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To: Portfolio Committee on Social Development

Attention: Ms Rosemary N Capa, Ms Liezl L van der Merwe, Ms Sibongile Tsoleli, Ms Hope H Malgas, Ms Evelyn R Wilson; Mrs Cheryllyn Dudley; Mr Mandlenkosi P Galo; Ms Karen Jooste; Mrs Beverley L Abrahams; Ms Velhelmina P Mogotsi; Ms Nokulunga P Sonti; Mr Nhlanhlakayise M Khubisa; Ms Bridget SMasango; and Mr Solomon P Mabilo

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Dear Honourable Members of the Portfolio Committee on Social Development

RE: SOCIAL GRANT HANDOVER SYSTEM

1. The Centre for Applied Legal Studies ('CALs') writes to you as an organisation committed to the constitutional right of access to social assistance and social welfare.
2. CALS is a law clinic and NGO located within the School of Law of the University of the Witwatersrand. Its vision is a socially, economically and politically just society where repositories of power, including the state and the private sector, uphold human rights.

3. As a law clinic CALS has represented the Black Sash Trust in various litigious interventions. These litigious interventions were in cases between the South African Social Security Agency ('SASSA') and private institutions responsible for the administration of social grants and the provision of financial services and products to social grant beneficiaries in the High Courts and the Constitutional Court. As such, CALS has developed a niche and unique knowledge base on the social grants system.
4. CALS' primary concern, as evidenced by the court cases it participated in as a legal representative, is ensuring that social grant beneficiaries receive the full value of their social grants (i.e. that they are not depleted unlawfully or unscrupulously) on time. This will ensure that the means of livelihood of the most impoverished and vulnerable members of South African society are met. It is for this reason that CALS pens this letter: CALS is concerned with the narrative in the public that indicates uncertainty about how social grants will be administered and distributed after 31 March 2017.
5. Since 2012, social grants have been administered by a company contracted to SASSA — Cash Paymaster Services ('CPS'). Since this time there have been numerous concerns raised about the operation of the grant system by CPS which have included:
 - 5.1. Widespread complaints about unlawful, unauthorised, and unscrupulous deductions from social grants including for loans, advance airtime, water and electricity, and funeral policies against child support grants generally, and from adults' grants in excess of the legislated maximum permissible deduction.
 - 5.2. This has led to amendments of the Regulations to the Social Assistance Act in efforts by the Department of Social Development ('DSD') and SASSA to "clean up" the system; which in turn lead to a number of court challenges during 2015 and 2016. These challenges were brought by CPS and CPS-affiliated companies as well as other corporate institutions deriving business through offering products and services against grants. They were brought to challenge such clean up processes and the new regulations that were passed by DSD; the latter were an attempt to clamp down on such companies' ability to canvass sales against social grants;
 - 5.3. There are very serious concerns about the sharing of confidential information by CPS with its affiliated companies which has enabled the ambush marketing of products to grant beneficiaries;
 - 5.4. This is compounded by the fees attached to such products, the lack of informed consent when beneficiaries 'choose' to obtain such products, in addition to instances of misrepresented information to beneficiaries concerning services they are 'required' to take.

6. Apart from the practice summarised above, on 17 April 2014, the Constitutional Court in the *AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* ([2014] ZACC 12) (*'AllPay II'*) case found the contract between SASSA and CPS to be invalid. The Constitutional Court handed down the following order in *AllPay II*:

“1. The Contract for the Payment of Social Grants between the South African Social Security Agency (SASSA) and Cash Paymaster Services (Pty) Ltd (Cash Paymaster) dated 3 February 2012 is declared invalid.

....

4. If the tender is not awarded, the declaration of invalidity of the contract in paragraph 1 above will be further suspended until completion of the five-year period for which the contract was initially awarded”.

7. In essence, the provisions read together mean that SASSA had to put out a new tender for the contract to administer social grants. If SASSA failed to contract anew with another service provider by 15 October 2016, it would be required to continue its contract with CPS until 31 March 2017 when the initial contract (which had been declared invalid) would come to an end.

