

SUBMISSION ON THE
DRAFT SOUTH AFRICAN SOCIAL SECURITY AGENCY BILL

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EXECUTIVE SUMMARY

Government proposes to establish a new Social Security Agency to address the manifold problems of the current social assistance delivery system. Whilst we applaud efforts to streamline and improve the delivery of social grants, we express strong reservations about the model adopted in the Social Security Agency Bill. We argue that most of the purported benefits of a new agency could be more efficiently realised through changes to the current administrative system. We are also wary of initiating major institutional reconfiguration at a time when government is still considering its response to the Taylor Committee's proposals for a comprehensive and integrated social protection system.

Problems of the current system

The current social assistance delivery system is beset by a number of administrative deficiencies, including:

- Poor management, distribution and development of human resources;
- Inadequate infrastructure and IT support systems;
- Regulatory barriers to take up, such as stringent means-testing or complex eligibility requirements;
- Variations in access to social grants across provinces as a result of provincial discretion in budgeting and resource allocation;
- High levels of fraud that have not been addressed by outsourcing delivery to private contractors;
- Long delays in grant approval and arbitrary suspension or termination of grants;
- A lack of binding national norms and standards; and
- A failure to provide sufficient public education and information on social grants and eligibility criteria.

These problems inhibit access to social assistance, despite the fact that such access is constitutionally guaranteed for those who are unable to support themselves and their dependants. As a result, they make the Department of Social Development vulnerable to legal challenges. Already, the *Mashava* case has challenged the assignment to provinces of responsibility for administration of the Social Assistance Act.

Proposals in the Bill

The Department proposes to remove the administration of social assistance from the public service by transferring the staff, assets and liabilities of relevant departments to a new Social Security Agency, designed “to ensure the efficient and effective management, administration and payment of social security grants”.

However, there is little evidence that this move would resolve the administrative problems impeding access to social assistance.

- It is unrealistic to expect that the new Agency would permit the imposition of performance contracts on all staff. It would be no better equipped to ensure staff capacity and performance without additional resources and improved managerial direction. The essential staff needs – effective training and performance assessment – can be achieved without the creation of a new Agency.
- Creating an Agency will be costly, time-consuming, and may invite disputes over the allocation of moveable and immoveable property.
- The lack of binding national guidelines governing the interpretation and application of regulations will continue to permit inconsistent application of the legislation.
- The Agency is likely to eclipse the Ministry as the dominant policy-making body on social grant administration.
- An Agency would have no greater capacity to attract skilled personnel.
- The Bill would empower the Minister to engage in deferred law-making without submitting to the public participation and control mechanisms built into the legislative and regulatory processes.

Furthermore, the “agentisation” of public service provision will fragment the public service and move us away from the vision of a unitary public service. In those countries that fragmented the resources of the State in favour of agentised and commercialised systems of delivery have lead to a weakening of the state and a weakened delivery system.

An alternative proposal for improving Social Assistance delivery

Improved social assistance delivery requires us to address:

- The role of private partners in service delivery;
- Systemic weaknesses in conditional grants;

- Management skills profiles;
- Procurement Systems; and
- Fiscal constraints.

There is a logical sequence of steps that should be followed to improve delivery, including such key tasks as:

- Establish the invalidity of the assignment of the Social Assistance Act to provinces;
- Centralise social assistance delivery within the Social Development Ministry;
- Give the Minister of Social Development clear responsibility for social assistance, poverty alleviation, children, and social security integration;
- To the extent necessary, delegate social assistance delivery functions to the provincial sphere of government;
- Develop a focused human resources strategy through negotiation with the trade unions to improve service efficiency and staff capacity;
- Develop and implement national norms and standards for social assistance delivery;
- Locate the social assistance budget at a national level, with allocations for social grants in the form of conditional grants to the provinces; and
- Carefully monitor the impact on social security access of the above steps.

The essential goal of these steps is to establish a nationally organised social security system with standardised management, budgeting and communications systems.

Government should also engage in a broad consultative process on the Taylor Committee recommendations, including the Institutional arrangements proposed in the report of the Taylor Committee.

We submit that, given the momentous nature of the institutional change that the Agency represents, it is vital to ensure that it does ultimately succeed in improving access to social grants as opposed to merely replicating existing problems. The consequences of not improving the social security delivery system are serious for beneficiaries' access to social security rights. It will also render the institutional arrangements associated with the proposed Agency vulnerable to constitutional challenge for failing to achieve the reasonable implementation of the social assistance programmes.

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1. INTRODUCTION

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Access to social assistance for those who cannot afford to support themselves and their dependants is a right enshrined both in the Constitution and in legislation.¹ However, in its groundbreaking decision in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), the Constitutional Court held that in order to fulfil socio-economic rights (such as social security rights), reasonable legislative and other measures must be adopted. The Court went on to say:

Mere legislation is not enough. The State is obliged to act to achieve the intended result and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation...An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.²

There have been a number of reports and studies documenting the range of problems experienced in the implementation of social security programmes.³ South Africa's first democratic government inherited a welfare system that was fragmented, inequitable and administratively inefficient. This was an inevitable consequence of a system administered by 14 different departments for the different population groups and homelands. In 1996, government appointed the Committee for the Restructuring of Social Security (CRSS), headed by Rev Frank Chikane. The brief of this Committee was to make recommendations on the reform of current social security systems. These included information and payment systems and technology, the restructuring of human resources management systems, and the development of systems to eliminate fraud and corruption. The main recommendation of the CRSS related to the establishment of a *nationally organised* social security system with standardised management, budgeting and communications systems.

It is clearly a constitutional imperative that the inadequacies in social assistance delivery be urgently resolved. A failure to do so will inevitably expose the

¹ The Social Assistance Act No. 59 of 1992

² *Grootboom*, para. 42.

