MINISTER
JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

Private Bag X276, PRETORIA, 0001 • SALU Building, 316 Thabo Sehume Street, PRETORIA • Tel: (012) 406 4669, Fax: 086 507 5765 • www.doj.gov.za
Private Bag X256, CAPE TOWN, 8000 • 5th Floor, Room 510, 120 Plein Street, CAPE TOWN • Tel: (021) 467 1700, Fax: (021) 467 1730 • www.doj.gov.za

Ref: 8/6/nie/1
E-mail: Ministry@justice.gov.za

Honourable Mr M J Mahlangu, MP
Chairperson of the National Council of Provinces
P O Box 15
CAPE TOWN
8000

Dear Mr Mahlangu

SUBMISSION TO ALTER THE AREAS OF JURISDICTION OF THE NORTH WEST HIGH COURT, MAFIKENG AND THE NORTHERN CAPE HIGH COURT, KIMBERLEY

SUBMISSION TO ALTER THE AREAS OF JURISDICTION OF THE NORTH WEST HIGH COURT, MAHIKENG AND THE NORTHERN CAPE HIGH COURT, KIMBERLEY

As you are aware, the implementation of the Constitution Twelfth Amendment Act, 2005 resulted in the alteration of the boundaries of the Northern Cape and North West provinces. In terms of these canges, the Moshwaneng Local Municipality was included into the Northern Cape Province. The changes brought to the provincial boundaries of the latter two provinces necessitate a consequential change to the Kudumane magisterial district which falls under the area of jurisdiction of the North West High Court, Mahikeng, while the corresponding municipality fall within the provincial boundary of the Northern Cape. The current situation leads to various challenges and disjuncture in respect of the administration of justice. For example the laws passed by the Nothern Cape Provincial Legislature are adjudicated by the North West High Court instead of the former court which lacks jurisdiction over the municipal area. This in turn causes further disjuncture in respect of the Magistrates Courts and other law enforcement agencies and hinders access to justice.

On 7 April 2013 I approached the Judicial Sevice Commission and the Heads of Courts to seek their approval of the notice that seeks to extend the area of jurisdiction of the Northern

Cape over the Kudumane magisterial district to correct the situation. Both the Judicial Service Commission and the Heads of Courts have given their approval of the notice.

In terms of section 2(2) of the Interim Rationalisation of Jurisdiction of High Court Act, 2001. (Act No.41 of 2001) the approval of Parliament is required before the notice can be published. The latter section provides as follows:

"(1) Notwithstanding the provisions of any other law, the Minister, may after consultation with the Judicial Service Commission, by notice in the Gazette-

(a) alter the area of jurisdiction for which a High Court has been established by including therein or excising therefrom any district or part thereof;

(b) amend or withdraw any notice issued in terms of this section.

(2) Any notice referred to in subsection (1) must be approved by Parliament before publication thereof in the Gazette".

A map depicting the Kudumane magisterial district which will be added to the area of jurisdiction of the Northern Cape High Court is attached for ease of reference.

Other subsequent alterations of the areas of jurisdiction of the High Courts to give effect to the rationalisation of courts contemplated in item 16 (5) of Schedule 6 to the Constituion, will be dealt in accordance with the procedure specified in the Superior Courts Act which was passed by Parliament recently.

I will apperciate Parliament's consideration of this matter,

With kind regards

J - Rade.

JEFF RADEBE, MP
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

Date: 16/05/13

Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 438 Cape Town 5 December 2001 No. 22893

THE PRESIDENCY

No. 1282 5 December 2001

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 41 of 2001: Interim Rationalisation of Jurisdiction of High Courts Act, 2001

(English text signed by the President.)
(Assented to 29 November 2001.)

ACT

To make provision for the interim rationalisation of the areas of jurisdiction of the High Courts; and to provide for matters connected therewith.

PREAMBLE

WHEREAS item 16(6)*(a)* of Schedule 6 to the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), provides that as soon as practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution;

AND WHEREAS item 16(6)*(b)* of Schedule 6 to the Constitution provides that the Cabinet member responsible for the administration of justice, acting after consultation with the Judicial Service Commission, must manage the said rationalisation;

AND WHEREAS item 16(4)*(a)* of Schedule 6 to the Constitution provides that a provincial or local division of the Supreme Court of South Africa or a supreme court of a homeland or a general division of such a court, becomes a High Court under the new Constitution without any alteration in its area of jurisdiction, subject to any rationalisation contemplated in item 16(6) of Schedule 6 to the Constitution;

AND WHEREAS the rationalisation process envisaged in item 16(6) of Schedule 6 to the Constitution is a comprehensive process which will require a considerable period to bring to its conclusion;

AND WHEREAS the interim rationalisation of the areas of jurisdiction of certain High Courts as a matter of urgency will promote the efficiency of, and equity relating to, the administration of justice throughout the whole of the Republic;

BE IT THEREFORE ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—
"Constitution" means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);
"district" means any district referred to in section 2(1)*(a)* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944);
"High Court" means any High Court contemplated in section 166*(c)* of the Constitution;
"Judicial Service Commission" means the Judicial Service Commission contemplated in section 178(1) of the Constitution;
"Minister" means the Cabinet member responsible for the administration of justice.