8. At the end of the contract period, i.e. on 1 April 2017, CPS will no longer be contractually bound to administer and distribute social grants on behalf of SASSA. Despite this however, it is imperative that social grants are paid in full and on time following 31 March 2017.

9. In our view, there are three ways of ensuring that this happens. The first is to make an application to the Constitutional Court for a variation of the court order dated 17 April 2014 and thus continue the contract with CPS. The second is for SASSA to take over the administration and distribution of social grants. And, the third is for SASSA to contract with another institution to administer and distribute social grants. The options and concerns for each of these options will be addressed in turn below.

10. Variation Order

10.1. SASSA would have to seek a variation of the court order from the Constitutional Court if it continues its contract with CPS for the administration and distribution of social grants. Because the Constitutional Court had declared the contract between CPS and SASSA invalid, any continued contract between the two parties would be rendered invalid. As such, SASSA would have to make an application to the Constitutional Court to extend its suspension of the declaration of invalidity beyond 31 March 2017.

- 10.2. The Constitutional Court rules do not contain a provision detailing the timelines for applications wherein variation of court orders are sought. However, both the *Minister for Justice and Constitutional Development v Nyathi* ([2009] ZACC 29) ('*Nyathi*') and the *Ex Parte Minister for Social Development* ([2006] ZACC 3) cases were brought urgently on days prior to the expiration of the suspension. In *Zondi v MEC, Traditional and Local Government Affairs and Others* ([2005] ZACC 18) ('*Zondi II*') and *Ex Parte Minister of Social Development* the order had suspended a declaration of invalidity for a period of 12 months and 18 months respectively to allow for a legislative process.
- 10.3. In *Zondi II*, the Constitutional Court said that it had the power to extend a period of suspension (of an order) where it is just and equitable and where an application is made before the expiry of the period of suspension (para 43). In *Minister of Justice v Ntuli* ([1997] ZACC 7) ('*Ntuli*'), the court made it clear that it should not vary an order of suspension after the suspension period has expired (para 38). It is seminal therefore that SASSA brings the application for the variation of the order of court well ahead of the expiry of the period of suspension.
- 10.4. The Constitutional Court in *Ex Parte Minister of Social Development* said, among other things, the following about applications for variation:
- 10.4.1. The factors are: the sufficiency of the explanation for the failure to comply with the original period; the potentiality for prejudice being sustained if the period is extended or not extended; the prospects of complying with the deadline; the need to bring litigation to finality; and the need to promote the constitutional project and prevent chaos (para 50(d));
- 10.4.2. The application must be made within a reasonable time with sufficient time to allow the matter to be considered by the court before the expiration of the suspension period (para 50(f)); and
- 10.4.3. The explanation for the failure to correct the constitutional defect within the time limit should be fully, candidly and timeously set out (para 50(g)).
- 10.5. Ideally, SASSA would bring the application with enough time to allow the court to receive all the papers from all the parties, hear the oral arguments (if any) and hand down a judgment before the expiration of the suspension period. In order to do so on non-urgent basis, SASSA would have had to launch the application at the beginning of October 2016. An example of time periods is as follows:
- 10.5.1. 3 October 2016: launch the application;

- 10.5.2. 10 October 2016: notice of intention to oppose (Rule 11(1)(b));
- 10.5.3. 31 October 2016: answering affidavit (rule 11(3)(a)(ii));
- 10.5.4. 14 November 2016: replying affidavit (rule 11(3)(b)).

10.6. Following the filing of the replying affidavit, the court would have ample time to decide whether to hear the application; call for, receive and study heads of argument; set down the matter for oral argument and hear the same; and finally hand down a judgment.

10.7. Given that SASSA did not file in October 2016, it falls upon it to make an urgent application to the court for a variation of the court order. Such urgent application would need to be filed with the court as soon as possible to ensure that the court does not view the urgency as one that has been self-created. This is especially in light of the fact that SASSA has always been aware that the contract would come to an end in March 2017.