³ See, for example, the research report entitled, 'Social security transfers, poverty and chronic illness in the Eastern Cape: An investigation of the relationship between social security grants, the alleviation of rural poverty and chronic illnesses including those associated with HIV/AIDS – A case study of Mount Frere in the Eastern Cape.' School of Public Health (University of the Western Cape), Social Disadvantage Research Centre (Oxford University), the Economic Policy Research Institute, 21 May 2002.

Department to legal challenges.⁴ The critical question is whether the proposed Social Security Agency will solve these problems or simply perpetuate or even exacerbate them.

A further question that arises from the draft legislation is, to what extent is the Department of Social Development abdicating its constitutional responsibilities in placing one of its central functions, social assistance, in the hands of a Board, who will have to oversee the functions of the Agency. Unlike certain other agencies of the state, the proposed Agency has the vital role of giving effect to the constitutional right of everyone to have access to social assistance in terms of section 27 of the Constitution.

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2. ANALYSIS OF THE PROBLEMS IN THE ADMINISTRATION OF SOCIAL GRANTS

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A key feature of the delivery of social grants in South Africa has been the assignment of the administration of the Social Assistance Act to the Provinces in 1996.⁵ Many of the problems described below in the administration of social grants can be substantially attributed to the lack of a *nationally organised* social security system with standardised management, budgeting and communications systems (as per the CRSS recommendation).

2.1 Implementation problems in social grants administration

The problems experienced in the administration of social grants can be broadly categorised as the following:

2.1.1 Human resources

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Problems in this regard include:

- **In**effective human resource management in the department

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Key to the **human resource (HR)** problems in the department is the manner in which work is shaped by management. The mistake that is repeatedly made in the Public Service is to change the structure instead of dealing with the actual HR problem. This is directly attributable to poor styles of management, and a culture of avoidance. The reshaping of the organisation of work is a major problem. The lack of effective **human resource management (HRM)** in the department has lead to a lack of career pathing, loss of skills in the

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⁴ There have already been a range of cases relating to the administration of the Social Assistance Act, and the regulations promulgated under this Act. See, for example, the cases of *Ngxuza*, *Bushula*, *Mahambehala*.

⁵ Proc. R7 of 1996.

department, poor employment practices, which in turn has had a negative impact on allocation of decision making powers. Support mechanisms for staff are largely absent leading to a lowering of moral, insecurity and job dissatisfaction.

This is due partly to the fact that the human resource development (HRD) strategy for the Public Service was only finalised during 2002, which includes an internship framework and a scarce skills strategy. This strategy in turn has had to be taken forward by the Public Service Sector Education & Training Authority (PSETA).

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➤ Resource and personnel distribution disparities,

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There exists a large disparity in the nature of resources and personnel distribution between and within provinces. Thus the ratio of staff to beneficiaries varies from 1: 2 951 (Eastern Cape) to 1: 802 (Northern Cape). In certain provinces many of the offices are better-resourced in human capacity terms and facilities, while others are severely lacking.⁶

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➤ Inadequate training and capacity building

The HRM plan that exists in the department has been weak. The Department's ten-point plan called for fundamental transformation of the department to meet the objectives of the plan. By its own admission, the department in its 1999-2001 report proposed that far more needed to be done to broaden the skills base, and institute career pathing for operational and support staff.⁷ The Strategic Plan of the Department 2002-2005 provides for executive support, HRM and sector education and training.

Most training in the head office has been done at senior management level (Grades 9 to 12). The indicator of the lack of adequate training going on in the department is reflected in total expenditure by programme. With the exception of administration, all other skills development programmes are massively under-spent. Welfare service transformation and development implementation support are the biggest under-spenders. (Annual report 2001-2). Training in the area of management development has received the least number of beneficiaries.

⁶ 'Old Age Pensions and the Challenges posed to the State: South Africa's Dilemma', Research Report, Nadel Human Rights Research and Advocacy Project, 1999, p 27.

⁷ 'The Road to Social Development: Unity in Action for Change' 1999 - 2001, Department of Social Development.

2.1.2 Inadequate infrastructure, safety and IT support systems

Welfare offices in poor districts do not have access to suitable office accommodation and equipment. There is a shortage of pay points. Currently 8 723 pay points exist nationally servicing 3 942 451 people. There is a lack of adequate infrastructure at pay points, which results in long queues (varying in time from 67 minutes to 5 hours). Many paypoints do not have help desks, and conditions are often extremely uncomfortable for beneficiaries at these points. There are an increasing number of “loan sharks” harassing people at the pay points with little apparent effort to control the situation. Safety at pay points is a problem. Even though police and security personnel are stationed at most points their numbers are inadequate and there is unequal access to security at paypoints.

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2.1.3 Regulations

Sometimes the regulations governing access to social grants are unduly complex and place barriers in the way of social grant recipients accessing grants to which they are entitled.

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Means testing

Effective means testing requires applicants to present a range of documentary evidence of their eligibility. Depending on the grant this may include an identity document, a birth certificate, an affidavit of income, medical records, etc. It can be very difficult for poor families to establish their eligibility to the satisfaction of the state and because the costs involved in doing so can be substantial, the burden is most onerous for those households with fewest resources.

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Means testing is also associated with the imposition of strict rules about who is and who is not eligible. These rigid, “one size fits all” restrictions on access to grants can exclude a large number of people who might normally be eligible. For example, those with chronic illnesses may be excluded from receiving disability grants if they do not meet specific medical criteria – even if their illnesses prevent them from working.

Costs of applying for grants

The costs involved in applying for social grants (travel to centres, copying of documents, identity photographs etc) limit access to these grants even before an application is made.

