

ANNEXURE B

BILL

An Act to promote the protection of personal information processed by public and private bodies; to provide for the establishment of an Information Protection Commission; and to provide for matters incidental thereto

To be introduced by the Minister for Justice and Constitutional Development

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows --

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CHAPTER 1

GENERAL PROVISIONS

Objects of the Act

1. (1) The objects of this Act are –

- (a) to give effect to the constitutional right to privacy-
 - (i) by safeguarding a person's personal information when processed by public and private bodies;
 - (ii) in a manner which balances that right with any other rights, including the rights in the Bill of Rights in Chapter 2 of the Constitution, particularly the right to access to information;
 - (iii) subject to justifiable limitations, including, but not limited to effective, efficient and good governance and the free flow of personal information, particularly transborder transfers.
- (b) to establish voluntary and mandatory mechanisms or procedures which will be in harmony with international prescripts and which will, while upholding the right to privacy, at the same time contribute to economic and social development in an era in which technology increasingly facilitates the circulation and exchange of information; and
- (c) generally, to promote transparency, accountability and effective governance of all public and private bodies by, including, but not limited to, empowering and educating everyone to understand their rights in terms of this Act in order to exercise their rights in relation to public and private bodies.

(2) When interpreting a provision of this Act, every court must prefer any reasonable interpretation of the provision that is consistent with the objects of this Act over any alternative interpretation that is inconsistent with these objects.

Interpretation

2. In this Act, unless the context otherwise indicates -

“biometric” means techniques of personal identification that are based on physical characteristics including fingerprinting, retinal scanning and voice recognition;

“Commission” means the Information Protection Commission as established in section 34 of this Act;

“consent” means any freely-given, specific and informed expression of will whereby data subjects agree to the processing of personal information relating to them;

“Constitution” means the Constitution of the Republic of South Africa 108 of 1996;

“data subject” means the person to whom personal information relate;

“information protection principle” means any of the principles set out in Chapter 3 of this Act;

“Minister” means the Minister for Justice and Constitutional Development;

“personal information”¹ means information about an identifiable, natural person, and in so far as it is applicable, an identifiable, juristic 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;

¹ The definition of “personal information” in this Bill corresponds to the definition of “personal information” in the Promotion of Access to Information Act 2 of 2002. Since the two pieces of legislation are so closely related and the Commission has furthermore proposed that one supervisory authority be appointed to oversee both Acts it is important to ensure consistency in the terminology used. The Commission would, however, like to propose the following changes to this definition, which, if approved, would then be effected in the definition in both Acts:

- * the word “financial” included before the word “criminal” in subparagraph (b)
- * subpara (d) to read as follows: “(d) the address, blood type or any other biometric information of the person;
- * a semi-colon to be inserted after the words “the person” in para (e) and the rest of the sentence to be deleted.
- * Paragraphs (g) and (h) to be deleted.

The definition also provides for information about an identifiable juristic person in so far as it is applicable. (See also the definition of “personal information” in the ECT Act.)
Comment is invited in all instances.

- b) information relating to the education or the medical, criminal or employment history of the person or information relating to financial transactions in which the person has been involved;
- c) any identifying number, symbol or other particular assigned to the person;
- d) the address, fingerprints or blood type of the person;
- e) the personal opinions, views or preferences of the person, except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual;
- f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
- g) the views or opinions of another individual about the person;
- h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the person, but excluding the name of the other individual where it appears with the views or opinions of the other individual; and
- i) the name of the person where it appears with other personal information relating to the person or where the disclosure of the name itself would reveal information about the person;
- j) but excludes information about a natural person who has been dead, or a juristic person that has ceased to exist, for more than 20 years;

“prescribed” means prescribed by regulation;

“private body” means

- (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
- (b) a partnership which carries or has carried on any trade, business or profession; or
- (c) any former or existing juristic person, but excludes a public body;

“processor” means the person or body which processes personal information for the responsible party, without coming under the direct authority of that party;

"processing" means any operation or any set of operations concerning personal information, including in any case the collection, recording, organisation, storage, updating or modification, retrieval, consultation, use, dissemination by means of transmission, distribution or making

available in any other form, merging, linking, as well as blocking, erasure or destruction of information;