11. It follows from the above that the following questions should be answered by SASSA:

- 11.1.1. Does SASSA plan to continue its contract with CPS?
- 11.1.2. Why is SASSA not taking over the administration and distribution of social grants as it informed the Constitutional Court it would?
- 11.1.3. If SASSA does plan to continue its contract with CPS, when does SASSA plan to lodge its application for variation with the Constitutional Court?
- 11.1.4. Given that SASSA has always been aware that the contract with CPS would come to an end in March 2017, on what grounds will SASSA apply for variation of the court order?
- 11.1.5. What is the cause for the delay in lodging the application for variation?
- 11.1.6. On what grounds will SASSA support the treatment of the application as one of urgency?
- 11.1.7. Does SASSA's conduct meet the factors of consideration for the variation of the court order as set out in *Ex Parte Minister of Social Development*?
- 11.1.8. Should SASSA intend to extend, or contract a new with CPS, how will SASSA ensure that the personal information of grant beneficiaries is not shared with CPS's related company structures and business concerns and their social grants not diminished in the continued contract with CPS?

12. SASSA takeover

12.1. SASSA made it clear to the Constitutional Court that it wished to take over the administration and distribution of social grants (paras 13 and 17 of *AllPay II*). Following its failure to award the contract to a new entity, SASSA submitted a report to the Constitutional Court dated 15 October 2015 explaining the same to the latter.

12.2. It is at this point, that SASSA should have been undoubtedly clear that it would have to take over the administration and distribution of social grant payments. Therefore, arrangements should have been made over the last 15 months (between October 2015 and January 2017) to take over the system.

12.3. Consequently, the following questions should be answered by SASSA:

- 12.3.1. Does SASSA wish to take over the administration and distribution of social grants?
- 12.3.2. How does SASSA plan to administer and distribute social grants?
- 12.3.3. Does SASSA have the infrastructure necessary to administer and distribute social grants?
- 12.3.4. If not, by when will SASSA have such infrastructure?

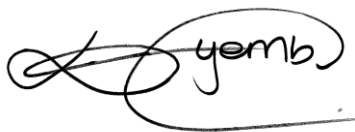
13. Awarding a new tender

13.1. In addition to the two options set out above, SASSA has also indicated that it might award a new contract by putting out a “request for information from Service Providers for the Social Grant Payment and Banking Services”. It put the call out on 9 December 2016, with a closing date of 10 February 2017 (<http://www.etenders.gov.za/content/south-african-social-security-agency-hereby-invites-request-information-service-providers>). SASSA hosted a meeting with interested entities on 13 January 2017.

13.2. If SASSA does intend to award a new contract for the administration and distribution of social grants it would need to publish a call for proposals, adjudicate on the proposals and award the new tender by 31 March 2017. It would also need to ensure that the recipient of a new tender is in a position to take over, seamlessly, the payments of grants by 1 April 2017. The new tender recipient would require all information of grant beneficiaries and have the necessary payment platforms in place by 1 April 2017. It would need to do all of this within just over two months.

- 13.3. CALS is of the opinion that the following questions should be answered by SASSA:
- 13.3.1. Will SASSA be administering and distributing social grants through a new distributor?
 - 13.3.2. If so, why is SASSA not taking over the administration and distribution of social grants as it informed the Constitutional Court it would?
 - 13.3.3. What has SASSA done to propel the award of such a contract since the request for information on 9 December 2016 and the meeting it hosted on the same on 13 January 2017?
 - 13.3.4. How will SASSA ensure that the personal information of grant beneficiaries is not shared and their social grants not diminished in the new contract with a new distributor?
 - 13.3.5. What is the contract period with the new distributor?
 - 13.3.6. What conditions will be attached and included in the contract to protect social grant beneficiaries and ensure the realisation of social welfare?
 - 13.3.7. When does SASSA plan to take over the administration and distribution of social grants?
14. It should be restated that CALS' primary concern is that social grant beneficiaries receive the full value of their social grants on time. CALS remains committed to assisting SASSA and the DSD in ensuring the realisation of the right to social assistance.
15. Please feel free to contact the author at the contact details set out below should you have any questions or concerns.

Kind regards,

A handwritten signature in black ink, appearing to read 'Nyembe', with a large, stylized flourish extending from the end of the name.

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