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Unclear eligibility conditions

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In addition, many of the eligibility conditions in the regulations are unclear and are subject to varying interpretations by welfare staff in different districts and provinces. For example, the care dependency grant (CDG) is limited in its scope and purpose, and suffers from unclear eligibility criteria. The Social Assistance Act (1992) does not define 'severe disability' nor 'permanent home care', leading to subjective interpretation by officers. The assessment procedure for the CDG is purely medical, and does not consider the socio-economic situation, the child's environment and the availability and accessibility of resources, nor the holistic needs of the child. The lack of guidelines and training in the use of the present tool, result in a lack of consistency in the assessment procedure and subjective interpretation by Medical Officers. The current assessment tool also has serious limitations in measuring the impact of childhood disability and the consequent activity limitations and participation restrictions.

The need for clear, well-defined regulations

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Effective access to social grants therefore depends on streamlined regulations under the Social Assistance Act, which keeps the burden on grant recipients to a minimum. To achieve this requires clear national policy decisions and guidance on what eligibility conditions are essential for the various grants.

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Public Service regulations remain a reason for sections of the Public Service arguing to opt out of the Public Service. In the case of the current proposal, this has been a major reason for wanting to set up the Agency. The current regulations in the Public Service reflect two streams of Public Service thinking: new-managerialism thinking and developmental thinking. This gives rise to contradiction within the Public Service and the regulations are a reflection of this, thus becoming an obstacle for delivery.

Where the developmental approach has been used, (regulations governing the conditions of service), these have been simplified into collective agreements. The opposite applies to those regulations that are meant to promote the efficient, economic and effective use of resources and those which are meant to improve the management and functioning of departments, sub-departments, branches, offices and institutions. In particular, the organisation, procedure and methods of work, supervision, simplification of work and the elimination of unnecessary work are the most restrictive areas and do not greatly assist in terms of service delivery.

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2.1.4 Dependence on Home Affairs for crucial eligibility documents

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In the Mount Frere study, the failure to obtain the necessary documents (bar-coded ID documents and birth certificates) was the single most cited explanation for a failure to access the child support grant.⁸

2.1.5 Budgeting procedures and constraints

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Currently the funding for social grants falls within the equitable share allocated to each province. This allows for provincial discretion in allocating funds for what is a constitutional and statutory entitlement. The provincial assignment has resulted in provincial variations in access to social grants and consequent inequities. Certain provinces under-budget for social grants, resulting in long delays in the payment of beneficiaries, sometimes extending to years.

Under-budgeting of services

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On average, 90% of Provincial Budgets are spent on social grants, which leaves very little money over for the range of support services and subsidies to welfare organisations. (DSD Strategic Plan 2002). This results in chronic under-budgeting for the range of services that the DSD is supposed to carry out, leading to greater internal conflict with communities and NGOs.

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The problem with conditional grants is they are mainly for new programmes and cannot be integrated into the department's budget once the conditional grant ceases. At the same time, conditional grants have played a role in putting in place specific infrastructure.

In the case of NGOs, the shift to a more restrictive macro-economic policy in 1996/7, and a far more restrictive fiscal policy, has meant that NGOs have been severely hampered in carrying out their mandates. This has led to a loss of skilled staff due to subsidies being cut and a reduction in conditions of service.

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The absence of norms and standards due to the assignment of the Act to the Provinces, has meant that realistic budgets particularly for support services have not been possible. As with all service delivery departments, the relationship between policy and financing and the division of revenue is critical.

Provincial power assignment and financial management

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The overarching constraint is the assigning of power to the provinces and the manner in which provincial finances are managed. The reality is that often grants are not approved because a Province has run out of finances for that particular responsibility. This has happened often, where the Province will legitimately argue that the funds are insufficient, and that these funds have to compete with

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⁸ "Changes in caregivers, due to poverty shocks or HIV/AIDS-related deaths, complicate the documentation required for successful application for the Child Support Grant." (Samson 2002: 15).

other provincial budget priorities. The political will to revisit Proclamation 7 has been lacking even though DSD can see the consequences of continuing with it. DSD's own argument is that it should be taken back to the national level, (Social Assistance as a National Function – 2002), albeit in the form of an Agency.

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2.1.6 Payment contracts

Introduced as an alternative service delivery mechanism, the contracting out of social assistance payments has failed to rectify the department's internal problems it was experiencing through public service delivery.

Fraud, inexperience and varied performance

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High levels of fraud have continued in provinces. The current figure of R2 billion (DSD 2001/2) in fraud and litigation has not been stemmed through the outsourcing of functions, rather it has allowed further loopholes to emerge due to the introduction of new stakeholders into the system. The inexperience of contractors has in certain circumstances (e.g. in the Eastern Cape), led to public service officials having to train these private companies. By the department's own records, standards in delivery varies from province to province, and this can also be with the same contractor.

Beneficiaries most often do not encounter department officials but instead encounter employees of the payment company who are not sufficiently informed about the documentation required, the means test and the links between the various grants.

The most damning proof that the system of contracting does not work, comes yet again from the DSD, in its report, *Social Assistance as a National Function* (2002). On the policy option to outsource more functions by the Provinces it states: "This option has already been tried out in terms of payment disbursement and it is less than desirable." Yet when the unions and civil society raised their objections to this form of alternative service delivery in the 1990s, the Department dismissed such arguments.

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2.1.7 Lack of binding national norms and standards

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Even though the problems experienced in the various provinces are similar they are by no means equal.⁹ For instance, on average, it took between three and six months to process an old age pension grant in the Western Cape while in the Eastern Cape a similar application could take between one and two years.¹⁰ Many applicants face long waiting periods before knowing if their applications are successful. For many, obtaining a social grant is a question of life and death and

⁹ Research conducted by the Nadel Human Rights Research and Advocacy Project.

