**Report of the Standing Committee on Finance (SCoF) on the referral of the Financial Intelligence Centre Amendment Bill [B 33B–2015] dated 21 February 2017**

Introduction

1. On 28 November 2016 the President referred the Financial Intelligence Centre Amendment Bill [B 33B–2015] (the Bill) back to the National Assembly in terms of section 79(1) of the Constitution. The President’s reservations concern the constitutionality of the proposed section 45B(1C) of the Bill, that authorises warrantless searches, under certain conditions, of any premises subject to the Financial Intelligence Centre Act, 2001. The Bill was originally introduced in part as a response to the Constitutional Court judgement in *Estate Agency Affairs Board v Auction Alliance* ([2014] ZACC 3) that found section 45B of the Financial Intelligence Centre Act 38 of 2001 unconstitutional because it operated from a point of departure that inspections could always be carried out without a warrant. The judgment required this situation to be attended to by introducing a distinction between instances where a warrant is required to conduct an inspection and where it is not required.
2. The reservations of the President are summed as follows:

“I am of the view that even though the purpose to be served by the Bill is very important and pressing, the proposed section 45B(1C) does not, in the respects identified, and others that the National Assembly may identify, meet all of the concerns set out in paragraphs 36 to 43 of the *Estate Agency Affairs Board* judgment referred to above.”

1. The reservations concern the substance of the Bill; namely, whether warrantless searches provided for in clause 32 of the Bill, amending section 45B of the principal Act, will survive constitutional muster. The President indicated that the authority to conduct warrantless searches must not be overbroad “as this would create an impermissible threat to the right to privacy.” Inspectors should not have “too much discretion in their searches, endangering the privacy of property owners and occupiers who are not adequately informed of the limits of the search or inspection.” Furthermore, as a search may result in criminal prosecution, the requirement for a warrant is necessary. The President’s referral was not accompanied by a legal opinion.
2. On 30 November 2016 the reservations of the President were referred to the Standing Committee on Finance (the Committee) for consideration and report in terms of Joint Rule 203.
3. Joint Rule 203 provides that the Committee must consider and confine itself to the President’s reservations and report an amended Bill, correcting any constitutional defect in the substance of the Bill, if it agrees with the President’s reservations. Similarly, any debate on the Report must be confined to the President’s reservations. Even the Constitutional Court must confine itself to the President’s reservations in the event that the President refers the Bill as a result of the reservations not being accommodated fully (*Ex Parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* (CCT12/99) [1999] ZACC 15). In other words, the Committee is authorised to amend only the clause (or clauses) that the President believes is (are) unconstitutional. The Committee does not have the power to review any other clauses on the grounds that they may also be unconstitutional or because there is a need for any change of policy.
4. The Committee was not obliged to have public hearings on the President’s concerns about the constitutionality of warrantless searches. In fact, on all previous occasions that the President returned a Bill to Parliament on the grounds that one or more clauses may be unconstitutional, the relevant parliamentary committee did not have public hearings. Committees have had hearings in cases where a Bill has been returned by the President on the grounds of inadequate public participation, not unconstitutionality. The Standing Committee on Finance had about 10 hours of public hearings and deliberated on the FICA Bill for over 40 hours between November 2015 and May 2016, allowing for submissions from the public until shortly before voting on the Bill, so the President did not question the public participation process related to the Bill. However, the Standing Committee on Finance, consistent with its approach to encouraging maximum public participation, decided to have public hearings on the President’s concerns about the constitutionality of warrantless searches in the FICA Bill.
5. Prior to publishing the invitation to make public submissions, the Committee received submissions, one of which argued for the reconsideration of the Bill, as opposed to dealing only with the constitutionality of the proposed section 45B(1C). When the Committee advertised for public hearings it was therefore clearly indicated that all submissions must deal only with the proposed new section 45B(1C) dealing with warrantless searches in clause 32 of the Bill, as the Committee’s mandate is circumscribed by section 79 (1) of the Constitution and Parliament’s Joint Rules.
6. At the public hearings independent legal experts also confirmed that the Committee had to restrict its deliberations to the constitutionality of warrantless searches in the FICA Bill.

Public Participation

1. Despite the restrictions referred to in paragraphs 5 and 7 above, the Committee decided not to stifle stakeholders who made submissions to the hearings and allowed them to raise their concerns about aspects of the FICA Bill other than the constitutional issues related to warrantless searches. The majority in the Committee felt that the hearings should not be over-dominated by Senior Counsel and other technical experts, and stakeholders should be free to speak their mind. But the Committee was clear that it could only process issues relevant to the constitutionality of warrantless searches in the FICA Bill. All other issues are to be put into a separate report that will be considered as part of the public hearings on the “Transformation, including the Deracialisation, of the Financial Sector” that begin on 14 March.

