

South African Institute of Race Relations NPC
Submission to the
Department of Social Development,
regarding the
Amended Regulations of 2022
to the
Social Assistance Act of 2004,
Johannesburg, 11 March 2022

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1 Introduction

The minister of social development, Ms Lindiwe Zulu (the minister), has invited interested parties to submit written comments, by 13th March 2022, to the Department of Social Development (the Department) on the Amended Regulations (the Regulations) that were gazetted by the minister on 22nd February 2022 under the Social Assistance Act of 2004.

This submission is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

2 No satisfactory SEIAS assessment

Since September 2015, all new legislation and regulation in South Africa has had to be subjected to a ‘socio-economic impact assessment’ before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May

2015. The aim of this system is to ensure that ‘the full costs of regulations and especially the impact on the economy’ are fully understood before new rules are introduced.¹

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once a new regulation has been proposed, ‘an initial assessment’ must be conducted to identify different ‘options for addressing the problem’ and making ‘a rough evaluation’ of their respective costs and benefits. Thereafter, ‘appropriate consultation’ is needed, along with ‘a continual review of the impact assessment as the proposals evolve’.²

A ‘final impact assessment’ must then be developed that ‘provides a detailed evaluation of the likely effects of the regulation in terms of implementation and compliance costs as well as the anticipated outcome’. When a regulation is published ‘for public comment and consultation with stakeholders’, this final assessment must be attached to it. A particularly important need, moreover, is to ‘identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration’.³

The Regulations are likely to trigger precisely such ‘excessive costs’ – particularly in terms of skilled emigration. They will also bring South Africa closer to a damaging fiscal cliff, while deterring investment, limiting growth, adding to unemployment – and making it increasingly difficult to sustain existing social grants, let alone the new ones the Regulations propose to usher in.

Yet no proper SEIA assessment of the Regulations has been carried out, while no final SEIA report has been appended to the Regulations to help the public understand the ramifications of the Regulations. A comprehensive SEIA report is nevertheless vital to proper public consultation – for it is only when the public is well informed on pending laws that they can make their comments with sufficient understanding of all relevant costs and likely consequences.

3 Proper public participation

Public participation in the law-making process is a vital aspect of South Africa’s democracy, as the Constitutional Court has repeatedly reaffirmed in judgments spanning a decade or more. These include *Matatiele Municipality and others v President of the Republic of South Africa and others*, *Doctors for Life International v*

¹ Department of Planning, Monitoring and Evaluation, ‘Socio-Economic Impact Assessment System (SEIAS), Revised Impact Assessment: National Health Insurance Bill’, 26 June 2019 (2019 SEIAS Assessment); *SEIAS Guidelines*, p3, May 2015

² *SEIAS Guidelines* p7

³ *SEIAS Guidelines*, p11

*Speaker of the National Assembly and others, and Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and others.*⁴

In the *New Clicks* case in the Constitutional Court, Mr Justice Albie Sachs noted that there are many ways in which public participation may be facilitated. He added: ‘What matters is that...a reasonable opportunity is offered to members of the public and all interested parties *to know about the issues* and to have an adequate say’. This passage was quoted with approval in both *Doctors for Life* and in the *Land Access* case.⁵

However, the public cannot ‘know about the issues’ nor have an adequate say when the provisions of a measure are so vague and uncertain that it remains entirely unclear what is being proposed and what the costs and consequences may be. This risk is particularly great in relation to these Regulations.

This is partly because the Regulations give the minister enormous and untrammelled discretionary powers to decide on the amount and duration of social relief of distress (SDR) grants. So vague are the relevant provisions that no one can tell what is being proposed, what the costs might be, and how these costs can in future be met. Moreover, no clear parameters have been included to guide the minister in the exercise of her discretion. The absence of these parameters is inconsistent with the rule of law, the supremacy of which is guaranteed by Section 1 of the Constitution. The uncertainty generated by all these factors makes it impossible, moreover, for the public to ‘know about the issues’ raised by the Regulations and to make informed comments on them as part of the public participation process.