Minister may alter area of jurisdiction of any High Court

2. (1) Notwithstanding the provisions of any other law, the Minister may, after consultation with the Judicial Service Commission, by notice in the *Gazette*—

(a) alter the area of jurisdiction for which a High Court has been established by including therein or excising therefrom any district or part thereof;

(b) amend or withdraw any notice issued in terms of this section.

(2) Any notice referred to in subsection (1) must be approved by Parliament before publication thereof in the *Gazette*.

(3) The publication of a notice referred to in subsection (1) does not affect any proceedings which have been instituted but not yet completed at the time of such publication.

Transfer of proceedings from one High Court to another

3. (1) If any civil proceedings have been instituted in any High Court, and it appears to the Court concerned that such proceedings—

(a) should have been instituted in another High Court; or

(b) would be more conveniently or more appropriately heard or determined in another High Court,

the Court may, upon application by any party thereto and after hearing all other parties thereto, order such proceedings to be removed to that other High Court.

(2) An order for removal under subsection (1) must be transmitted to the registrar of the High Court to which the removal is ordered, and upon receipt of such order that Court may hear and determine the proceedings in question.

Repeal of laws and saving

4. Subsections (1) and (4) of section 6 of, and the First Schedule to, the Supreme Court Act, 1959, are hereby repealed.

(2) Notwithstanding the repeal of the laws referred to in subsection (1), the seats and the areas of jurisdiction of the High Courts referred to in the said First Schedule shall, subject to any alteration under section 2, remain as they were immediately before the commencement of this Act.

Short title

5. This Act is called the Interim Rationalisation of Jurisdiction of High Courts Act, 2001.

Deliberation on the Protection of Personal Information Bill [B 9B – 2009]

NATIONAL TREASURY SUBMISSION 7 JUNE 2013

national treasury
Department:
National Treasury
REPUBLIC OF SOUTH AFRICA

Enquiries: Adv E van Schoor Tel 012 315 5983

Mr Gurshwyn Dixon
Secretary to the Select Committee on Security and Constitutional Development
Parliament of the Republic of South Africa
E-mail: gdixon@parliament.gov.za
Fax: 086 6589 371

Dear Mr Dixon

PROTECTION OF PERSONAL INFORMATION BILL

1. I refer to the Protection of Personal Information Bill ("the Bill"), which is currently before the Select Committee on Security and Constitutional Development ("the Committee").

2. The National Treasury ("the NT") and the Financial Services Board ("the FSB") have highly appreciated the opportunity on 28 November 2012, to present submissions to the Committee, to attend further deliberations on the Bill by the Committee on 13 February 2013, and to attend the workshop on the Bill held on 22 May 2013.

3. The NT and the FSB welcomed the request of the Committee on 13 February 2013 that the NT, the FSB and the Department of Justice and Constitutional Development ("the DoJCD") endeavour to find solutions to the outstanding issues regarding clauses 38(2) and 72(3)*(a)* of the Bill. Officials of the NT and the FSB have engage with officials the DoJCD to develop proposals to address these outstanding concerns. The opportunity to continue to do so following the workshop on 22 May 2013 is also appreciated.

4. The NT and the FSB also greatly appreciate the DoJCD's willingness to engage on outstanding issues throughout a very protracted process. The engagement has enabled us to reach agreement regarding proposed amendments to clause 72 of the Bill, and also to have fruitful engagements regarding clause 38.

5. The DoJCD has requested that detail be provided as to which specific functions that the FSB performs, that it would be unable to perform, in terms of the provisions of the Bill as they currently stand. Such specificity is endeavoured to be provided to the DoJCD and the Committee in the Annexure which is attached, which details specific activities which have in fact been undertaken by the FSB in the performance of its functions, which would be impeded in terms of the Bill as it currently stands.