¹⁰ "Old Age Pensions and the Challenges posed to the State: South Africa's Dilemma" Nadel Human Rights Research and Advocacy Project, 1999, p 27.

they hover between survival and starvation while waiting for a grant.¹¹ This does not accord with the constitutional values of human dignity and equality. These problems can only be addressed through binding national norms and standards.

The process of formulating policy on social grants through the MINMEC is ineffective for the purposes of standardising access to a uniform set of social assistance benefits. National norms should relate to issues such as standard processing and payment periods, uniform regulatory agreements with payment contractors, review and appeal procedures etc. The lack of binding national norms and standards leads to a situation where beneficiaries in different provinces and districts wait for varying lengths of time for their grants to be processed. This is exacerbated by the differing resources, infrastructure and staff capacity between provinces, and between urban and rural districts.

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Policy is currently enforced through a series of “gentlemen’s agreements.” What is thus lacking is an authoritative figure to develop and ensure the implementation of enforceable policy. The national norms and standards project cannot be implemented due to provinces blocking it, claiming independence and inadequate funds in their provincial budgets to implement them.

2.1.8 Inadequate community outreach and education programmes on the social grants and the conditions for eligibility.

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One of the major problems identified in research and community based workshops is that many communities are still not adequately informed and are unaware of their entitlements to social security, as well as the mechanisms of how to access various grants.¹²

The impact of this lack of knowledge is two-fold in nature. Firstly, in some instances communities have no knowledge of certain grants and, therefore, cannot benefit from a critical state programme to assist those in need. In most instances the communities that do not know about the grants are those communities most in need of social assistance. What makes the situation even more intolerable is that in some areas not only do the communities not know about the various grants that are available, but the local officials themselves lack the adequate knowledge of some of the grants.

Secondly, in some communities people have general knowledge of various social grants, as they know that different grants exist and that certain people are eligible for them, but they do not know how to access these grants. There is no sustainable support for communities after they have received the initial information on social assistance. The provision of information on what grants

¹¹ *Ibid.*, p. 31.

¹² Workshops facilitated by the Nadel Human Rights Project during 2001 entitled “Women’s access to health care and social security”.

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exist is not followed up with accessible information on how to obtain the assistance and what mechanisms are available to assist in obtaining support.

Effectively this lack of knowledge and education means that in reality the obligations found in the Constitution, legislation and case law regarding the right to social assistance is not a reality for many South Africans.

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2.2 Impact of the unreasonable implementation of the social grants programme

The impact of these problems on beneficiary's access to social assistance rights is profound. These range from low take-up rates, long queues in very uncomfortable conditions, delays in the approval and payment of grants, and the arbitrary suspension and termination of grants.¹³ The Department has itself identified and acknowledged these problems on various occasions.¹⁴

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The assignment of the Act to the Provinces has been challenged in the *Mashava* case¹⁵. Social assistance is a hard cash delivery system, which is demand related and linked to statutory and constitutional entitlements. It is accordingly inappropriate to allow room for provincial discretions and variations. The provincial assignment has resulted in inequity as the system allows provinces to exercise non-uniform budget discretion through manipulating access to the grant system. It is implicit within the constitutional and legal framework that uniform national standards have to apply to access to social security (e.g. when can grants be stopped, the assessment process etc.). The fudged boundaries and responsibilities between the national and provincial spheres of government in the delivery of social assistance rights allows the provinces to vacillate over improved service delivery.

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3. EVALUATION OF THE ESTABLISHMENT OF A PROPOSED SOCIAL SECURITY AGENCY

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3.1 Nature of the proposed Agency

The Department has proposed the establishment of a Social Security Agency as contained in the draft South African Social Security Agency Bill. Cabinet apparently approved this Bill in principle during October 2002. It was presented

¹³ On the constitutional implications of these problems in the administration of social security grants, see: S. Liebenberg, 'The right to social assistance: The implications of *Grootboom* for policy reform in South Africa' 17 *South African Journal on Human Rights*, 232 at 241 – 247.

¹⁴ See, for example, Mid-Year Departmental Programme Report to Minister Zola Skweyiya from the Director-General of Social Development (31 August 2000).

¹⁵ [*Mashava v The President of the Republic of South Africa and Others*, Case No. 17220/2002 \(High Court, Transvaal Provincial Division\).](#)

for the first time to civil society stakeholders during January 2003. The key objective of the proposed Agency “is to ensure the efficient and effective management, administration and payment of social security grants.”¹⁶ The Bill makes provision for the transfer of the staff, assets and liabilities of the national and provincial departments involved with social security functions.¹⁷ The effect of the Bill is to remove the administration of social assistance grants from the public service, specifically the national Department of Social Development and the relevant provincial departments responsible for the administration of social assistance grants.

This proposed Agency differs from the institutional recommendations contained in the Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (March 2002) – the so-called ‘Taylor Report.’

While the Committee proposed the creation of a Social Security Agency, there are three crucial differences in the scope and function of this envisaged structure:

- (1) The scope of the Agency would extend to social security programmes in its broadest context i.e. including social insurance, private sector regulation and social assistance.
- (2) The primary functions of the Agency would be research and monitoring, policy co-ordination, information and IT. Critically it would perform “intermediary services”, acting as an interface between the public and all parts of the social security system.
- (3) The Board as proposed in the Taylor Committee Report was essentially a representative board as compared to individual appointees of the Minister as envisaged in the draft Bill.¹⁸

The proposed ‘Social Security Agency’ is really a misnomer, as the Bill is restricted to an Agency performing social *assistance* administration.