In addition, too little time has been allowed for public consultation. The Regulations were gazetted on 22nd February 2022 with a deadline for comment of 13th March 2022. Hence, less than three weeks has been allowed for stakeholders and other interested parties to get to grips with wording that is confusing and uncertain and economic ramifications which cannot be quantified or properly evaluated.

Moreover, the Regulations are defined as ‘including’ regulations published in 2008, 2009 (when four different sets of rules were adopted), 2010, 2011 (with again four sets of rules in a single year), 2012, 2015, 2016 and 2021. That 14 sets of regulations must thus be taken into account makes the task of understanding and evaluating the Regulations very difficult, if not impossible, to achieve within the time allowed.

In a nutshell, the public has been given inadequate information and not nearly enough time to make meaningful submissions. Regulations adopted on such a flawed basis will be ripe for constitutional challenge.

⁴ (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); 2006 (6) SA 416 (CC); 2016] ZACC 22

⁵ Section 59(1), Constitution of the Republic of South Africa, 1996; *Minister for Health and another v New Clicks South Africa (Pty) Ltd and others*, [2005] ZACC 14, at para 630, emphasis supplied by the IRR; *Doctors for Life*, at para 145; *Land Access* judgment, at para 59

4 The content of the Regulations

Given the short period allowed for public comment, only some of the most problematic provisions in the Regulations can be addressed.

4.1 Definitions

4.1.1 *'insufficient means'*: Under the Regulations, “insufficient means” for purposes of social distress means that a person is not in receipt of income or financial support, the determination of which is provided for in the Procedure Manual. This wording is intrinsically vague, especially as regards ‘financial support’. Uncertainty is compounded, moreover, by the reference to the ‘Procedure Manual’ which has still to be developed by the minister.⁶

4.1.2 *'procedure manual'*: The Regulations define this manual as ‘the manual for determining the application, eligibility, payment and appeals processes for social relief of distress approved by the minister’.⁷ Again, there is uncertainty as to what this manual may in time provide. In addition, the manual need not deal with the amount or duration of SRD grants, thereby adding to uncertainty.

4.2 Regulation 9: Persons eligible for social relief of distress

4.2.1 This regulation begins by indicating that SRD grants may be paid to:⁸

- (a) ‘a person or representative of a household that has been affected by a disaster’, whether or not a disaster has been declared under the Disaster Management Act of 2002.
- (b) ‘a South African citizen or permanent resident...who is (i) between the ages of 18 and 60; and (ii) has insufficient means; and (iii) does not unreasonably refuse to accept employment or educational opportunities’.
- (c) [those] ‘awaiting payment of an approved grant’.

There is no indication as to whether these criteria are conjunctive or disjunctive, which again adds to the uncertainty of this wording.

4.2.2 A further vague provision indicates that people may also qualify for SRD grants if refusing their applications ‘may cause undue hardship as contained in the Procedure Manual for Social Relief of Distress’. This manual may or may not be the same as the ‘procedure manual’ referred to in Regulation 1.⁹ The meaning of ‘undue hardship’ is not defined and is also uncertain.

⁶ Clause 1, Regulation 1

⁷ Clause 4, Regulation 1

⁸ Clause 5, Regulation 9(1)

⁹ Clause 5, Regulation 9(2)

4.2.3 Particularly disturbing is Regulation 9(8), which states: ‘The Agency [ie the South African Social Security Agency or Sassa] may limit disbursements to the budget made available for this benefit’.¹⁰

This wording suggests that Sassa may disregard what the Department’s annual budget allows. Yet this would be contrary to the Public Finance Management Act of 1999. It would also – and especially with public debt already disturbingly high – put the Department’s accounting officer in breach of his or her fiduciary obligation to ‘prevent any prejudice to the financial interests of the state’.¹¹

4.3 Regulation 14A: Appeal against decision of Agency in relation to social relief of distress

4.3.1 The proposed Regulation 14A allows the minister to ‘appoint such number of persons as members of the Independent Tribunal as may be necessary to consider social relief of distress appeal applications’.¹² However, declaring a tribunal to be ‘independent’ does not make it so. The Regulations should therefore set out the steps that will be taken to ensure the necessary independence of the tribunal and its members, as required by Sections 32 (the right to administrative justice) and 34 (the right of access to court) of the Constitution.