Clause 38 of the Bill

6.1 In light of the engagements that have taken place with the DoJCD in relation to the NT's and FSB's concerns regarding clause 38 of the Bill, it is proposed that clause 38(2) of the Bill be amended to provide as follows:

"(2) For purposes of this section, the term **"relevant function"** means any function of a public body, or conferred on any person in terms of the law, which is performed to –
(a) protect members of the public against—

(i) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or

(ii) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity;

(b) ensure that financial sector institutions conduct their business, both their internal business processes and external consumer-facing activities, in a way which is consistent with and advances the objectives of consumer protection, fairness and integrity in financial markets and confidence in the financial system; or

(c) ensure the safety and soundness of financial institutions, including the ability of the financial institutions to meet the financial promises and obligations they incur in the course of carrying out their business, and thereby ensure the stability of the financial system."

6.2. It is also proposed that the current wording of clause 38(1) of the Bill be retained, and that the Committee not adopt the proposed amendment to clause 38(1) that was proposed in the list of amendments that the DoJCD submitted to the Committee at the workshop on 22 May 2013. The proposed amendment, to restrict the application of clause 38 to only clause 11(3) and (4), and not to clause 11(1) and (2), would result in clause 38 not providing the necessary assistance to financial sector regulators in relation to the application of clause 11, and is a matter of serious concern for the NT and the FSB.

MOTIVATION FOR PROPOSAL

Background

7.1 For purposes of having an effectively functioning and stable financial system, both effective prudential and market conduct regulation are required.

7.2 The term "prudential regulation" is viewed as regulation in order to ensure the safety and soundness of financial sector institutions, focusing in particular on the ability of the financial institutions to meet the financial promises and obligations they incur in the course of carrying out their business.

7.3 The term "market conduct regulation" is viewed as regulation in order to ensure that financial sector institutions conduct their business - both their internal business processes and external consumer-facing activities - in a way which is consistent with and advances the objectives of consumer protection, fairness and integrity in financial markets and confidence in the financial system.

7.4 The Financial Services Board is currently responsible for regulation of the following key financial sector areas:

- Pension fund supervision;
- Insurance supervision;
- Securities supervision;
- Stability of the Financial Markets and the various components of the financial sector that it regulates;
- Conduct of business;
- Consumer protection; and
- Aspects of market competition.

7.5. In terms of current legislation, the Financial Services Board is responsible for both prudential and market conduct regulation within the areas of financial activity noted above.

7.6 The Banking Supervision Division in the South African Reserve Bank is currently responsible for the regulation and supervision of banks.

7.7 In terms of the Twin Peaks regulatory framework that is envisaged to be established, a Prudential Regulator will be established within the South African Reserve Bank, and the current Financial Services Board will evolve to become the new Market Conduct Regulator.

7.8 *Important Aspects of the FSB's current functions*

7.9 *Financial Soundness*

As a regulator, the FSB needs to be convinced that the regulated entities are financially sound to fulfil their operational requirements prior to and after licensing. The FSB usually relies not only on the information provided by the applicant entity but also on information obtained from other regulators to establish its financial soundness. Regulated entities tend to operate in different sectors and are thus regulated by various regulators, who exchange information on a daily basis on the financial soundness thereof. The objective here is not only to protect investors but to ensure financial soundness of the regulated entities to increase confidence in our financial sector. The current definition of 'relevant function' in the PPI Bill limits the allowable exchange or processing of information by these regulators to instances where it is necessary to protect the members of the public.

7.10 *Financial Markets Integrity and Efficiency*

The FSB regulates the financial markets in South Africa, which comprises of financial market infrastructures and other regulated persons, i.e. brokers, custodian, financial advisers and intermediaries, etc. All these entities are required to contribute to the efficiency and integrity of the financial markets and ultimately of the broader economy. The FSB is a member of the International Organisation of Securities Commissions, a standard setting body for securities regulation. It has signed a multilateral memorandum of understanding in terms of which regulators have agreed to exchange information of, inter alia, personal information of the entities they regulate. It exchanges information on a regular basis on financial markets participants who operates cross border, including exchanges, clearing houses, central securities depositories, etc.

7.11 *Financial stability*

The FSB has also a mandate to contribute to the overall stability of the financial system. Financial stability is a responsibility of all local financial sector regulators. It is a joint effort requiring exchange of information on group supervision of entities and other macro prudential related issues. The FSB is also part of the Financial Stability Oversight Committee which monitors financial stability related issues in South Africa and globally. There is also regulator to regulator exchange of information to ensure financial stability.

Prudential and Market Conduct Regulation, and the move towards the Twin Peaks Regulatory Framework

7.12 There will, in the future, be joint regulation of the financial markets between the Prudential and the Market Conduct regualtors, wherein MoUs will be entered into to ensure adequate and coordinated regulation of the SA financial markets. Both regulators will need to satisfy themselves that the SA financial market infrastructures are efficient, and it will be necessary to exchange information on the regulated entities that participate in the financial markets for this purpose.