1. The Committee received written submissions on the FICA Bill from:

* Black Business Council (BBC)
* Progressive Professionals Forum (PPF)
* Council for the Advancement of the South African Constitution (CASAC)
* Banking Association of South Africa (BASA)
* Corruption Watch
* Association of Black Securities and Investment Professionals (ABSIP)
* Business Unity South Africa (BUSA)
* Business Leadership South Africa (BLSA)
* South African Institute of Professional Accountants (SAIPA)
* Cliff, Dekker, Hofmeyer
* CASISA

1. In addition to the submissions that dealt in the main with legal arguments on the constitutionality of the impugned provision, the Committee procured a legal opinion from private Senior Counsel, Adv Ishmael Semenya. National Treasury also submitted a legal opinion from private Senior Counsel, Adv Jeremy Gauntlett. Both senior Counsel presented the opinions during the public hearings, which were engaged with by the Committee.
2. Public hearings were conducted on 25 January 2017. The legal opinion from the Committee’s Senior Counsel concluded that the warrantless searches provision will pass constitutional muster and the Committee could return the Bill as is to the President. However, both Advocates Semenya and Gauntlett suggested that the Committee could also decide to make some minor amendments to clarify the authority of the inspector performing warrantless inspections. Adv Gauntlett also suggested that the committee consider providing further measures to prevent arbitrary exercise of this power. Another four legal opinions concurred with the view that the warrantless searches provision will pass constitutional muster. Two other opinions, one submitted by PPF and the other by SAIPA argued that the Bill will not pass constitutional muster. It was not clear to the Committee whether these came from lawyers.
3. All parties were invited to a second round of public engagement that took place on 1 February 2017. National Treasury responded to submissions presented at the previous engagement. Most organisations did not see the need to engage further on the issues.
4. While not seeking to be prescriptive, the Committee believes that other Committees deliberating on Bills returned by the President on constitutional grounds, should consider having public hearings, unless the circumstances make it completely unnecessary.

Amendments and Explanations

1. The Committee decided to make minor amendments to clarify the authority of the inspector performing warrantless inspections and to prevent arbitrary exercise of this power. The amendments were based primarily on proposals from Advocates Semenya and Gauntlett.
2. Clause 32 of the Bill now includes a definition for “compliance”, which is the purpose of inspections in terms of the Act. Read with the already included definition of “non-compliance”, it is now clearer that a warrantless inspection in terms of the proposed section 45B(1C) is not permitted in respect of criminal offences. This amendment addresses the President’s reservation that the apparent unqualified discretion of an inspector acting without a warrant may result in criminal prosecution.
3. The amendments to the Bill also remove the provision that “any” premises may be subject to a warrantless inspection and substitutes it with a distinction between “private residence” and “unlicensed residence”. In the former case, a warrantless inspection may only take place with the informed consent of the person apparently in control of the business and the occupant of that part of the private residence to be entered and inspected. In the case of an unlicensed business premises, informed consent from the person apparently in control of the business suffices. In the absence of consent, either premises may only be entered and inspected with the prior authority of Director of the Financial Intelligence Centre or the head of a supervisory body, or senior staff member of the Financial Intelligence Centre or supervisory body with the necessary delegation of authority. An inspector is not authorised to conduct a warrantless inspection based on his or her own opinion.
4. In addition to the existing requirement in the Bill of having a reasonable belief that a warrant will be issued and an application is likely to defeat the purpose of the inspection, the Committee added the requirement that the person authorising the inspection must reasonably believe that the inspection is for any or all of the actions permitted in terms of section 45B(2)(a) to (f). Section 45B(2) of the Financial Intelligence Centre Act circumscribes the conduct of an inspector during an inspection. This amendment addresses the President’s reservation about providing too much discretion for inspections that might endanger the privacy of property owners and occupiers who are not adequately informed of the limits of the search or inspection.
5. To protect the right to privacy further, the Committee made consequential amendments to the proposed section 45B(1D) to require any inspection to be reasonable in respect of the business hours and with strict regard to constitutional rights. Inspections outside business hours are limited to inspections on authority of the Director, the head of a supervisory body or a delegated official and a delay will defeat the purpose of the inspection. A new paragraph (d) elaborates on how an inspection must be conducted with strict regard to decency and good order as the circumstances require, in particular by—

(i) entering and inspecting only such areas or objects as are reasonably required for purposes of section 45B(2);

(ii) conducting the inspection discreetly and with due decorum;

(iii) causing as little disturbance as possible; and

(iv) concluding the inspection as soon as possible.

1. The Committee, having considered the reservations of the President, reports an amended Bill.

Report to be considered