4.4 Regulation 16: Determination of amount and period of social relief of distress

4.4.1 The Regulations are particularly vague, contradictory, and confusing in their description of the different values that SRD grants may have for people awaiting payment of approved grants and ‘households’ (this time there is no reference to ‘persons’) affected by a disaster. These individuals or households may receive either the equivalent of ‘an older person’s grant’, or ‘an amount determined by the Agency to provide humanitarian relief to the displaced person’.¹³

No guidance is provided as to which of these options is to apply, or how the decision between them is to be made. Sassa is also given an untrammelled discretion to decide what ‘humanitarian’ relief is to be provided, while the term ‘displaced’ is also not defined. At the same time, humanitarian relief is confined to those displaced by a disaster when it might also be needed by people who are still living in their homes but whose livelihoods have been reduced or eliminated by government restrictions (as under the Covid-19 lockdown rules).

4.4.2 The Regulations also state that, ‘in the case of insufficient means, [the value of social relief of distress may] not be below or above the value and duration prescribed by the minister’.¹⁴ This wording is extraordinarily vague and uncertain, for it allows the

¹⁰ Clause 5, Regulation 9(8), emphasis supplied by the IRR

¹¹ Section 50(1)(d), Public Finance Management Act, 1999

¹² Clause 7, Regulation 14A

¹³ Clause 9, Regulation 16(1)(a) to (d)

¹⁴ Clause 9, Regulation 1(e)

minister to prescribe any ‘amount’ or ‘duration’ for SRD grants. To say that these grants may not be ‘below or above’ what she has laid down does not solve the fundamental problem of the untrammelled discretion hereby accorded the minister.

4.4.3 The Regulations further provide that ‘social relief of distress may, at the end of [a three-month period], and on confirmation that the person is still in need of assistance, be extended for further periods not exceeding three months’.¹⁵

According to the 2021 regulations, any extension of a SRD grant requires the recommendation of a social service professional or other person designated by Sassa. Under the Regulations, by contrast, SRD grants may be extended (for successive three-month periods) without any time limit if recipients are ‘still in need of assistance’. This allows a grant intended as a temporary measure to become a permanent one.

4.4.4 The Regulations also empower Sassa to ‘provide non-financial assistance or relief to eligible applicants for social relief of distress’.¹⁶ This provision, introduced in 2015, is inherently vague and uncertain.

5 Ramifications of the Regulations

In practice, the SRD grant has been pegged at R350 a month since it was introduced in 2020 to help counter job losses and increasing destitution under the Covid-19 lockdown. However, there is nothing in the Regulations to cap the grant at this amount.

In addition, the Regulations break fresh ground in stating that, in cases of ‘insufficient means’, the SRD grant is have ‘the value and duration prescribed by the minister’.¹⁷ There are no evident limits to her discretionary powers in this regard.

According to the Regulations, what the national budget provides for SRD grants may be seen as irrelevant too. The relevant wording in Regulation 9, as earlier noted, states that Sassa ‘*may* limit disbursements to the budget made available for this benefit’.¹⁸

However, ‘may’ has a different meaning from ‘must’ – and suggests that Sassa is being empowered to disregard what the Department’s budget allows. Yet any over-spending going beyond the Department’s annual vote must be approved by Parliament under Section 34 of the Public Finance Management Act of 1999 (failing which the amount over-spent will become a charge against the Department’s vote in the next or future years).¹⁹

¹⁵ Clause 9, Regulation 16(3)

¹⁶ Clause 9, Regulation 16(4)

¹⁷ Clause 9, Regulation 16(1)(e).