The establishment of the proposed Agency is clearly a far-reaching measure that removes an existing function and capacity from within the public service, and locates it within an entirely new public entity. This appears to be a precipitous step, taken without much in-depth research into the short-, medium- and long-term implications of the establishment of such an Agency.

Government itself acknowledges that its social assistance programme, which reaches substantial numbers of South Africa’s poorest citizens, is one of its most effective poverty alleviation programmes. It is critical that institutional arrangements for the implementation of this programme be carefully researched and developed with a maximum of public participation and consultation.

¹⁶ Clause 3(a) of the Bill.

¹⁷ Clause 30.

¹⁸ Clauses 8 and 9.

Government does not appear to have established a clear, accessible process for engaging in public debate and consultation and further research on the institutional or other recommendations of the Taylor Committee. At the very least, these processes have not been communicated clearly to the public. Given the socio-economic implications of these proposals, the failure of the department to do this weakens the credibility of their proposals.

The systemic problems in the delivery of social assistance in South Africa are unlikely to be resolved by simply transferring the grants administration function to a new public entity. In fact, government will have less power to control and rectify these problems, as it will essentially be at arm's length from the new agency.¹⁹ Public entities can be as (if not more) inefficient as the existing public service depending upon how much thought has been put into its design. Excessive haste in design and implementation will translate into inefficiency down the line. What the department is attempting to do is to get around the assignment powers (Proclamation 7 of 1997) to provinces through the introduction of an agency. This does not address the problem, but rather shifts it to an institution at arm's length from the public service.

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3.2 Will the Agency result in improved access to social assistance grants?

It is useful to examine what problems the Agency seeks to address and assess whether the Agency is likely to achieve an improvement in social security delivery on the ground.

3.2.1 Staffing

This is clearly a major issue. The Agency will allow the CEO to discipline and train staff, using performance contracts. Currently only senior management in the Public Service, grades 13 to 16, and those who are brought into the Public Service at these grades are on performance contracts. In other sectors, where performance contracts have been introduced at lower levels, there has been major problems, leading to disputes being declared and ending up in court (Parliament).

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Therefore the idea that you will be able to automatically place all new staff under performance contracts is not realistic. Further, performance contracts, unless well structured, can themselves also suffer the same problems that the merit award system faced in the public service resulting in its discontinuation.

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Whilst the Bill emphasises the fact that all existing staff are to be taken over, the department knows that in terms of the recent Constitutional Court ruling (*Nehawu v. UCT*), and the Labour Relations Act, they are obliged to take over the staff. As

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¹⁹ See for example, the procedure entailed in the Minister giving directions to the Board about Policy matters and the performance of the Agency's functions: clause 7.

we have pointed out, the key problem in the public service is the organisation and management of work. The answer lies in the re-organisation of work not in the re-organisation of the structure. The under performance of staff cannot be solely attributed to themselves personally but has to be taken in the context of a broader objective environment, the lack of resources and lack of managerial direction. The Department of Public Service and Administration and the South African Management Development Institute (SAMDI) have acknowledged this, hence funds were made available through annual budget allocations to address this problem. In addition SAMDI has now moved to middle management to address the problems at that level.

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In addition, alleged incapacity has to be dealt with in terms of the Labour Relations Act, and the proposal to move to an Agency to circumvent this will not help. Incapacity has to be dealt with as part of the organisational challenges, which face the public service.

The essential task that is needed here is to train staff effectively and to systematically monitor their performance. This does not require an Agency to accomplish. Performance management does not appear to be best suited to this context where it may lead to the creation of perverse incentives, such as the avoidance of difficult cases in preference to easier ones, or the writing of multiple letters. The problem does not lie solely with staff at the lower-levels. The middle and upper management are culpable of failing to monitor performance and train on a coherent and national scale.

The Agency hopes to rely on a sleight of hand to either train or get rid of these officials through a performance contract process. But if the agency takes over the state's middle and upper management, as the Bill indicates, it will not happen.

A more logical step in addressing the staffing issues involved in social security delivery is to remove the assignment of the administration of the Social Assistance Act, and for the national Minister to *delegate* appropriate functions to the provincial spheres. Delegation retains existing staff but subjects them to national level intervention to redress performance, as the MECs will be answerable to the Minister. Interventions to address existing poor performance can be made through a joint task team, drawn from provinces, together with organised labour drawn from the Health & Welfare Sector Bargaining Council. This is the most efficient way of redressing low levels of discipline and poor training, rather than prematurely establishing an Agency to accomplish this.

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3.2.2 Infrastructure

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The Agency will require extensive investment to be set up. New relationships will be needed in a wide range of areas since service delivery requires infrastructure in diverse locations. This is a potential minefield of multi-provincial negotiations, disturbed service delivery relationships, since staff will be uncertain and financial

dilemmas. Contradictions over movable and immovable property and different categories of staff will result in a time consuming and costly exercise with no clear undertaking that service delivery will improve.

The process of setting-up of an Agency will be cost-intensive, time-consuming and draining for existing social security staff who are already under pressure. It makes more sense to retain the existing infrastructural arrangements, and to work on improving these and the staffing issues identified above.

3.2.3 Policy leadership and control

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A major problem at present is the lack of binding national guidelines regarding the interpretation and application of the regulations under the Social Assistance Act. MINMEC has become a consensual negotiation and co-ordination forum. Although MINMEC's decisions are contractually binding, they are not subject to the Minister's authority. Thus MINMEC typically does not take decisions on issues such as the implementation of the 2001 regulations, and it is left to Provinces to determine. This allows for provincial variations in how regulations are interpreted, for example, the test for disability in order to qualify for a disability grant. Often this happens not so much through express policy, but through allowing procedures to determine the policy.

The removal of the assignment and the delegation of functions will vest clear national responsibility for poverty alleviation and social grants with the national Minister.

