



Funding Practice Alliance

Formal Submission to the Department of Trade and Industry

On the

Draft Lotteries Amendment Bill 2013

Submitted to:

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1. Introduction

The Funding Practice Alliance(FPA) welcomes the call for comment on the *Draft Lotteries Amendment Bill 2013* by the Department of Trade and Industry(DTI). This document serves as the FPA's formal submission on the *Draft Lotteries Amendment Bill 2013(hereinafter referred to as 'the Bill')*. This submission focusses on the structures and policies that guide the adjudication, allocation and distribution of funds from the National Lotteries Distribution Trust Fund(NLDTF) by the National Lotteries Board(NLB) and its 'committees'.

The Funding Practice Alliance is made up of three organisations; CDRA (Community Development Resource Association), Inyathelo -The South African Institute for Advancement and SCAT (Social Change Assistance Trust). The purpose of the FPA is to conduct research into, inter alia, the size and scale of funding to CSOs , good funding practices including grant-making practices; the administrative capacity of state funding agencies; state and civil society power relations; mutual accountability between grant - seekers and grant - makers; decision making processes related to funding; and the effectiveness of funding relationships as well as exit strategies. The members of the FPA interact with a large number of Civil Society Organisations (CSOs) in the course of their work. These organisations include Community Based Organisations (CBOs), Non – Governmental Organisations (NGOs) , faith based organisations and intermediary grantmakers operating in a variety of sectors and across various scales of operation. Over the years these organisations heard many organisations expressing their frustrations with the state of the National Lotteries Distribution Trust Fund (NLDTF). As a result the FPA decided to mobilise a strategic response to the concerns raised, to move the debate from a large pool of anecdotal impressions to sound empirical research with the emphasis on solution - driven conversations in service of the larger social development agenda.

2. Comments regarding the draft Lotteries Amendment Bill

2.1 Point 6(c)(m) (pg. 8 of the Bill) referring to Section 10 of the principal Act, allows the NLB to *'conduct or authorise staff of the Board to conduct research on and approve grants to appropriately deserving good causes or recipients that may be funded without application lodged in accordance with this Act'*.

The FPA does not agree that the NLB should fund organisations without the organisation submitting an application; in fact this would be considered 'bad practice' in the funding environment and could lead to leakage which the NLB and the DTI should not encourage. Organisations should always submit an application indicating need and activities/projects or programmes that will take place should they receive funding. Without a completed application the NLB would not be able to draft an agreement with an organisation on what is expected of the beneficiary organisation. The FPA strongly objects to this clause. Civil society organisations that work directly with communities have a better understanding of the needs within these communities. It is therefore not necessary for the NLB to conduct its own research in order to determine the priority needs within communities. The NLB

should instead focus on ensuring that organisations are aware of the policies and procedures of applying for grants from the NLB.

- 2.2 Point 6(c)(o) (pg. 8 of the Bill) referring to Section 10 of the principal Act, gives the Board *'the power to prohibit, withdraw or reduce any grant made by the distributing agency if the board receives information that such grant is utilised or is likely to be utilized in a manner that does not comply with the purpose or conditions stipulated in the grant or is utilised for an unlawful purpose or purpose distantly unrelated to the purpose of the grant'* and Point 6(d)(2) and (3) (pg. 8 of the Bill) that gives the board *'the power to institute legal proceedings in order to properly discharge its functions and responsibilities in terms of this Act'* and *'the board may approach any court for any order the board deems appropriate for effective regulation and enforcement of the Act'* respectively.

The FPA notes these inclusions in the Bill with interest and are concerned that the Bill does not provide more guidance on how this will operate. For instance, how far back, in terms of years, can the NLB go in reviewing decisions made by the DA's and choosing to withdraw or recover amounts from grants distributed? The FPA posits that the Bill should provide more guidance on how the NLB may exercise these new powers.