“public body” includes-

- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when-
 - (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation; and
- (c) Parliament or a committee of Parliament;
- (d) the Cabinet as constituted under the Constitution;
- (e) any other body designated by the Minister by regulation made under this Act, to be a public authority for the purposes of this Act;

“record” means any recorded information -

- (a) regardless of form or medium; and includes any -
 - (i) writing on any material;
 - (ii) information produced, recorded or stored by means of any tape-recorder, computer equipment (whether hardware or software or both), or other device; and any material subsequently derived from information so produced, recorded or stored;
 - (iii) label, marking, or other writing that identifies or describes any thing of which it forms part, or to which it is attached by any

means;

- (iv) book, map, plan, graph, or drawing;
- (v) photograph, film, negative, tape, or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced;
- (b) in the possession or under the control of a public or private body, respectively;
- (c) whether or not it was created by a public or private body, respectively; and
- (d) regardless of when it came into existence;

"responsible party" means the natural person, juristic person, administrative body or any other entity which, alone or in conjunction with others, determines the purpose of and means for processing personal information.

CHAPTER 2

APPLICATION PROVISIONS

Application of this Act

3. This Act applies to-

- (a) the fully or partly automated processing of personal information, and the non-automated processing of personal information entered in a record or intended to be entered therein;
- (b) the processing of personal information carried out in the context of the activities of a responsible party established in the Republic of South Africa;
- (c) the processing of personal information by or for responsible parties who are not established in South Africa, whereby use is made of automated or non-automated means situated in South Africa, unless these means are used only for forwarding personal information.

Exclusions

4. This Act does not apply to the processing of personal information -

- (a) in the course of a purely personal or household activity;
- (b) that has been de-identified to the extent that it cannot be re-identified again;
- (c) that has been exempted from the application of the information principles in terms of sec 33.²

Saving

5. This Act will not affect the operation of any enactment that makes provision with respect to the processing of personal information and is capable of operating concurrently with this Act.

² Once the harmonisation of the legislation has taken place as recommended above in para 3.6.39 of the Discussion Paper, section 4 may read as follows:

4. *This Act does not apply to the processing of personal information -*
- (a) *in the course of a purely personal or household activity;*
 - (b) *that has been de-identified to the extent that it cannot be re-identified again;*
 - (c) *by or on behalf of the intelligence or security services referred to in theAct;*
 - (d) *for the purposes of implementing the police tasks defined in the Act;*
 - (e) *by the armed forces in terms of theAct with a view to deploying or making available the armed forces to maintain or promote the international legal order.*

This Act binds the State

6. This Act binds the State.

CHAPTER 3

CONDITIONS FOR THE LAWFUL PROCESSING OF PERSONAL INFORMATION

Part A: Processing of personal information in general: Information protection principles

PRINCIPLE 1

Processing limitation

Lawfulness of processing

7. Personal information must be processed -
- (a) in accordance with the law; and
 - (b) in a proper and careful manner in order not to intrude upon the privacy of the data subject to an unreasonable extent.

Minimality

8. Personal information may only be processed where, given the purpose(s) for which it is collected or subsequently processed, it is adequate, relevant, and not excessive.³

Consent and necessity conditions

³ Sec 8 (embodying the minimality principle, see paras 4.2.23-4.2.28 above) can also be included under Principle 2: Purpose specification and Principle 4: Data quality. Comment is invited.

9. (1) Personal information may only be processed where the:

- (a) data subject has given consent for the processing; or
- (b) processing is necessary for the performance of a contract or agreement to which the data subject is party, or for actions to be carried out at the request of the data subject and which are necessary for the conclusion or implementation of a contract; or
- (c) processing is necessary in order to comply with a legal obligation to which the responsible party is subject; or
- (d) processing is necessary in order to protect an interest of the data subject; or
- (e) processing is necessary for the proper performance of a public law duty by the administrative body concerned or by the administrative body to which the information are provided, or
- (f) processing is necessary for upholding the legitimate interests of the responsible party or of a third party to whom the information is supplied.