¹⁸ Clause 5, Regulation 9(8), emphasis supplied by the IRR

¹⁹ Section 34(1),(2), Public Finance Management Act of 1999

The Regulations provide no limits as to how high the SRD grant might go in the future. This is particularly concerning in the light of a recent report – compiled by an expert panel comprising seven academics under Professor Alex van den Heever, chair of social security systems administration and management studies at Wits University – which provides some possible figures.²⁰

This expert report, which was completed late last year, begins by recommending that the current R350-a-month SRD grant with its 10 million or so beneficiaries should be retained for an additional year.²¹ This is also what the February 2022 budget now authorises.²²

The expert report further recommends that the country should thereafter shift to what it describes as a ‘viable entry-level’ option: a Basic Income Support (BIS) grant paying R595 a month (the food poverty level) to 27.5 million people and costing some R181bn a year.²³

The report urges that this BIS grant should thereafter be raised in incremental steps to R1 300 a month, the upper-bound poverty level. The grant would then cost some R430bn a year – which is more than the entire social development budget of some R410bn for 2021/22.²⁴

Some BIS proponents argue that the grant can easily be funded through increased borrowing and limited tax increases. The cash injection from the grant, they say, would stimulate demand among lower-income groups, which in turn would push up growth and generate more revenue, mainly through extra VAT.²⁵

However, Wits University adjunct professor Michael Sachs has cautioned that a BIS grant will not help stimulate growth and would have to be financed by raising either VAT or personal income tax. Said Sachs at a Department of Social Development webinar last year: ‘Ultimately, every rand spent on BIS will have to be funded by an extra rand of taxation, either now or in the future.’²⁶

However, South Africa’s tax base is unusually narrow. This is primarily because almost half the population is unemployed (on the expanded definition), while millions of

²⁰ Expert Panel on Basic Income Support: Report into the appropriateness and feasibility of a system of Basic Income Support for South Africa, 15 December 2021, <http://www.governmentpublications.lib.uct.ac.za/news/expert-panel-basic-income-support-report-appropriateness-and-feasibility-system-basic-income>

²¹ <https://www.businesslive.co.za/fm/features/2022-01-20-welfare-grant-a-big-mistake/>

²² National Treasury, *2022 Budget Review*, 23 February 2022, p4

²³ <https://www.businesslive.co.za/fm/features/2022-01-20-welfare-grant-a-big-mistake/>

²⁴ Ibid

²⁵ Ibid

²⁶ Ibid

registered taxpayers earn less than the income tax threshold. The tax burden is already very high, moreover, and cannot easily be increased without deterring already limited fixed investment and promoting a further flight of capital and skills.²⁷

In addition, the country is drawing uncomfortably close to a damaging ‘fiscal cliff’. South Africa’s fiscal cliff study group defines the fiscal cliff as the moment when all tax revenues collected are spent on payments to civil servants, social grants, and debt servicing costs.²⁸

In 2007 spending on these three items absorbed roughly 55% of government revenue. By February 2020, however, such spending was expected to absorb 76% of tax revenue. Later in 2020, moreover, the mid-term budget policy statement showed that the fiscal cliff had been reached – for spending on these items was expected to absorb 100% of the country’s diminished tax revenues.²⁹

Then, however, came the mining tax bonanza triggered by recovering economies and rising commodity prices. This has averted the fiscal cliff for now, but spending on public servants, social grants, and debt servicing nevertheless stands at 75% of estimated tax revenues in the February 2022 budget.³⁰

The closer the country comes to the fiscal cliff, the more consumption spending will drive out investment spending on the infrastructure, plant, and machinery vital to increased productivity and faster growth. Without growth, moreover, unemployment will continue to increase.³¹ This will leave ever more people with ‘insufficient means’ and in need of social assistance that the country will not be able to sustain.

