



Centre for Applied
Legal Studies

DJ Du Plessis Building West Campus Wits Braamfontein
Private Bag 3 Wits University 2050 South Africa
Tel + 27 11 717-8600 Fax + 27 11 717 1702
www.law.wits.ac.za/cals

Submission

to the

Minister of Social Development

on the

Amendments to the Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of Eligibility for Social Assistance made in terms of the Social Assistance Act, 2004

February 2021

Ariella Scher

Head of Programme: Business and Human Rights
Centre for Applied Legal Studies
Email: Ariella.Scher@wits.ac.za

Thuli Zulu

Candidate Attorney
Centre for Applied Legal Studies
Email: Thuli.Zulu@wits.ac.za



INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies (“**CALS**”) welcomes the opportunity to submit comments on the draft Amendments to the Regulations made in terms of the Social Assistance Act, 2004 (“**the draft Regulations**”) in response to the call by the Minister of Social Development (“**the Minister**”). In the event that the Minister hosts public hearings on the Amendment to the Regulations, CALS hereby requests that it be placed on the roll to make oral submissions.
2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALS’ vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. It fulfils this mandate by –
 - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations;
 - providing professional legal representation to survivors of human rights abuses; and
 - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of vulnerable persons and communities.
4. CALS operates across a range of human rights issues, namely basic services, business and human rights, environmental justice, gender justice, and the rule of



law, and adopts a gendered and intersectional approach to interpreting, implementing and – where necessary – promoting the development of the law.

PURPOSE OF THESE COMMENTS: THE VULNERABILITY OF SOCIAL ASSISTANCE RECIPIENTS/BENEFICIARIES

5. The draft Regulations provide for the manner in which social assistance is to be applied for, processed and paid, in application of the constitutional right of access to social security,

“including, if they are unable to support themselves and their dependants, appropriate social assistance” (Constitution of the Republic of South Africa, 1996 (***the Constitution***) s 27(1)(c)).

6. It is trite that applicants for social assistance are vulnerable persons ripe for exploitation by powerful corporations. The recent history of South Africa’s social assistance programme demonstrates this vulnerability all too well.
7. The Department of Social Development and the institutions – whether public or private – which administer social assistance play an oversized role in South African society, impacting the lives of millions of vulnerable persons. The successful performance of this role is contingent on the protection of those persons, including ensuring that applicants, beneficiaries and recipients of social assistance are in no way prejudiced as a consequence of their substantial need.
8. CALS accordingly seeks to ensure that the draft Regulations adequately protect vulnerable persons from such exploitation, including safeguarding their personal information and shoring up the process by which such information is collected, stored and processed.

COMMENT ON THE SUBSTANCE OF THE AMENDMENTS TO THE REGULATIONS

9. CALS’ comments on the draft Regulations focus on the documents and information required when applying for social assistance, and the collection, storage and processing thereof. This information constitutes “personal information” within the



definition outlined in the Protection of Personal Information Act 4 of 2013 (“**POPI Act**”), and must be treated accordingly.

10. CALS argues that the draft Regulations do not provide for adequate safeguards to prevent this information being accessed and potentially exploited by corporations, to the detriment of vulnerable applicants.

The context of these comments: the constitutional right to privacy

11. The Constitution enshrines the right to privacy in s 14, which right –

“includes a right to protection against the unlawful collection, retention, dissemination and use of personal information” (Preamble to the POPI Act).

12. This is the context in which the nature and process of an application for social assistance, as set out in the draft Regulations, must be assessed.

The documents and information required when applying for social assistance

13. Chapter 2 of the draft Regulations (Regulations 10-17) provides for the application for social assistance. Regulation 10(1) stipulates that the application may be completed manually or electronically in the presence of a designated officer, while Regulation 10(3) requires that the application –

“must be accompanied by all the necessary documentation contemplated in regulation 11.”

14. Regulation 11 makes provision for the submission by applicants of the required documents. Those documents include important personal information such as identity documents, birth certificates, marriage certificates and sworn statements confirming income, which must be provided in either original or certified copy form.