With an Agency, the current dilemma would be retained, with the state avoiding transparency in funding poverty alleviation through the vehicle of a separate entity, which it can then blame for poor performance. Even worse, it places the Agency in a potential conflict of interest situation by permitting it to divide its own revenue into self-interested areas such as staff improvement and loans as well as delivery.

What is likely to happen is that the Agency will become the dominant policy-making body in executive areas (forms, application procedures, processing issues, payment procedures, line discretion's and so forth). It is unlikely to foster procedures that are expensive to administer but which will facilitate delivery, especially if its budget includes both administrative costs and benefits. The Minister's discretion will be limited to the broadest policy parameters. The result will be a similar stalemate to that which presently exists between the provinces and the Minister. The Minister ought to make policy but cannot enforce it, so does not make policy and the provinces do it through administrative convenience.

Reverting back to a delegation of functions will establish the Minister's authority and policy-making expertise. If it is ultimately decided thereafter to establish an

Agency, such an Agency will not enter a policy vacuum, but an informed structure with the Minister's office capable of properly monitoring and evaluating the Agency. Financial pressures are likely to reduce the number of institutions to monitor the Agency and rather allow it to monitor itself or restrict monitoring to a reading of an annual report.

3.2.4 Financing and budgeting

The Agency has no greater benefit over a national department function. In effect, it will require two layers to calculate the social grants budget since the national department must also do so.

3.2.5 Employing new skill

A highly skilled CEO can be employed by an Agency. However, exactly the same is possible in the Public Service. Since the higher management echelons are now outside of the PSCBC, grades 13 to 16 are brought in on contract and performance management contracts, and conditions of service which are outside the PSCBC. This has meant that at very senior levels of the public service you are able to attract highly skilled management. Secondly, merely by introducing the post of a CEO is no guarantee that this will turn matters around. The public sector since the rationalisation and restructuring of the public sector, is littered with examples of highly paid failures when it comes to CEOs, and at worst corruption.

The criteria, is one of skill and there is nothing which prevents the public service from attracting such skill. It is a fallacy to think that one person's entrepreneurship or dynamism can change the culture, which currently exists in the social security sector. What is required is a well-trained cadre of public service employees, properly resourced and remunerated, and working in a supportive working environment with sufficient staffing levels. The attitudinal problems and discipline corrections flow from such an approach, and this is not conditional upon having a CEO. The spirit of *Batho Pele*, whilst a laudable initiative, cannot exist at conceptual level and depend on the goodwill of public service workers. It has to be resourced.

3.2.6 Public participation

Article 7(1) provides that:

The Minister may, by written notice given to the Chairperson, give directions to the Board about policy matters and the performance of the Agency's functions.

The Minister may give policy direction by written notice, rather than in the body of the Act or by regulation. In addition, scant detail is given in the draft Bill with

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regard to its underlying policy, and a fairly expansive degree of discretion is given to the Agency in terms of the Bill (see, for example, clause 4). The effect of clause 7 is potentially to allow for deferred law-making by the Minister without the necessity of having to go through the participatory and control mechanisms built into the legislative process, or the publication and minimal participatory, publication requirements built into the regulation making process.

It is highly likely that the directives ultimately given by the Minister may in many instances materially and adversely affect the rights of the public given that they relate to policy matters and given the subject matter of the Bill (i.e. social security delivery and the transformation and/or wholesale replacement of a huge public service sector). In the ordinary course of events, in terms of section 4 of the Promotion of Administrative Justice Act of 2000, where an administrative action materially and adversely affects the rights of the public, there is a duty on part of the administrator to give effect to the right to procedurally fair administrative action. This may take the form of allowing for the publication of, and the public's participation in the decision-making procedure through either a public inquiry or a notice and comment procedure, or an alternative procedure provided for in the empowering Act, which is different, but fair. The assumption is that the Ministerial directives constitute administrative acts, which are in many instances likely to trigger the duties contemplated in section 4 of the Promotion of Administrative Justice Act.

In essence, the procedure for allowing public participation in the process of Ministerial directives is unclear. There is a strong danger that the Bill will allow the Minister to engage in deferred law-making without submitting to the public participation and control mechanisms build into the legislative and regulatory process.

3.3. Impact on the development of the Public Service

A critical factor in the debate concerning the proposed Agency is the future structure of the Public Service. Any current restructuring of the Public Service should take into consideration future moves to realise the vision of a single public service. An approach that fragments the public service further, such as 'agentisation' cannot be supported except in those circumstances where there is a compelling reason to do so. Rather than electing to 'opt out' and seek to establish an alternative structure to deliver the same services, it would be preferable to address the challenges faced by the Public Service directly.

Secondly, we are in a period of transition that can be best described as reconstructing the State towards a national democratic State with a developmental agenda. In any developing country, how the State is restructured to meet the needs of its people is central in the delivery of services to the people. Experience has shown in those developing countries that fragmented the

resources of the State in favour of agentised and commercialised systems of delivery have lead to a weakening of the state and a weakened delivery system.

~~The point of departure for the Public Service must be guided by the Constitution. Key values and principles that must govern the Public Service in terms of the Constitution are:~~

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- The efficient and effective use of resources must be promoted.
- The public must be encouraged to participate in policy making.
- Good human resource management and career development must be promoted. Practices to maximise human potential must be cultivated.

In this context, the proposal by the Department of Social Development to establish an Agency of the narrow type as envisaged must be questioned.

Research has not been forthcoming which indicates that Agency would be a more effective or efficient use of the State's resources. In fact the setting up of the Agency will in fact increase the costs of administration at least in the short term, since new structures will demand new funding.

