suggest one possible solution. We do urge that before settling on this solution, further research seek to discover alternative possible solutions to contrast and compare with the one here put forward.

24. At this time, we are unclear whether this proposal ought to find expression as a new, proviicial statute, subsidiary legislation under the Social Assistance Act, 1992, or otherwise; we leave that for later determination by lawyers better qualified than we to deal with South African law. Whatever its form, we propose a new law giving the MEC power to induce necessary transformations in existing welfare NGOs and how they conduct business.

25. That power, we suggest, will hinge on four features. First, the MEC will have a general power to require all NGOs who receive a welfare grant to adhere to stipulated performance conditions. That will give the MEC power to order necessary changes in NGO structure, processes and methods of work.

26. Second, the proposed Act will give the MEC power to monitor an NGO and to order necessary changes in a NGO's structure, processes and methods of work as revealed in the MEC's monitoring and evaluation of the NGO.

27. Third, the new Act will give the MEC power to implement the conditions or recommendations made. In case the NGO fails to meet the conditions laid down by law, the performance conditions of the subsidy, or to carry out a recommendation of the MEC, the MEC will have the power to revoke a subsidy to an NGO.

28. Fourth, in aid of the MEC's power to require changes in NGOs, and to protect welfare clients in the event the MEC revokes a subsidy, the new Act will give the MEC power to take over the assets of an NGO whose subsidy the MEC must cancel, using them for the benefit of the clients of the programme the NGO had responsibility under the performance subsidy to conduct.

SUMMARY AND CONCLUSION
29. The new welfare paradigm finds itself sharply constrained by the existing law concerning the MEC's powers. The proposed 'seventh bill' will empower the MEC to use his powers over subsidies to recommend changes to NGOs, and to make sure that either the NGO makes the changes, or no longer receive a departmental subsidy.