(2) The processing of personal information in terms of subsection (1)(e) or (f) is subject to the data subject's rights set out in sections 14, 52 and 93⁴ below.

Collection directly from data subject

10. (1) Personal information must be collected directly from the data subject.

(2) It is not necessary to comply with subsection (1) of this principle if -

- (a) the information is contained in a public record; or
- (b) the data subject authorises collection of the information from someone else; or
- (c) non-compliance would not prejudice the interests of the data subject; or
- (d) non-compliance is necessary --
 - (i) To avoid prejudice to the maintenance of the law by any public body, including the prevention, detection, investigation, prosecution, and

⁴ This section furthermore to be read with the other information principles; See also ss 10, 11 and 12 of the UK DPA; arts 14 and 15 of the EU Directive; See also sec 45 of the ECT Act for the opt-out option regarding unsolicited commercial communications.

- punishment of offences; or
 - (ii) For the enforcement of a law imposing a pecuniary penalty; or
 - (iii) For the protection of the public revenue; or
 - (iv) For the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
 - (v) In the interests of national security; or
 - (vi) for upholding the lawful interests of the responsible party or of a third party to whom the information are supplied;
- (e) compliance would prejudice a purpose of the collection; or
- (f) compliance is not reasonably practicable in the circumstances of the particular case; or
- (g) the information -
 - (i) will not be used in a form in which the individual concerned is identified; or
 - (ii) will be used for statistical or research purposes and will not be published in a form that could identify the individual concerned; or
- (h) the collection of the information is in accordance with an authority granted under section 33 (exemptions) of this Act.

PRINCIPLE 2

Purpose specification

Collection for specific purpose

11. Personal information must be collected for a specific, explicitly defined and legitimate purpose.

Data subject aware of purpose of collection and intended recipients

12. (1) Where personal information is collected, such steps must be taken as are, in the circumstances, reasonably practicable to ensure that the data subject is aware of -

- (a) a purpose for which the information is being collected; and
- (b) the intended recipients of the information.

(2) The steps referred to in subsection (1) of this section must be taken before the information is collected or, if that is not reasonably practicable, as soon as reasonably practicable after the information is collected.

(3) The steps referred to in subsection (1) of this section in relation to the collection of information from the data subject need not be taken if those steps have been taken previously in relation to the collection from that data subject, of the same information or information of the same kind and the purpose of collection and intended recipients of the information are unchanged.

(4) It is not necessary to comply with subsection (1) of this section where -

- (a) non-compliance is authorised by the data subject; or
- (b) non-compliance will not prejudice the interests of the data subject; or
- (c) non-compliance is necessary -
 - (i) to avoid prejudice to the maintenance of the law by any public body, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) for the enforcement of a law imposing a pecuniary penalty; or
 - (iii) for the protection of the public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal being proceedings that have been commenced or are reasonably in contemplation; or
 - (v) in the interests of national security; or
- (d) compliance would prejudice a lawful purpose of the collection; or
- (e) compliance is not reasonably practicable in the circumstances of the particular case; or
- (f) the information will -
 - (i) not be used in a form in which the data subject is identified; or
 - (ii) be used for statistical or research purposes and will not be published to any third party in a form that could identify the data subject.

Retention of records

13. (1) Subject to subsections (2) and (3), records of personal information must not be kept in a form which allows the data subject to be identified for any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed, unless-

- (a) another law requires or authorises the responsible party to retain the record;
- (b) the responsible party reasonably requires the record for purposes related to its operation;
- (c) the record is retained in terms of any contractual rights or obligations of the parties;
- (d) the data subject has authorised the responsible party to retain the record.

(2) Records of personal information may be retained for periods in excess of those provided for under (1) only where the retention of these records are for historical, statistical or scientific purposes, and where the responsible party has established appropriate safeguards against the records being used for any other purposes.

(3) A responsible party that has used a record of personal information about an individual to make a decision about the individual must -

- (a) retain the record for such period of time as may be prescribed by law; or
- (b) where there is no law prescribing a retention period, for a period which will afford the data subject a reasonable opportunity, taking all considerations relating to the use of the personal information into account, to request access to the record.