- 2.3 Point 6(c)(p) (pg. 8 of the Bill) referring to Section 10 of the principal Act, the Board *'in consultation with the Minister, determine category of applications for grants that are excluded from funding.'*

Just as the categories of funding are included in the Lotteries Act, the FPA submits that the Lotteries Act should include those categories of funding that that Lotteries does not fund. This is accepted donor practice that allows organisations to decide whether a donor would be the right funding partner for the organisation during the prospecting stage of the funding cycle.

- 2.4 Point 7(a)(7) (pg. 9 of the Bill) referring to Section 13 of the principal Act, allows for the Minister to decide *'on justifiable grounds not to issue a licence as contemplated in subsection (1), the Minister may, after consultation with the board, appoint or authorize an Organ of State to conduct the National Lottery'*

Point 7(a)(8) (pg. 9 of the Bill), the Minister *'in deciding whether justifiable grounds contemplated in sub section (7) exists, the Minister may take into consideration Government plans and priorities.'*

Point 7(a)(9) (pg. 9 of the Bill), *'In appointing a person or Organ Of State to conduct the National Lottery in terms of subsections (8), the provisions of subsections (2) and (3) shall not apply.'*

Point 7(a)(10) (pg. 9 of the Bill), *' In appointing an Organ of State to conduct the National Lottery, the Minister may exempt such Organ of State from the provisions of subsections (2) and (3).'*

These clauses in the draft Lotteries Amendment Bill will collectively bring about a state Lottery. Not only will the Lotteries be run by the State, but the distribution of funds will be

guided by Government plans and priorities – in effect the funds will be distributed as per the national budget, there will be no independent Board to hold the funds in trust or to guide the distribution thereof, which will mean that the money will belong to the state for the state to do with as it pleases. These clauses are incredibly concerning and it may be necessary for the DTI to consider the primary purpose of the funds in the NLDTF. NLDTF funds should not be used as a government tool. The NLB and the NLDTF has been established to distribute funds to the civil society sector whose primary purpose is to improve South African society. The inclusion of the clause to consider Government plans and priorities in determining how and where funds should be distributed also implies that the work of civil society organisations is not aligned to government priorities. The FPA submits that this clause is not necessary, as civil society organisations are established for the “public good” and all their activities are geared towards improving and uplifting communities.

The FPA would like to clarify that the purpose of civil society organisations is not to implement government plans and priorities. This does not mean that the work of civil society organisations is against the national plans and priorities as determined by government. However, a statement within the Lotteries Act that explicitly states that the ‘allocation of funds should be informed by national plans and priorities’ fails to take into account that civil society organisations are guided by the needs of communities and society and are strategically placed to respond to these needs. The allocation of funds from the NLDTF strictly according to ‘national plans and priorities’ would change the entire nature of the civil society sector in South Africa as organisations would no longer look to communities to assess the greatest needs of society.

In addition, it should be absolutely clear that local, provincial and national government and other state agencies, do not receive funding from the NLDTF, and that NLDTF funding is ring-fenced for supporting the development of a strong civil society rather than serving as budget relief for government.

- 2.5 Point 7(b) (pg. 10 of the Bill) referring to Section 13 of the principal Act, deletes the following from the principal Act, *‘In considering whether to grant the licence contemplated in subsection (1), the Minister and the board shall not favour an applicant solely because the applicant or a shareholder or partner of that applicant is an organ of the State.’*

The removal of this clause could lead to a conflict of interest on the part of the Minister and the Board when making the decision on whom to award the licence to. We recommend that this clause not be removed from the principal Act as it would allow the Minister or the Board to unfairly favour an entity in which an Organ of State is a shareholder or in cases where the Organ of State is the applicant, when issuing the licence, this would amount to bad governance on the part of the Board and bad practice on the part of the Minister.