7.13 With regard to financial stability, the Market Conduct Regulator will intensify its role in contributing to financial stability and will be working closely with the Treasury and prudential regulator in ensuring overall financial stability in the SA financial sector.

7.14 In the future, the Market Conduct Regulator will focus most intently on market conduct regulation, and the Prudential Regulator will focus intently on prudential regulation, as defined above. However, they will need to be able to intensely and extensively interact with

and exchange information (including personal information) with each other, and with domestic and other international regulators, for purposes of effective prudential and market conduct regulation, and effective functioning and stable financial markets, and financial stability for the country.

The key concern with the Bill

8.1 The key concern with the Bill is that it does not appropriately cater for, and will hinder the appropriate and effective conduct of the vital market conduct and prudential regulatory functions as defined above. The Bill has, in the exclusions set out in clause 3, provided appropriate recognition to the anti-money laundering and anti-terrorism activities of the Financial Intelligence Centre, and in specific exemptions contained in clauses such as clauses 11, 12, 15 and 18 has provided appropriate recognition for the revenue raising activities of the South African Revenue Service. The prudential and market conduct regulatory functions as described above are essential to protecting the economic interests of the Republic and the interests of affected consumers. They are critical in relation to the maintenance of effectively functioning and stable financial system, and must be accorded the same appropriate recognition and status as the functions of the FIC and SARS.

8.2 Considering clause 6 of the Bill, it does not provide any exemption with respect to the prudential and market conduct regulatory functions that must currently be performed by the Financial Services Board, and that is envisaged to be performed by the Prudential and Market Conduct Regulators. Clause 6(1)*(c)* only refers to activities of a public body relating to:

"(i) national security, including activities that are aimed at assisting in the identification of the financing of terrorist and related activities, defence or public safety; or

(ii) the purpose of which is the prevention, detection, including assistance in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures,".

8.3 The critical need for the financial stability and effective prudential and market conduct regulation are not provided for in the Bill.

8.4 It is notable that clauses 12(2)(d)(ii), 15(3)(c)(ii) and 18(4)(c) (ii) provide explicit exemption for the activities of the South African Revenue Service. The activities of the FSB and other financial sector regulators are not adequately catered for in clauses 11(1), 12(2), 15(3) and 18(4). Specific information sharing activities relating to the FSB's functions which have been undertaken with other regulators, which would be impeded in terms of the Bill as it currently stands, are detailed in the Annexure to this letter.

8.5 Considering clause 38(2), and the current definition of "relevant function" in the Bill, it covers certain, but not all aspects of market conduct regulation, as it does not encompass regulating the business processes and practices of financial sector entities. It primarily covers the aspect of consumer protection, and does not adequately cater for the critical market conduct regulatory activities of ensuring fairness and integrity in financial markets and confidence in the financial system. The definition of "regulatory function" only refers to activities specifically aimed at the protection of members of the public, and does not cater for the critical aspects of protecting financial market integrity and confidence in the financial system.

8.6 The definition of "regulatory function" also does not properly cater for prudential regulation and in particular, the critical overall function of ensuring financial stability in the country.

8.7 In order for the Bill not to inappropriately hinder appropriate market conduct and prudential regulation, and pose a risk to the maintenance of an effectively functioning financial system in South Africa, it is essential that clause 38(2) of the Bill cater appropriately for the market conduct and prudential regulatory functions currently performed by the Financial Services

Board and the South African Reserve Bank, and also for the future functions of the Prudential and Market Conduct regulators that are envisaged to be established.

9. It is hoped that the outstanding concerns regarding clause 38 Bill can be satisfactorily addressed through the adoption by the Committee of the above amendments proposed to clause 38(2), and the retention of the current wording of clause 38(1).

Yours sincerely,

Adv E Van Schoor
Chief Director: Legislation

Date: 7/6/2013

EXAMPLE ON AD HOC INFORMATION REQUESTS:

No.	Date received	Requester	Purpose
1.	7/5/2012	Swiss Financial Market Supervisory Authority (FINMA)	Verification of shareholding in an Insurance Company South Africa
2.	16/5/2012	Bermuda Monetary Authority (BMA)	Letter of good standing of a registered insurer (financial, directors and the like)
3.	17/5/2012	Insurance Regulatory and Development Authority (IRDA): India	Letter of no objection that shareholding in registered insurer is held through a specific company
4.	10/5/2012	China Insurance Regulatory Commission	Letter of good standing of a registered insurer (financial, directors and the like)
5.	28/5/2012	Central Bank of Lesotho	Letter of no objection to the merging of subsidiaries of registered insurer
6.	29/5/2012	Guernsey Financial Services Commission	Confirmation of fit and proper status of a specific individual
7.	09/7/2012	Office of the Commissioner of Insurance (Hong Kong)	Letter of good standing of a registered insurer (financial, directors and the like)
8.	11/6/2012	Bermudian Monetary Authority (BMA)	Letter of good standing of a registered financial services provider (financial, directors and the like)
9.	13/9/2012	Mozambique	Financial soundness request on registered insurer
10	12/9/2012	Qatar Financial Centre Regulatory Office	Confirmation of fit and proper status of a specific individual
11	24/9/2012	Bank Negara Malaysia	Confirmation of no objection to the establishment of office of a registered insurer in that country
12	09/10/2012	Isle of Man Insurance and Pensions Authority	Confirmation of fit and proper status of a specific individual
13	27/11/2012	Financial Services Commission: Gibraltar	Confirmation of fit and proper status of a specific individual

14	14/12/2012	Central Bank of Lesotho	A complain from the Central Bank of Lesotho of Unlawful soliciting of insurance business in Lesotho by registered financial services provider
15	30/1/2013	Insurance Regulatory and Development Authority (IRDA): India	Confirmation of fit and proper status of a specific individual
16	19/2/2013	Financial Services Commission: Gibraltar	Confirmation of fit and proper status of a specific individual
17	11/3/2013	Jersey Financial Services Commission	Letter of no objection to a change in asset managers
18	19/3/2013	Monetary Authority of Singapore	Confirmation of fit and proper status of a specific individual
19	8/4/2013	Central Bank of Lesotho	Information of registered insurers and financial services providers allegedly conducting business illegally in Lesotho
20	17/4/2013	Jersey Financial Services Commission	Confirmation of fit and proper status of a specific individual
21	24 May 2013	Malta Financial Services Authority	Confirmation of fit and proper status of a specific individual

EXAMPLE ON SUPERVISORY COLLEGES:

- The following international supervisory colleges were attended during 2012 up to present:
  - ✓ An Old Mutual supervisory college at the FSA held in the United Kingdom from 14 to 16 March 2012.
  - ✓ An international supervisory college on the Zurich Group of Companies in Zurich, Switzerland was attended in July 2013.
  - ✓ An Old Mutual PLC supervisory college that was hosted by the FSA in the UK during March 2013.

- The following "local" supervisory colleges were attended since January 2012:
  - ✓ In March 2012 supervisory colleges were held with the Bank Supervision Department to discuss ABSA Group, MMI group and Old Mutual South Africa Group of Companies.
  - ✓ In April 2012 supervisory colleges were held with the Bank Supervision Department to discuss Standard Bank Limited / Liberty Holdings Limited Group of companies.
  - ✓ In June 2012 supervisory colleges were held with the Bank Supervision Department on African Bank and Investec Group of Companies.
  - ✓ In September 2012, supervisory colleges were held with the Bank Supervision Department to discuss ABSA Group and its regulated entities and Old Mutual South Africa Limited and its regulated entities.

- ✓ In October 2012, supervisory colleges were held with the Bank Supervision Department to discuss RMI Holdings / FirstRand and its regulated entities.
- ✓ In November 2012 a supervisory college was held with the Bank Supervision Department to discuss Liberty Group/Standard Bank and its regulated entities.
- ✓ In January 2013 a supervisory college was held with the Bank Supervision Department to discuss African Bank Investment Limited and Investec Limited.
- ✓ In March / April 2013 a supervisory college was held with the Bank Supervision Department to discuss MMI group / FirstRand group, Standard Bank Group / Liberty Holdings Limited and ABSA Group.

International standards relating to supervisory colleges

INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS: INSURANCE CORE PRINCIPLES, STANDARDS, GUIDANCE AND ASSESSMENT METHODOLOGY, 1 OCTOBER 2011 AS AMENDED 12 OCTOBER 2012 This publication is available on the IAIS website (www.iaisweb.org).

Supervisory colleges:

The primary purpose of a supervisory college would be to discuss supervisory issues and exchange all information that is relevant to a group (including financial information, personal information and the like). Typically a supervisory college focus on the following:

- Agree on the cooperation and coordination process including the planning and setting of procedures for supervisory cooperation during emergency situations;
- Produce an overview of the group setting out its formal and operational structure;
- Carry out a risk analysis on a group-wide basis, identifying the most relevant entities and the most important relationships in the group;
- Discuss issues supervisors have found within the entities they supervise that they believe could be systemic throughout the group;
- Where practicable, agree on areas of supervisory work to avoid unnecessary duplication; possible joint inspections could also be decided;
- Agree on the information supervisors should gather from the group and exchange with other members of the supervisory college, including the form and the frequency with which this happens; and
- Agree on whether the supervisory college should set out any arrangements in respect of group-wide supervision in written form (bilateral or multilateral agreements).