The arguments that are being advanced that an Agency will be able to deal with human resource problems more efficiently, seem more preoccupied with asserting discipline than what the Constitution requires of the Public Service. Whether one is in or outside the Public Service, relevant labour legislation is applicable. It is misleading to portray the idea that by escaping the additional public service regulations one will be able to deal with staff more efficiently.

It has been established both in the South African Public Service and in international experience, that job satisfaction and security lead to increased productivity. The absence of these two factors has the opposite effect. The mere establishment of an Agency will not automatically result in increases s in job satisfaction and security.

One of the areas of human resource development that has been pursued since 1994 is to train and develop a new public service cadre, with a vision and understanding of the democratic principles that underpin our new democracy. The programme of transforming the Public Service, in specific provinces and sectors by the Department of Public Service and Administration, and the 2002 report of the Public Service Commission, all point to the need for priority to be given to targeted groups of workers in the Public Service, who are responsible for delivering services directly to people.

One of the greatest weaknesses lies in the area of human resource management. While Agencies often seek to restructure how services are

delivered, they often do not deal with the question of human resource management.

The move to a Social Security Agency reflects the political abandoning of the challenges of effective human resource management in the Public Service. In the mid-90's when the transformation of the public service was taking root, the trade unions pushed for and won the right for inclusion in transformation co-ordinating committee's (TCC's).

The failure of these TCC's to survive, can be directly attributed to the bureaucratic model that has persisted in the public service. The failure to significantly change this model has led to a number of departments agreeing to move outside of the Public Service to escape these challenges. The route has often been through agentisation.

In conclusion, the shift toward establishing an Agency without addressing the underlying challenges of service delivery will weaken the Public Service without necessarily improving the delivery of social services to beneficiaries living in poverty.

4. AN ALTERNATIVE PROPOSAL FOR IMPROVING SOCIAL ASSISTANCE DELIVERY

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4.1 Addressing the challenges in social assistance delivery

Any alternative must answer the challenges, which are impeding the efficient, equitable delivery of the social assistance programme:

These can be defined as:

- Excessive reliance on private partners
- Systemic weaknesses in conditional grants
- Lack of appropriate management skills
- The excessive bureaucracy of the procurement system.
- The effects of fiscal restraint

4.1.1 Private Partners in delivery of services

A central reason for the inability to spend resources is the increasing dependence on the private sector to deliver services. The lack of systems and experience to manage these relationships has lead to a decline in service

delivery.²⁰ Management of contracts is a specialised skill. In contracting out, the degree of resources which the state still has to provide and the lack of capacity in the private sector to deliver, results politically in the undermining of confidence in the Public Service as opposed to the private sector. Where services are provided by the private sector, oversight is a major problem that government has tried to deal with, but not very successfully.

Our proposal would rather see a system of public-public partnerships developing with assistance from specialised agencies on specific technical issues. This could cut across sectors and between provincial and local government. Where specific skills in the private sector are not present in the Public Service, the contracting in of management to impart those skills over a given period of time should be considered.

4.1.2 Systemic weakness in conditional grants

Our proposal would be to simplify the procedures currently used for conditional grants, which are time consuming and complex, resulting in conditional grants only being disbursed some three months after the budget is announced thus putting pressure on the department.

4.1.3 Management

As part of the solution towards ensuring a better-performing Department of Social Development, career pathing needs to be introduced as a matter of urgency. This is not a new suggestion and has long been the point of discussion in the Public Service Bargaining Co-ordinating Council. The approach must be sectoral and offer workers in the Department clearer mechanisms for determining promotions and enhancing service delivery.

One of the key problems in the public service is the way in which work is shaped by management. It is the reshaping of *the organisation of the work* as opposed to a new structure that needs attention. Certainly this will enhance morale in the department, something that is currently lacking. Career pathing supports the retention of and development of skills.

If the problem is the conduct of officials in the department, human resource management is the mechanism that must be used to address employment practices. This would include:-

- assessment procedures,
- the allocation of decision making power,
- support mechanisms from more senior officials, as well as

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²⁰ See, for example, the recent announcement of the National Department and the Eastern Cape Department of Social Development that they intend instituting action against private payment contractors following reports of poor service delivery in the Eastern Cape.

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Skills development is clearly a critical factor in addressing the problems that confront the Department.

The department's integrated human resource management plan must be given the chance to achieve what it was set up to do. This plan must include career pathing, a skills-based grading system and, most importantly, must reflect a shift from the new-managerial approach of governing the public service, to a developmental model. The setting of goals would be a joint process between stakeholders, supervisors and political leadership. Consultation becomes central in delivery of services. The dangers of new-managerialism have resulted in the situation we have today in Social Development - extraordinary discretion, corruption and incompetence.

4.1.4 Procurement Systems

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The current government procurement system can delay major expenditure by 3 to 6 months on a particular programme. Key in this is the Tender Board. Our proposal would be that there needs to be a comprehensive look at the Public Service Act and its regulations. This must be headed by the Department of Public Service and Administration, but involve key stakeholders. The objective should be to remove those aspects of the Act and regulations that unnecessarily hinder service delivery. These could be fast tracked since there is ample experience in the Public Service as to those regulations that are the main cause of unnecessary delay.

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4.1.5 Fiscal constraint

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Heavy fiscal restraint has become a barrier to spending. Savings are encouraged even at the costs of delivery. Budget cuts have lead to posts been frozen, and even untargeted cuts in employment. This has led to reduced capacity without improving efficiency. Ironically, under-spending often leads to further budget cuts.

What we call for is a relaxation of macro-economic parameters. Specifically, by making significant changes in the tax to GDP ratio and the deficit to GDP ratio. In both cases we argue that we have the fiscal space to increase both tax and deficit as a percentage of GDP. In this manner, more money can be made available for social investment and address the problems we have with chronic under-resourcing. In addition there must be a reduction in debt servicing and in this regard we call for the ring-fencing of apartheid debt.