- 2.6 Point 8(b)(a) (pg. 10 of the Bill) referring to Section 14 of the principal Act, provides more power to the Minister as follows: *‘to obtain the consent of the Minister after consultation with the board before doing anything specified in the licence.’*
- Point 8(c)(b) (pg. 10 of the Bill) referring to Section 14 of the principal Act, adds the following underlined section: *‘to refer specified matters to the board and the board must refer such matters to the Minister[or to the board, as the case may be,] for approval.’*
- Point 9(a)(1) (pg. 10 of the Bill) referring to Section 15 of the principal Act, states that: *‘The Minister [or the board] may after consultation with the board vary any condition in the licence granted under section 13....’*

The above three clauses and several others in the draft Lotteries Amendment Bill give the Minister of Trade and Industry more power and responsibility in the functioning of the NLB. The FPA submits that the opposite should be the case and the NLB should be given greater powers to perform its legislated duties rather than having its powers taken away. The Minister of Trade and Industry has several duties and responsibilities under his Ministerial portfolio which would not allow him the time to play an active role in the functioning of the NLB. The FPA requests that the DTI consider the governance role of the NLB and the time constraints on the Minister’s time in drafting these amendments.

- 2.7 Point 21 (pg. 16 of the Bill) referring to Section 26D of the principal Act, states: *‘A member of the distributing agency his or her spouse, life partner, business partner or associate, may not hold an office in or be employed by or have an interest whatsoever, whether direct or indirect, in any company or other entity which applies for grants or supplies goods or renders services to the board unless such an interest is declared to the satisfaction of the Minister.’*

The FPA applauds the DTI for addressing ‘conflict of interest’ in the draft Lotteries Amendment Bill. The issue of ‘conflict of interest’ has long been a concern with the Distributing Agencies and the NLB. The FPA submits that the DTI should not limit this clause to spouses, life partners, business partners and associates but should also refer to ‘family members’ to ensure that there are fewer loopholes for those who would choose to abuse the system.

- 2.8 Point 22(2) (pg. 17 of the Bill) referring to Section 26E of the principal Act, states that: *‘No applications for grants by a juristic person acting as an agent, representative or conduit of any potential beneficiary shall be considered unless good cause is shown as to why such potential beneficiary is unable to make an application on its own.’*

The DTI needs to define the term ‘conduit’ for the purpose of this legislation. There are organisations such as Community Foundations and small Grantmakers that could be misunderstood as conduit organisations to individuals who have a limited understanding of the civil society sector. For instance, Community Foundations could be a very useful vehicle to funding organisations in rural areas who have little access to information and who struggle to meet financial and narrative reporting requirements. A misinterpretation of the term could negatively affect organisations in the sector.

- 2.9 Point 28(d) (pg. 20 of the Bill) referring to Section 32 of the principal Act, removes the following clause from the principal Act(Section 32 (4)): *‘In performing his or her functions in*

terms of subsection (3), the Minister shall – (a) consult with the board and the relevant distributing agency before giving any directions to that distributing agency; and (b) take into account – (i) general development in the Republic, with specific reference to the regional, economic, financial, social and moral interests of the Republic and the enhancement of the standard of living of all people in the republic; and (ii) provincial and local interests, including – (aa) the number of lottery tickets sold in each province; (bb) the population of each province; and (cc) the financial requirements of each province.'

The deletion of the clauses referring to the interests of provinces in the Republic of South Africa in the draft Lotteries Amendment Bill is concerning. Further centralisation of power with the Minister and the nationalisation of the purpose of the NLDTF disregards the differences in terms of the work of civil society organisations and the organisational formations that exist within civil society. Considering provincial civil society interests and concerns will enable the NLB to better respond to societal and community challenges, not to do so ignores the uniqueness of the communities across South Africa. The FPA submits that the DTI should consider that communities across South Africa are not faced with the same challenges.