(4) A responsible party must destroy or delete a record of personal information or de-identify it as soon as reasonably practicable after it is no longer authorised to retain the record under subsection (1).

PRINCIPLE 3**Further processing limitation****Further processing not incompatible with purpose of collection**

14. (1) Personal information must not be further processed in a way incompatible with a purpose for which it has been collected in terms of principle 2.

(2) For the purposes of assessing whether processing is incompatible, as referred to under subsection (1), the responsible party must take account of the following -

- (a) the relationship between the purpose of the intended further processing and the purpose for which the information has been obtained;
- (b) the nature of the information concerned;
- (c) the consequences of the intended further processing for the data subject;
- (d) the manner in which the information has been obtained, and
- (e) any contractual rights and obligations existing between the parties.

(3) The further processing of personal information must not be regarded as incompatible as referred to under subsection (1) where -

- (a) the processing of the information for that other purpose is authorised by the data subject; or
- (b) the source of the information is a publicly available publication; or
- (c) non-compliance is necessary -
 - (i) to avoid prejudice to the maintenance of the law by any public body, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) for the enforcement of a law imposing a pecuniary penalty; or
 - (iii) for the protection of the public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal (being proceedings that have been commenced or are reasonably in contemplation); or
 - (v) in the interests of national security; or
- (d) the processing of the information for that other purpose is necessary to prevent or mitigate a serious and imminent threat to-

- (i) public health or public safety; or
- (ii) the life or health of the data subject or another individual; or
- (e) the information is used for historical, statistical or scientific purposes where the responsible party has made the necessary arrangements to ensure that the further processing is carried out solely for these specific purposes and will not be published in a form from which the identity of the data subject may be established or inferred; or
- (f) the further processing of the information is in accordance with an authority granted under section 33 (exemptions) of this Act.

PRINCIPLE 4

Information quality

Quality of information to be ensured

15. The responsible party must take the reasonably practicable steps, given the purpose for which personal information is collected or subsequently processed, to ensure that the personal information is complete, not misleading, up to date and accurate.

PRINCIPLE 5

Openness

Notification to Commission and to data subject

16. (1) Personal information may only be collected by a responsible party that has notified the Commission accordingly in terms of this Act, and which notification has been noted in a register kept by the Commission for this purpose.

(2) Where a responsible party collects personal information about a data subject, the responsible party must take such steps as are, in the circumstances, reasonably practicable to ensure that the data subject is aware of -

- (a) the fact that the information is being collected;
- (b) the name and address of the responsible party;
- (c) whether or not the supply of the information by that data subject is

- voluntary or mandatory and the consequences of failure to reply; and
- (d) where the collection of information is authorised or required under any law, the particular law to which the collection is subject.

(3) The steps referred to in subsection (2) of this section must be taken before the information is collected or, if that is not reasonably practicable, as soon as reasonably practicable after the information is collected.

(4) A responsible party is not required to take the steps referred to in subsection (2) of this section in relation to the collection of information from a data subject if a responsible party has previously taken those steps in relation to the collection, from that data subject, of the same information or information of the same kind.

(5) It is not necessary for a responsible party to comply with subsection (2) of this section if -

- (a) non-compliance is authorised by the data subject; or
- (b) non-compliance would not prejudice the interests of the data subject; or
- (c) non-compliance is necessary -
 - (i) to avoid prejudice to the maintenance of the law by any public body, including the prevention, detection, investigation, prosecution, and punishment of offences; or
 - (ii) for the enforcement of a law imposing a pecuniary penalty; or
 - (iii) for the protection of the public revenue; or
 - (iv) for the conduct of proceedings before any court or tribunal being proceedings that have been commenced or are reasonably in contemplation; or
 - (v) in the interests of national security; or
- (d) compliance would prejudice a purpose of the collection; or
- (e) compliance is not reasonably practicable in the circumstances of the particular case; or
- (f) the information will be used for statistical or research purpose and will not be published in a form that could reasonably be expected to identify the data subject.