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4.2. The logical sequence of steps for improving delivery

It is our view that it is inappropriate to leapfrog over a logical sequence of steps for addressing the social security delivery problems identified above. These are the following:

- (1) Consent and support the process establishing the legal invalidity of the assignment.
- (2) Centralise powers and functions in relation to social assistance delivery within the National Minister and Department of Social Development.
- (3) Clearly vest policy responsibility with the National Minister of Social Development for the following:
 - Social assistance;
 - Poverty alleviation;
 - Children; and
 - Social security integration
- (4) To the extent necessary, delegate social assistance delivery functions to the provincial sphere of government.
- (5) Develop a focused human resources strategy, through negotiation with the trade unions to improve service efficiency and staff capacity. This may involve sending expert national task teams to the provinces to work with improving the human resource capacity of provincial staff. Explore the full range of options within the public service to improve performance and capacity among staff (for example, establishing clear lines of accountability, enhanced staff training). The lines of accountability should become clearer when the power of the national Minister over the social assistance function is unambiguously established.
- (6) Develop and implement national norms and standards for social assistance delivery.
- (7) Locate the social assistance budget at a national level. Budgetary allocations for social grants should be in the form of conditional grants to the provinces to administer as instructed, and according to binding national norms and standards (see above comments on improving the conditional grant system). In this way, it will become easier to ensure accurate budgeting for social grants.
- (8) Carefully monitor the impact on social security access of the above steps.

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The essential goal of these steps is to establish a nationally organised social security system with standardised management, budgeting and communications systems.

Only once these steps have been taken, will the government be in a position to assess their impact on social assistance delivery. It is only at this juncture that government will be able to properly assess whether an Agency as envisaged in

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the draft Bill is necessary and desirable to ensure effective access to social assistance grants.

Parallel with the above steps, government should engage in a broad, consultative process on the Taylor Committee recommendations, including the institutional arrangements as proposed in their Report.

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5. CONCLUSION

The institutional arrangements for social security delivery are clearly critical for determining whether the implementation of the social grants programme fulfils the constitutional test of reasonableness in terms of section 27. A major obstacle to the effective delivery of social grants has been the assignment of the administration of the Social Assistance Act to the provinces. This has resulted in a range of administrative and efficiency problems, but most importantly has resulted in unequal access to and enjoyment of social grants in various provinces. The national Minister has effectively been deprived of clear policy control over the social assistance function with the result that he has been unable to establish national norms and standards for social security delivery.

A further obstacle to effective and equitable access to social grants has been the budgeting process whereby social grant allocations fall within the equitable share allocation to the provinces in terms of section 214 of the Constitution. There is thus no 'ring-fenced' protection for social grant funds, which are subject to the vagaries of provincial budgeting priorities. This has resulted in situations where certain provinces have run out of funds for social grants during the financial year. The impact on beneficiaries has been long delays in the processing or payment of their grants in these provinces.

The assignment of the Act is now subject to legal challenge in the Mashava case. The national government and all the provincial governments (with the exception of KwaZulu-Natal) are not opposing the challenge to the legal validity of the assignment. If the legal challenge succeeds, it will mean that the national Minister is vested with clear national control over social assistance. This will enable him to set national policy in relation to the administration of social grants, and establish clear regulations, and norms and standards in relation to such matters as grants processing time, eligibility requirements, and suspension and termination procedures.

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We are of the view that it is premature to establish a Social Security Agency as envisaged with the primary function of taking over the administration and payment of social assistance grants. The next most logical step in improving social grants administration is to assess the impact of the removal of the assignment and the establishment of a nationally organised social security system. With clear policy authority and control vested in the National Minister, the

administration of social grants can be *delegated* to the provincial spheres of government.

Without these steps, there is a real danger that the Agency will simply replicate the existing dysfunctions of the system with all the attendant costs and risks associated with the establishment of a new institution. These costs and risks are particularly high where an important public service capacity (the assets and staff within the national and provincial departments dealing with social development) with a critical responsibility for poverty alleviation is being transferred to another entity. This step should not be taken without thorough research and full consultation of relevant stakeholders.

The proposal for an independent delivery mechanism can ultimately lead to rising costs and reduced access for the poor. The proposals are largely driven by a new-managerial approach, which rigorously separates the delivery of services from policy development. This approach emerged first in the developed countries of Europe, where the results have been at best mixed. At worst it has led to a decline in service delivery in developing countries where the challenges are far greater in terms of lack of infrastructure. In such conditions, agencies take on a life of their own, leading to inappropriate responses, while governments lack the capacity required to regulate them (e.g. outsourcing of pension payments). Switching to alternative forms of private delivery has not solved the problem.

The debate on comprehensive social security (social protection) has not yet been resolved in any defined form. It therefore reflects a lack of co-ordinated strategy to produce a draft Bill without any prior consultation, on an aspect of comprehensive social security.

The process of negotiations at NEDLAC on the Taylor Committee report has not even begun. The understanding is that once government had made up its mind on the various aspects of the report, they would engage at NEDLAC. This is surely a breach of good faith, in that we are now presented with draft legislation whilst another undertaking was given.

The current Bill lacks a foundation of thorough research and a transparent, consultative process of policy development. We submit that, given the momentous nature of the institutional change that the Agency represents, it is vital to ensure that it does ultimately succeed in improving access to social grants as opposed to merely replicating existing problems. The consequences of not improving the social security delivery system are serious for beneficiaries' access to social security rights. It will also render the institutional arrangements associated with the proposed Agency vulnerable to constitutional challenge for failing to achieve the reasonable implementation of the social assistance programmes.

