**FIC AMENDMENT BILL [B 33B—2015]: RESPONSE OF NATIONAL TREASURY AND FINANCIAL INTELLIGENCE CENTRE TO PROPOSALS OF DEMOCRATIC ALLIANCE**

*Note: References to provisions in NT’s proposal dated 3/2/2017 unless otherwise indicated*

1. The DA proposes the introduction of a distinction between routine and non-routine inspections which will entail the following:

* Warrantless routine inspections of premises of licensed[[1]](#footnote-1) accountable[[2]](#footnote-2) institutions (except private residences) to determine compliance (45B)(1)(b))
* Non-routine inspections with a warrant of-
* a private residence which is licensed; (45B(1A)(a))
* a private residence which is not licensed, where it is reasonably believed that the residence is used for a business to which this Act applies; (45B(1A)(a))
* premises which are notlicensed and the FIC or supervisory body reasonably believes that the premises are used for a business to which the Act applies; (45B(1A)(b))
* premises which are licensed where there are reasonable grounds for suspecting that an act of non-compliance occurred (new 45)(1A)(c) in DA’s proposal).

Response:

* The Bill proposed to steer clear of distinguishing between routine and non-routine inspections.
* The proposed distinction will lead to a situation where a supervisor body or the FIC will have to obtain a warrant to do follow-up inspections where non-compliance was found in previous inspections, or where a supervisor body or the FIC raises the risk profile of an accountable institution based on external information and therefore wants to do more frequent inspections
* It will place the supervisor body in a position where it has to demonstrate that a routine inspection is not a non-routine inspection if its decision to do a routine inspection without a warrant is challenged on the basis of this distinction
* The proposed distinction offers more protection for institutions where there is more reason to inspect them and no protection for institutions where there is no reason to inspect them
* The Constitutional Court in the *Auction Alliance* case also did not endorse this distinction[[3]](#footnote-3)
* The introduction of this distinction in section 45B goes beyond addressing the President’s concerns in his referral.

2. The DA proposes that, before a warrantless inspection of a private residence (45(1C)(b)), not only the FIC Director/the head of a supervisory body/delegated senior official (i.e. prior internal authorisation), but also the inspector, must on reasonable grounds believe that the specified criteria are present for a warrantless inspection.

Response: The inspector is the functionary who must trigger this provision, i.e. requesting prior internal authorisation. Therefore it is unnecessary to include a prerequisite that the inspector must also have the belief that the specified criteria are present. The inspector is the one that will have to satisfy the relevant internal authority that the criteria in 45B(1C)(b) are present.

3. The DA proposes that a warrantless inspection of a private residence be limited to a residence suspected to be used for business purpose by a licensed accountable institution under the Act (new 45(1C)(b)(iii) in DA’s proposal). This will mean that a warrantless inspection of a private residence suspected to be used for a business to which the Act applies, but not licensed for this purpose, will always require either a warrant (45B(1A) or consent (45B(1C)(a)).

Response: The need for warrantless inspections is more prevalent where business premises or private residences are suspected to be used for a business to which the Act applies, but is not licensed under the Act. Therefore, excluding such private residences from the possibility of a warrantless search not supported.

4. The DA proposes that the provisions in 45B(1D) on the conduct of an inspection without a warrant also apply to inspections with a warrant (see also proposed deletion of 45B(1E) in the DA’s proposal)

Response: Propose that 45B(1E) be retained since it applies relevant provisions of 45B(1D), namely 45B(1D)(c) and (d) to inspections with a warrant. The reasonable time and notice requirements in 45B(1D)(a) and (b) do not apply to inspections with a warrant because the warrant itself will determine these requirements.

5. The DA proposes that an inspection with or without a warrant be at a reasonable time within ordinary business hours except if the inspection is without a warrant with internal prior authority, then it must be done as close to the ordinary business hours as the circumstances reasonably permit (45B(1D)(a)).

Response: In NT’s proposed 45B(1D) inspections without a warrant requirement in terms of 45B(1)(b) or inspections without a warrant in terms of 45(1C) (with consent of relevant persons or prior internal authority), the inspection must be-

“at a reasonable time within ordinary business hours or, if the inspector on reasonable grounds believes that the purposes for which the entry and inspection is sought, is likely to be defeated by a delay, as closely as possible to ordinary business hours as the circumstances reasonably permit”.

It is proposed that the above wording be retained. However, since inspections outside ordinary business hours is not necessary for inspections not requiring a warrant (45B(1)(b)) or inspections with consent (45B(1C)(a), inspections outside business hours should be limited to inspections without a warrant conducted with prior internal authority (45B(1C)(b)). See the proposed insertion below.

“at a reasonable time within ordinary business hours or, in the case of the entry and inspection in terms of subsection (1C)(b), if the inspector on reasonable grounds believes that the purposes for which the entry and inspection is sought, is likely to be defeated by a delay, as closely as possible to ordinary business hours as the circumstances reasonably permit”.

6. The DA’s proposes to add provision in 45B(1D)(d) to limit the scope of an inspection to only such documents and items as are reasonably relevant to the purpose of the inspection.

Response: Unnecessary. Provision is made in NT’s proposed 45B(1D)(d)(i) that entering and inspecting is limited to “areas or objects reasonably required for purposes of 45B(2). 45B(2) lists the acts an inspector may perform in a conducting an inspection. The purpose of an inspection is that of compliance and is explicitly stated in 45B(1), (1A) and (1C) (referring to (1A)).

7. The DA proposes to add paragraph (e) in 45B(1D) that the inspection must only be for the purpose of determining compliance and that the specific provisions be mentioned.

Response: Unnecessary in view of NT’s proposal to define “compliance” in 45B(1)(a) and provisions in 45B(1)(b), 45B(1A) and (1C) (referring to (1A)) clearly stipulating that inspections must be done for purposes of compliance.

1. Also means registered or authorised as applicable. [↑](#footnote-ref-1)
2. Also means a reporting institution. [↑](#footnote-ref-2)
3. Par’s 62-64 of *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd and others* 2014 (4) BCLR 373 (CC)). [↑](#footnote-ref-3)