PRINCIPLE 6
Security safeguards

Security measures to ensure integrity of personal information

17. (1) The responsible party must implement appropriate technical and organisational measures to secure -

- (a) the integrity of personal information by safeguarding against the risk of loss of, or damage to, or destruction of personal information; and
- (b) against the unauthorised or unlawful access to or processing of personal information.

(2) The responsible party must take measures to -

- (a) identify all reasonably foreseeable internal and external threats to personal information in its possession or under its control;
- (b) establish and maintain appropriate safeguards against the risk identified;
- (c) regularly verify that the safeguards are effectively implemented; and
- (d) ensure that the safeguards are continually updated in response to new risks or deficiencies in previously implemented safeguards.

(3) The responsible party must have due regard to generally accepted information security practices and procedures which may apply to it generally or required in terms of specific industry or professional rules and regulations.

Information processed by person acting under authority

18. (1) Anyone acting under the authority of the responsible party or the processor, as well as the processor himself, where they have access to personal information, must only process such information with the knowledge or consent of the responsible party, except where otherwise required by law.

(2) The persons referred to under subsection (1), who are not subject to an obligation of confidentiality by virtue of office, profession or legal provision, are required to treat as confidential the personal information which comes to their knowledge, except where the communication of such information is required by law or in the proper performance of their duties.

Security measures regarding information processed by processor

19. (1) Where the responsible party has personal information processed for his, her or its purposes by a processor, the responsible party must ensure that the processor establishes and maintains information security safeguards in accordance with the provisions of subsection 17(2) above.

(2) The carrying out of processing by a processor on behalf of the responsible party must be governed by an agreement in writing or in another equivalent form between the processor and the responsible party, which agreement must include an obligation to establish and maintain security safeguards.

(3) The responsible party must satisfy itself that the processor -

- (a) processes the personal information in accordance with section 19(1) and
- (b) complies with the obligations incumbent upon the responsible party under section 17.

(4) Where the processor is established in another country, the responsible party must make sure that the processor complies with the laws of that other country, notwithstanding the provisions of subsection (3)(b).

Notification of security compromises

Option 1:⁵

20. (1) Where any compromise of information security safeguards has, or may reasonably be believed to have resulted in the personal information of any person being accessed or acquired by an unauthorised person, the responsible party, or any third party processing personal information under the authority of a responsible party, must notify -

- (a) the Commission as soon as reasonably possible after the discovery of the compromise; and
- (b) the person whose information has been compromised, where the identity of such a person can be established.

⁵

Should this option be incorporated in the legislation the following clause will have to be inserted in clause 39 (duties of Commission) :

(aa) To require the responsible party to disclose to any person affected by a compromise to the confidentiality or integrity of personal information, this fact in accordance with sec 20 of this Act.

(2) The responsible party must make the notification in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement or any measures necessary to determine the scope of the compromise and to restore the reasonable integrity of the responsible party's information system.

(3) The responsible party may only delay notification if the South African Police Services or the Commission determine that notification will impede a criminal investigation.

(4) The responsible party must notify a person whose personal information has been compromised by written notification -

- (a) mailed to that person at the person's last known physical address; or
- (b) by email addressed to the person's last known eMail address; or
- (c) by prominently posting details of the compromise on its website; or
- (d) by publication in the news media; or
- (e) as may be directed by the Commission.

(5) A notification must provide such information as may be relevant to allow the person to protect himself or herself against the potential consequences of the compromise, including where possible, the identity of the unauthorised person(s) who may have accessed or acquired the personal information.

(6) The Commission may direct a responsible party to publicise, in a manner directed by the Commission, the fact of any compromise to the integrity or confidentiality of personal information, if the Commission has reasonable grounds to believe that such publicity would protect any person who may be affected by the compromise.

Option 2

20. The responsible party must take all reasonable steps to ensure that where -

- (a) an information security compromise of personal information held by the responsible party or under the authority of a responsible party has taken place; and
- (b) the identity of a person affected by the compromise can be established, such a person is notified of the compromise or suspected compromise and

provided with such information as may be relevant to allow the person to protect himself or herself against the potential consequences of the compromise.