Obligations: The members of a supervisory college should communicate to one another all relevant information which may allow or facilitate supervision on a group-wide basis. Members of a supervisory college should also consider whether to communicate, on their own initiative, information which appears to be essential for other involved supervisors. The information that can be exchanged is facilitated by cooperation agreements concluded between the involved supervisors.

It is the responsibility of each supervisor within the supervisory college to ensure the safe handling of confidential information; there is no global law or regulation on confidential information. Each member of the supervisory college should take measures necessary to avoid unintentional divulgence of information or the unauthorised release of confidential information. It is vital that appropriate information exchange agreements or direct arrangements are in place between the members of the supervisory college to ensure that information can be exchanged in a secure environment.

Where confidential information exchanged within a supervisory college is also communicated to other supervisors there should be a formal mechanism in place with these supervisors to ensure the protection of the confidential information. Mechanisms could be included in MoUs or via direct arrangement.

There are various mechanisms for fostering cooperation, promoting communication and information exchange and facilitating enhanced coordination of group-wide supervision. The benefits of designating a group-wide supervisor can be further enhanced through mechanisms such as a memorandum of understanding (MoU) between involved supervisors and establishment of a "supervisory college" of involved supervisors. In fact the work of a supervisory college is usually based on the conclusion of a MoU between all parties involved. An MoU could take the form of a bilateral (between two jurisdictions) or multilateral (between more than two jurisdictions) agreement. The scope of an MoU could also vary, to reflect the circumstances of the particular group and involved supervisors. An MoU may relate to the exchange of information, based on formal request and/or in particular circumstances, such as emergency circumstances. In order for an MoU to work effectively, it is important that a strict confidentiality regime is ensured among all involved jurisdictions. An MoU may extend to the allocation of identified aspects of group-wide assessment to particular involved supervisors or the allocation of all aspects of group-wide assessment to the designated group-wide supervisor. An MoU may indicate a level of accepted reliance by one supervisor on the work of another supervisor (a limited form of supervisory recognition).

DPT JUSTICE REPLY TO NATIONAL TREASURY 10 JUNE 2013

Gurshwyn Dixon - Clause 38: Protectionof Personal Information Bill

From: Louw Ananda <AnaLouw@justice.gov.za>
To: "gdixon@parliament.gov.za" <gdixon@parliament.gov.za>
Date: 2013/06/10 04:32 PM
Subject: Clause 38: Protectionof Personal Information Bill
CC: Jeannine Bednar-Giyose <Jeannine.Bednar-Giyose@treasury.gov.za>, "LouwAn...
Attachments: 2013-youth-month15c3f5a

Dear Mr Dixon

1. I refer to the submission of the National Treasury, dated 7 June 2013, in connection with clause 38 of the Protection of Personal Information Bill, 2009, which Bill is currently being considered by the Select Committee.

2. The DOJCD's understanding is that the FSB and the National Treasury want to extend the definition of "relevant function" in clause 38(2) of the Bill in order to restrict the applicability of the conditions for lawful processing as set out in clauses 11, 12, 15 and 18 in Chapter 3 of the Bill.

3. The proposal by the FSB in connection with clause 38 will be discussed hereunder with specific reference to the issues that have been raised in the letter dated 7 June 2013.

Ad paragraph 5

4. Throughout the three years since it has raised this issue, the FSB has had a standing invitation from the DOJCD, the Technical Committee, the Portfolio Committee and once again during consultations in the NCOP to indicate what additional functions or duties there are that the FSB is unable to perform within the confines of the Bill, taking into consideration the existing exceptions (qualifications) in the conditions as well as the exclusions provided for in clause 6, and the exemptions in clause 38.

5. Unfortunately, the FSB has been unable to provide any further motivation in this regard. It should be noted that the most recent proposal by the FSB for the amendment of clause 38 refers to activities that are already covered in those provisions of the Bill which deal with the conditions for the lawful processing of personal information and does not take the matter any further.

6. In a final attempt to provide the information requested the FSB has now enclosed an Annexure which in their view lists the activities that may be impeded if they have to be performed in terms of the existing provisions of the Bill.

7. The Annexure contains a list of activities referred to as "Examples relating to the sharing of information". It is difficult to understand the relevance of the activities that have been listed in the Annexure. Firstly, no explanation is provided as to why the processing referred to in this Annexure will not be possible in terms of the Bill as it currently stands. Secondly, about a third of the institutions referred to in the Annexure are situated in countries where they are already subject to data privacy legislation. Despite this fact all of them are processing the information as indicated in the Annexure. The Annexure therefore does not present the necessary justification for any additional amendments to be affected to clause 38.