3 Amendments not considered in the Bill

3.1 The Act and its purpose

The Lotteries Act lacks a clear statement of intent regarding the long-term purpose of and NLDTF. The Lotteries Act needs a statement that outlines the kind of society we seek to become, and from this, the kind of activities and initiatives for which the NLDTF funds are earmarked to support work in line with this long-term purpose. It needs to be absolutely apparent from the wording in the Act that this state funding agency is geared to support the growth and development of a particular kind of society. It should also be apparent that the kinds of organisations that will be supported are not only those servicing immediate needs and priorities, but also those whose goals are longer-term in line with the framing paragraph referred to above. As it stands, the Lotteries Act was developed solely to legislate for the formation of the NLB and the NLDTF, and to provide guidance on how these would operate and what their responsibilities would be including providing licences for the operation of lotteries in South Africa. The fact that the establishment of the NLB, NLDTF and the Distributing Agencies is primarily meant to ensure that as much funds as possible are available for distribution to the civil society sector in recognition and support for the work that they do has become secondary, and needs to be addressed within the Bill at this juncture as a record of the purpose behind these structures.

3.2 Terminology

“Charitable expenditure”, as defined in the Lotteries Act, needs to be redefined in

more developmental terminology. It is not clear where this expenditure refers to funders and philanthropic trusts and foundations, and where it refers to welfare organisations (the only specific type of organisation mentioned in the definition).

With regard to defining funding areas and naming the particular Distribution Agencies(DA), the phrasing from “Charities” (in reference to Charity and Welfare) needs to be amended so that there is less emphasis on welfare-based terminology and greater emphasis on a developmental language. Charities is a very limiting term as it implies funding for welfare, immediate needs and providing support from those unable to provide for themselves.

The FPA also notes the omission in the Amendment of Section 1 of the Lotteries Act, in the Bill, in the definition of the word distribute that we hope will help to ensure that funds from the NLDTF are not distributed to persons or places outside of South Africa’s borders.

3.3 Appointment of Distributing Agency staff

The FPA is pleased that many of the concerns that we have raised in the past regarding the Distributing Agencies are being addressed through the draft Lotteries Amendment Bill. The FPA submits that the draft Lotteries Amendment Bill should set a limit for the employment term of the Distributing Agency staff. It is the FPA’s understanding that employment as a Distributing Agency member is not a lifelong appointment and that there will be limited terms of employment. The FPA also notes, with concern, that there is no public nomination (participation) process to the appointment of Distributing Agency staff/members. The FPA submits that the amended Lotteries Act should allow for a nomination process and a period for objections from the sector for those nominated through the publication of the names of those nominated, by whom they were nominated, and their qualifications and relevant experience for the position..

3.4 Calls for applications

The FPA submits that the NLB, should consider staggering the call for applications throughout the year. This could assist in preventing the bottleneck of receiving up to 7000 applications at one time of the year. Furthermore, the NLB should publish the dates on which applications will be received throughout the year at the beginning of each year so that organisations could plan to submit their application at a time that is aligned to the start of their respective project funding cycles.

The fact that the Distributing Agency’s publish specific funding priorities within each broad Distributing Agency funding area on an annual basis also needs to be published at the beginning of the year to enable organisations to plan their project activities and develop their funding applications well in advance of the deadline for receiving applications. The Distributing Agency should also provide the public with documentation on how the decision on specific funding priorities for that year was made.

3.5 Multi-year funding

The consideration and approval of a greater number of multi-year grants would also assist to reduce the number of applications received yearly by the NLB. As is standard practice in the funding sector with the approval of multi-year grants, the FPA acknowledges that the payments, reporting requirements and monitoring and evaluation requirements of these grants would be different to those of annual or project related grants.

4 Conclusion

The FPA is both encouraged by the DTI's attempts to address the challenges at the NLB and concerned at the obvious attempts to make the National Lottery a state lottery and to give greater powers to the Minister. Should the National Lottery become a state lottery, all the original intentions of the initial drafters of the Lotteries Act, that the NLDTF be made available to fund an active, responsive and independent civil society will be lost. As the FPA, we hope that the DTI is able to remove those clauses in the Amendment Bill that aim to take away a vital source of income to a sector that has and continues to ensure that even those that the government cannot reach are not excluded from South African society.