PRINCIPLE 7

Individual participation ⁶

Access to personal information

21. (1) Where a responsible party holds personal information, the data subject is entitled to-
- (a) obtain from the responsible party, free of charge, confirmation of whether or not the responsible party holds personal information about him or her; and
 - (b) have communicated to him or her, after having provided adequate proof of identity, the particulars of the personal information held, including information as to the identity of all persons who have had access to his, her or its personal record-
 - i) within a reasonable time;
 - ii) at a charge, if any, that is not excessive;
 - iii) in a reasonable manner;
 - iv) in a form that is generally understandable.

(2) Where, in accordance with subsection (1)(b) of this section, personal information is communicated to a data subject, the data subject must be advised that, under principle 7, the data subject may request the correction of information.

Correction of personal information

- 22.(1) Where a responsible party holds personal information, the data subject is entitled to -
- (a) request correction of the information; or
 - (b) request that there be attached to the information a statement of the correction sought but not made.

⁶ The Commission's proposal in this regard is that this Act will deal with the access to the personal information of the requester and that the Promotion of Access to Information Act 2 of 2002 will deal with the right of access to all other information. See discussion in Chapter 4 of the Discussion paper, para 4.2.186 and further, especially para 4.2.207. A single authority will furthermore administer both Acts. If this proposal is accepted provision will be made in this act for the procedures to be followed in this regard and PAIA will be amended accordingly.

(2) A responsible party that holds personal information must, if so requested by the data subject or on its own initiative, take such steps (if any) to correct that information as are, in the circumstances, reasonable to ensure that, having regard to the purposes for which the information may lawfully be used, the information is accurate, up to date, complete, and not misleading.

(3) Where a responsible party that holds personal information is not willing to correct that information in accordance with a request by the data subject, the responsible party must, if so requested by the data subject, take such steps (if any) as are reasonably practicable in the circumstances to attach to the information, in such a manner that it will always be read with the information, any statement provided by the data subject of the correction sought.

(4) Where the responsible party has taken steps under subsection (2) or subsection (3) of this section, the responsible party must, if reasonably practicable, inform each person or body or responsible party to whom the personal information has been disclosed of these steps.

(5) Where a responsible party receives a request made pursuant to subsection (1) of this section, the responsible party must inform the data subject of the action taken as a result of the request.

PRINCIPLE 8

Accountability

Responsible party to give effect to principles

23. The responsible party must ensure that the measures that give effect to the Principles set out in this Chapter are complied with.

Part B

Processing of special personal information

Prohibition on processing of special personal information

24. It is prohibited to process personal information concerning⁷ a person's religion or philosophy of life, race, political persuasion, health or sexual life, or personal information concerning trade union membership, criminal behaviour, or unlawful or objectionable conduct connected with a ban imposed with regard to such conduct, except where the data subject has given his or her explicit consent to the processing of the information or as otherwise provided in this section.

Exemption to the prohibition on processing of personal information concerning a person's religion or philosophy of life

25. (1) The prohibition on processing personal information concerning a person's religion or philosophy of life, as referred to in section 24, does not apply where the processing is carried out by -

- (a) church associations, independent sections thereof or other associations founded on spiritual principles, provided that the information concerns persons belonging thereto;
- (b) institutions founded on religious or philosophical principles, provided that this is necessary to the aims of the institutions and for the achievement of their principles, or
- (c) other institutions provided that this is necessary to the spiritual welfare of the data subjects, unless they have indicated their objection thereto in writing.

(2) In the cases referred to under subsection(1)(a), the prohibition also does not apply to personal information concerning the religion or philosophy of life of family members of the data subjects, provided that -

- (a) the association concerned maintains regular contacts with these family members in connection with its aims, and
- (b) the family members have not indicated any objection thereto in writing.

(3) In the cases referred to under (1) and (2), no personal information may be supplied to third parties without the consent of the data subject.

⁷ Sometimes the words "revealing" or "on" are used and the words "directly or indirectly" are included.

Exemption to the prohibition on processing of personal information concerning a person's race

26. The prohibition on processing personal information concerning a person's race, as referred to in section 24, does not apply where the processing is carried out -

- (a) with a view to identifying data subjects and only where this is essential for that purpose;
- (b) for the purpose of assigning a preferential status to a person from a particular ethnic or cultural group with a view to eradicating or reducing actual historical or socio-economic inequalities, provided that the data subject has not indicated any objection thereto in writing.