Ad paragraphs 8.1 to 8.3

8. The FSB seems to be of the opinion that the activities of the FIC and SARS are being accorded a higher status and recognition by the Bill than the activities of the FSB which, they argue, are of equal importance.

9. It should, however, be noted that exclusions, exemptions and exceptions from the Bill are not determined according to status or importance of responsible parties or their activities. The only criterium used is whether the activities of a responsible party will be unlawfully impeded if the responsible party has to comply with the Bill.

10. Worldwide a pre-evaluation has taken place and three areas of processing, namely, public security, defence and state security, have been identified as being areas where it would, in general, not be possible to comply fully with the internationally accepted privacy conditions. Article 3 of the Directive and clause 6 of the Bill deal with this aspect.

11. Article 13 of the Directive, in contrast to Article 3, provides for certain further derogations in respect of certain specific categories of information as set out in paragraphs (a) to (g).

12. This Article does not, however, in contrast to Article 3, make provision for broad exclusions or exemptions from conditions. Two requirements have to be met:

a) only the scope of a condition (obligations and rights) may be restricted; and
b) the restriction must be shown to be a necessary measure.

13. In order to qualify for a **restriction/exception** of any condition, the responsible party has to show that the specific restriction required is a necessary measure to enable the responsible party to exercise a specific activity within the class of information defined in the Article, even though such activity may impose on the data subject's privacy. The scope of the condition is, therefore, restricted only to the extent that the responsible party is not able to exercise its functions in terms of the class of information identified, without the restriction.

14. The Explanatory Memorandum of the data protection legislation of the Netherlands, for example, stresses that the "necessity" test in this regard should be applied ***very strictly*** and basically only to avoid "***absurd***" consequences from the application of the normal rules.

15. The PPI Bill can broadly be seen as giving effect to these derogations that are stipulated in Article 13 by means of the **exceptions (qualifications)** that have been included in the specific conditions in Chapter 3 and the **exemptions** provided for in terms of clauses 37and 38.

16. The processing performed by the FIC, the FSB and SARS has been evaluated in exactly the same manner in each case. Clause 6 does not refer to specific responsible parties. However, those activities performed by the three responsible parties that fall within these three categories will be excluded from the Bill. Any other activities will continue to fall within the scope of the Bill. Whereas many of the FIC's processing activities will resort under these three categories, fewer instances of the FSB and SARS processing will be excluded from the Bill in terms of clause 6.

17. None of these entities have been excluded in respect of all their processing activities. All three had to indicate why specific activities had to be excepted from the conditions. Certain aspects of the processing of these responsible parties were then excepted/exempted in accordance with the motivation provided. The remaining activities of the FIC have received no further exceptions. SARS has been excepted from clauses 12,15 and 18, but not from clause 11.The FSB has received an exemption from clause 11(3) and (4), clauses 12,15 and 18 as set out in clause 38 to the extent that these exemptions could be motivated.

18. As explained above in respect of paragraph 5 of the FSB submission, the FSB has been unable to provide any additional motivation for the further amendment of clause 38 of the Bill.

Ad paragraphs 8.5 to 8.7

19. It is clear from the above that the Bill does not aim to address all the functions of a responsible party in each of the derogations, but only those activities that would be impeded should a responsible party comply with the Bill.

Ad paragraph 6.2

20. The FSB has raised an objection against the amendment that has been proposed by the DOJCD in terms of which reference to clause 11(1) and (2) will be removed from clause 38. The original inclusion of clause 11(1) and (2) in clause 38 should be seen as a technical oversight. Article 13 of the EU Directive, which is the provision which provides for derogations from the conditions, does not make provision for any derogation from Article 7 of the Directive on which clause 11(1) and (2) of the Bill is based. It should further be noted that Article 13 of the Directive also does not provide for a derogation from Article 14 of the Directive on which clause 11(3) and (4) of the Bill is based. However, in the last mentioned instance the new EU Regulation does provide in Article 21 thereof for a derogation in this regard. Irrespective of whether the Directive is applicable or not it should be noted that clause 11(1) and (2) provides the basis upon which all processing is conducted in terms of the Bill. It is therefore an enabling provision which can not be excluded under any circumstances. It also provides an essential foundation for the remaining conditions in respect of which the FSB has not received an exemption.

21. By way of conclusion, I would like to point out that the DOJCD will therefore not be in a position to support any further amendment of clause 38 of the Bill.