This helps explain why the National Treasury, in the February 2022 *Budget Review*, was adamant that ‘any permanent extensions of social support need to be matched by new tax measures or expenditure reductions’.³²

However, the new Regulations ignore the Treasury’s injunction in their attempt to empower the minister to prescribe SRD grants of increasing amounts and indefinite duration.

These SRD grants could in practice be the equivalent of the BIS grants advocated in the recent expert report. However, since no one can predict the size of these SRD grants – or how many people would qualify for them over time – no accurate costing of what the Regulations propose can even be attempted.

²⁷ <https://www.businesslive.co.za/fm/features/2022-03-10-sa-shedding-skills-and-wealth/>

²⁸ <https://businesstech.co.za/news/finance/564552/south-africas-updated-fiscal-cliff-forecast/>

²⁹ Ibid

³⁰ Ibid

³¹ Centre for Risk Analysis, *Risk Alert*, 7 March 2022

³² <https://www.businesslive.co.za/fm/features/2022-01-20-welfare-grant-a-big-mistake/>

What is certain, however, is that the Regulations are seeking to make a small temporary grant into a large permanent one. Moreover, they seem intent on doing this via the back door: through ministerial regulation, rather than the normal parliamentary process – and hence without sufficient public debate or informed assessment of likely costs and consequences.

If the Regulations are adopted in their current form, the fiscal cliff will draw closer, growth will wither further, public debt and interest payments will expand, unemployment will worsen, and the jobless poor are likely to become ever more dependent on shrinking social grants that cannot be maintained.

6 Unconstitutionality of the Regulations

The Regulations are unconstitutional in various ways. Among other things, the wording of the Regulations is far too vague to comply with the rule of law – which requires that laws of all kinds be certain and clear.³³

In addition, the Regulations are inconsistent with Section 27 of the Constitution, which authorises the state to provide access to ‘appropriate’ social assistance – but obliges it to take ‘reasonable’ measures towards this end and to act within the limits of its ‘available resources’.

If the Regulations are adopted in their current form, the present temporary R350-a-month SRD grant could soon be replaced, at the minister’s discretion, by a permanent R529-a-month grant going to 27.5 million beneficiaries and costing at least R180bn a year. This is far from ‘reasonable’ and would take spending on social assistance way beyond the limits of the government’s ‘available resources’.

It could also precipitate a financial crisis in which the country’s sovereign debt rating is further downgraded, debt servicing costs increase even more rapidly than is currently anticipated, and the government becomes unable to sustain its spending on social grants and the wider social wage. All social grants would then have to be reduced, making for regression in the provision of social assistance rather than the ‘progressive realisation’ of this right, as required by Section 27(1)(c) of the Constitution.

In addition, the Regulation’s inconsistencies with Section 27 are not justifiable under Section 36 of the Constitution. This is because ‘less restrictive means’ of providing and sustaining social grants are clearly available. These less restrictive means require effective controls over the state’s consumption spending, coupled with appropriate measures to attract investment, expand employment, and bring South Africa’s growth rates back into line with the global growth rates it had succeeded in tracking for many years before 2012.

³³ Section 1(c), Constitution of the Republic of South Africa, 1996

That South Africa's growth rates have languished far below global ones since that year is the result of damaging policies, excessive red tape, and gross inefficiency and corruption in public administration. All these problems have been created by the government – and therefore lie within the state's power to resolve.

However, overcoming these barriers to investment, employment and growth will become more difficult to achieve if the Regulations are adopted in their current form and the country thus shifts closer to the fiscal cliff. The Regulations are unconstitutional and economically unwise and should be abandoned, not made part of the law.

South African Institute of Race Relations NPC

11th March 2022