Exemption to the prohibition on processing of personal information concerning a person's political persuasion

27.(1) The prohibition on processing personal information concerning a person's political persuasion, as referred to in section 24, does not apply where the processing is carried out -

- (a) by institutions founded on political principles with respect to their members or employees or other persons belonging to the institution, provided that this is necessary to the aims of the institutions and for the achievement of their principles, or
- (b) with a view to the requirements concerning political persuasion which can reasonably be applied in connection with the performance of duties in administrative and advisory bodies.

(2) In the cases referred to under subsection(1)(a), no personal information may be supplied to third parties without the consent of the data subject.

Exemption to the prohibition on processing of personal information concerning a person's trade union membership

28.(1) The prohibition on processing personal information concerning a person's trade union membership, as referred to in section 24, does not apply where the processing is carried out by the trade union concerned or the trade union federation to which this trade union belongs, provided that this is necessary to the aims of the trade union or trade union federation;

(2) In the cases referred to under subsection (1), no personal information may be supplied to third parties without the consent of the data subject.

Exemption to the prohibition on processing of personal information concerning a person's health or sexual life

29.(1) The prohibition on processing personal information concerning a person's health or sexual life, as referred to in section 24, does not apply where the processing is carried out by:

- (a) medical professionals, healthcare institutions or facilities or social services, provided that this is necessary for the proper treatment and care of the data subject, or for the administration of the institution or professional practice concerned;
- (b) insurance companies, provided that this is necessary for:
 - (i) assessing the risk to be insured by the insurance company and the data subject has not indicated any objection thereto, or
 - (ii) the performance of the insurance agreement; or
 - (iii) the enforcement of any contractual rights and obligations.
- (c) schools, provided that this is necessary with a view to providing special support for pupils or making special arrangements in connection with their health or sexual life;
- (d) institutions for probation, child protection or guardianship, provided that this is necessary for the performance of their legal duties;
- (e) the Ministers of Justice and Constitutional Development and of Correctional Services, provided that this is necessary in connection with the implementation of prison sentences or detention measures, or
- (f) administrative bodies, pension funds, employers or institutions working for them, provided that this is necessary for:
 - (i). the proper implementation of the provisions of laws, pension regulations or collective agreements which create rights dependent on the health or sexual life of the data subject, or
 - (ii) the reintegration of or support for workers or persons entitled to benefit in connection with sickness or work incapacity.

(2) In the cases referred to under subsection (1), the information may only be processed by persons subject to an obligation of confidentiality by virtue of office, employment, profession or legal provision, or under a written agreement.

(3) Where responsible parties personally process information and are not already subject to an obligation of confidentiality by virtue of office, profession or legal provision, they are required to treat the information as confidential, except where they are required by law or in connection with their duties to communicate such information to other parties who are authorised to process such information in accordance with subsection (1).

(4) The prohibition on processing other personal information, as referred to in section 24, does not apply where this is necessary to supplement the processing of personal information concerning a person's health, as referred to under subsection (1)(a), with a view to the proper treatment or care of the data subject.

(5) Personal information concerning inherited characteristics may only be processed, where this processing takes place with respect to the data subject from whom the information concerned have been obtained, unless:

- (a) a serious medical interest prevails, or
- (b) the processing is necessary for the purpose of scientific research or statistics.

(6) More detailed rules may be issued by regulation concerning the application of subsection (1)(b) and (f).

Exemption to the prohibition on processing of personal information concerning a person's criminal behaviour

30.(1) The prohibition on processing personal information concerning a person's criminal behaviour, as referred to in section 24, does not apply where the processing is carried out by bodies, charged by law with applying criminal law and by responsible parties who have obtained this information in accordance with the law.