15. The Protection of Personal Information Act 4 of 2013 (“**POPI Act**”) defines “personal information” in section 1 as –



“information relating to an identifiable, living, natural person . . . including, but not limited to—

(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;

(b) information relating to the education or the medical, financial, criminal or employment history of the person;

(c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;

(d) the biometric information of the person; . . .

(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person”

16. The information and documentation required to be submitted by an applicant for social assistance thus falls squarely within the POPI Act’s definition of “personal information” and must therefore be treated as stipulated within that Act.
17. The draft Regulations do not, however, detail how that personal information will be protected in the manner required by the POPI Act, and to prevent prejudice to vulnerable applicants.

The lawful processing of personal information

18. The lawful processing of information and documents required to be submitted by applicants for social assistance must accordingly comply with the conditions set out in the POPI Act.

18.1. Condition 7 details the extent of the required security safeguards as follows:



- 18.1.1. The integrity and confidentiality of personal information must be ensured through “appropriate, reasonable technical and organisational measures to prevent . . . unlawful access to or processing of personal information” (POPI Act s 19(1)(b)).
- 18.1.2. This includes measures which *inter alia* establish and maintain appropriate safeguards against any identified risks to the personal information (POPI Act s 19(2)(b)).
- 18.2. Condition 8 allows for the ‘data subject’ (in this instance, the applicant) to request that the personal information provided by them be corrected or deleted in the event that it becomes inaccurate, out of date or incomplete (POPI Act s 24(1)(a)).
- 18.3. The draft Regulations do not currently provide for the above safeguards for the personal information required by applicants for social assistance.
19. The POPI Act further generally prohibits the use of personal information for the purpose of direct marketing unless the ‘data subject’ has consented to such (POPI Act s 69(1)(a)). This is again a risk to which vulnerable applicants fall prey due to the exploitative marketing practices of corporations, and against which the draft Regulations do not currently offer protection.
20. Finally and significantly, the POPI Act generally prohibits the processing of the personal information of children (POPI Act s 34). The exceptions to this prohibition include where the personal information concerned is obtained with the prior consent of a “competent person” (POPI Act s 35(1)(a)), but the draft Regulations do not currently require that such consent be obtained.
21. CALS accordingly recommends that the draft Regulations be amended to accommodate the provisions of the POPI Act and thereby ensure that vulnerable applicants for social assistance are adequately protected from the unlawful processing and potential exploitation of their personal information.



The electronic collection of applicants' documents and information

22. The Electronic Communications Act 36 of 2005 seeks to guarantee information security and network reliability in the regulation of electronic communications in the public interest (section 2(q)). This is a recognition that information – including personal information – provided in an electronic format may be tampered with and/or accessed for purposes other than that which it was provided. Such conduct includes that committed by individuals and corporations seeking to exploit vulnerable persons such as applicants for social assistance.
23. The draft Regulations provide for the electronic submission of an application for social assistance (Regulation 10(1)) but do not outline the necessary safeguards which should be applied to the information and documents collected in this manner. Such safeguards must incorporate adequate protection mechanisms for the electronic collection, processing, transmission and storage of such information. Adequate protection must render the personal information accessible only by its target audience and for the intended purpose (namely the provision of social assistance), and not other persons or entities.
24. CALS accordingly recommends that the draft Regulations be amended to accommodate the provisions of the Electronic Communications Act to the extent necessary to safeguard any information and/or documents submitted electronically in the course of an application for social assistance.

CONCLUSION

25. In summary, CALS calls on the Minister to amend the draft Regulations as follows:
 - That applicants for social assistance be informed of their right to privacy and the full range of rights accorded to their personal information when submitting documents and information required when making their application;



- That the integrity and confidentiality of the personal information of applicants for social assistance be appropriately safeguarded to prevent unlawful access thereto or processing thereof;
- That applicants for social assistance be empowered to request that the personal information provided by them be corrected or deleted where appropriate;
- That the personal information of applicants for social assistance not be subjected to direct marketing unless the applicant has consented thereto;
- That the specific consent of a “competent person” be obtained in circumstances where the personal information of a child is being processed for the purpose of an application for social assistance; and
- That the electronic submission of any personal information of applicants for social assistance be adequately safeguarded to prevent such information – when collected, processed, transmitted and stored – being tampered with, accessed for purposes other than that which it was provided or otherwise exploited.

ENDS.