22. It is trusted that the above information will be of assistance to you.

Kind regards
Henk du Preez

NATIONAL TREASURY REPLY

11 JUNE 2013

Gurshwyn Dixon - Protection of Personal Information Bill

From: "Jeannine Bednar-Giyose" <Jeannine.Bednar-Giyose@treasury.gov.za>
To: "Gurshwyn Dixon" <gdixon@parliament.gov.za>
Date: 2013/06/11 01:12 PM
Subject: Protection of Personal Information Bill
CC: <AnaLouw@justice.gov.za>, "Du Preez Henk" <HDuPreez@justice.gov.za>, "Em...

Dear Mr Dixon;

1. We refer to the submission of the Department of Justice and Constitutional Development dated 10 June 2013, in which they provided a response to our submissions dated 7 June 2013. We would like to provide a few brief comments which we hope will be of assistance to the Committee.

2. During the deliberations in the Portfolio Committee on Justice and Constitutional Development, clause 38 of the Bill was developed, and it was identified at that stage in submissions made to the Portfolio Committee, that clauses 11, 12, 15, and 18 of the Bill posed difficulties for the functions of the FSB, and it was agreed that those provisions could be referred to in clause 38 of the Bill. The focus at that stage shifted to the definition of "relevant function" as incorporated in clause 38(2) of the Bill.

3. We have, on several occasions, endeavoured to respond to queries and provide the detail that has been sought by the Department of Justice and Constitutional Development. The Department of Justice and Constitutional Development has, unfortunately, not engaged with or commented upon the actual substance of the proposed amendment to clause 38(2) of the Bill.

4. We would highlight that our submissions do not only relate to the FSB, they also relate more broadly to impacts upon financial sector regulators, including the future Market Conduct and Prudential Regulators that are to be established. That is the crux of why our proposal in relation to clause 38(2) refers to the critical market conduct and prudential regulatory functions, and does not only refer to numerous specific functions of the FSB. The submissions indicate in what respects the prudential and market conduct functions of financial sector regulators are not appropriately catered for in the Bill, and why the definition of "relevant function" needs to appropriately reflect those functions.

5. In our submission on 7 June 2013, we noted that the functions of the Financial Intelligence Centre ("the FIC"), and the South African Revenue Service ("SARS"), have been appropriately incorporated in the Bill, while the other critical prudential and market conduct functions have not. The information sharing needs of the FSB, and the future Prudential and Market Conduct Regulators, are of a similar nature to those of the FIC and SARS, and in fact, these other financial sector regulators must be able to share information and co-operate with the FIC and SARS, and also with various international regulators. Therefore, it is essential that the prudential and market conduct functions of the FSB, and the future Prudential and Market Conduct Regulator, receive similar recognition in the Bill, as the impacts of the Bill on their functions is very similar in nature to the impacts on the functions of the FIC and SARS. The content of the proposed amendment in our submission of 7 June 2013 would appropriately recognize those functions, and provide for the specific exemptions that SARS receives in terms of the Bill. The FIC is granted an extensive exemption in terms of clause 6 of the Bill. The effect of these proposals would not provide such an extensive exemption.

6. We would kindly request the Committee to consider our submission of 7 June 2013, the content of the proposed amendment to clause 38(2), and the important prudential and

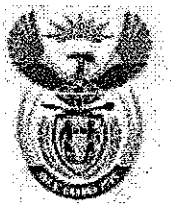
market conduct functions that the proposal seeks to ensure have appropriate recognition, and come to its own determination regarding the merits of the submissions and the proposals that we have made.

7. We would reiterate our serious concerns about the proposed amendment to clause 38 of the Bill that was submitted by the Department of Justice and Constitutional Development in its list of proposed amendments, and the proposed amendment certainly cannot be appropriately characterized as a "technical oversight": it substantially alters the content of the provision, and the Department of Justice and Constitutional Development has provided minimal explanation for the necessity of the amendment. Clause 38(1) as it stands would not be contrary to Article 21 of the new EU Regulation. There should, therefore, not be a necessity to amend clause 38(1) of the Bill, as clause 38(1) as it currently stands should not be problematic, as in relation to consent as addressed in clause 11, it would effectively be very similar to clause 11 (1)(c) and (e).

8. In conclusion, we thank the Committee for giving us the opportunity to make submissions, and for the consideration that the Committee has given to our submissions and proposals.

Very Best Wishes,

Jeannine Bednar-Giyose
Director: Financial Sector Regulation and Legislation
Chief Directorate: Legislation
Office of the Director General
Tel: (012) 315 5584, **Fax:** (012) 315 5121



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REPUBLIC OF SOUTH AFRICA

- Briefing on the Notice in terms of section 2(2) of Interim Rationalization of Jurisdiction of High Court Act no 41 of 2001