(2) The prohibition does not apply to responsible parties who process this information for their own purposes with a view to:

- (a) assessing an application by data subjects in order to take a decision about them or provide a service to them, or
 - (b) protecting their interests, provided that this concerns criminal offences which have been or, as indicated by certain facts and circumstances, can be expected to be committed against them or against persons in their service.
- (3) The processing of this information concerning personnel in the service of the responsible party must take place in accordance with the rules established in compliance with labour legislation.
- (4) The prohibition on processing other personal information, as referred to in section 24, does not apply where this is necessary to supplement the processing of information on criminal behaviour, for the purposes for which this information is being processed.
- (5) The provisions of subsections (2) to (4) are likewise applicable to personal information relating to a ban imposed by a court concerning unlawful or objectionable conduct.

General exemption to the prohibition on processing of special personal information

31.(1) Without prejudice to sections 25 to 30, the prohibition on processing personal information referred to in section 24 does not apply where -

- (a) this is carried out with the express consent of the data subject;
 - (b) the information has manifestly been made public by the data subject;
 - (c) this is necessary for the establishment, exercise or defence of a right in law;
 - (d) this is necessary to comply with an obligation of international public law, or
 - (e) this is necessary with a view to an important public interest, where appropriate guarantees have been put in place to protect individual privacy and this is provided for by law or else the Commission has granted an exemption.
- (2) The prohibition on the processing of personal information referred to in section 24 for the purpose of scientific research or statistics does not apply where:
- (a) the research serves a public interest,
 - (b) the processing is necessary for the research or statistics concerned,
 - (c) it appears to be impossible or would involve a disproportionate effort to ask for express consent, and

- (d) sufficient guarantees are provided to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent.

CHAPTER 4**EXEMPTIONS FROM INFORMATION PROTECTION PRINCIPLES****General**

32. References in any of the information protection principles to personal information or to the processing of personal information do not include references to information or processing which by virtue of this Chapter are exempt from that principle or provision.

Commission may authorise processing of personal information---

33. (1) The Commission may authorise a responsible party to process personal information, even though that processing would otherwise be in breach of an information protection principle if the Commission is satisfied that, in the special circumstances of the case -

- (a) the public interest in that processing outweighs, to a substantial degree, any interference with the privacy of the data subject that could result from that processing; or
- (b) that processing involves a clear benefit to the data subject or a third party that outweighs any interference with the privacy of the data subject or third party that could result from that processing.

(2) The public interest referred to in subsection (1) above includes the -

- (a) interests of State security;
- (b) the prevention, detection and prosecution of criminal offences;
- (c) important economic and financial interests of the State and other public bodies;
- (d) interests of supervising compliance with legal provisions established in the interests referred to under (b) and (c), or
- (e) scientific research and government statistics.

(3) The Commission may impose in respect of any authority granted under subsection (1) of this section such conditions as the Commission thinks fit.

CHAPTER 5

SUPERVISION

Part A

Information Protection Commission

Establishment of Commission

34. There is hereby established a body to be known as the Information Protection Commission.

Constitution of Commission and period of office of members

35.(1)(a) The Commission must consist of the following members, appointed by the State President -

- (i) a chairperson known as the Information Commissioner;
- (ii) two other persons known as ordinary members of the Commission.

(b) Members of the Commission must be appropriately qualified, fit and proper persons for appointment on account of the tenure of a judicial office or on account of experience as an advocate or as an attorney or as a professor of law at any university, or on account of any other qualification relating to the objects of the Commission.

(c) The chairperson of the Commission must perform his or her functions under this Act in a full-time capacity and must not be employed in any other capacity during any period in which the person holds office as Information Commissioner.

(d) The other members of the Commission must be appointed in a part-time capacity.

(e) The Chairperson must direct the work of the Commission and the Secretariat.

(f) No person will be qualified for appointment as a member of the Commission if that person –

- (i) is a member of Parliament;
- (ii) is a member of a local authority;
- (iii) is an unrehabilitated insolvent; or
- (iv) has at any time been convicted of any offence involving dishonesty.

- (2) The State President may appoint one or more additional members if he deems it necessary for the investigation of any particular matter or the performance of any duty by the Commission.
- (3) The members of the Commission will be appointed for a period of not more than five years and will, at the expiration of such period, be eligible for reappointment.
- (4) A person appointed as Information Commissioner may resign from office by writing under his or her hand addressed to the President and will in any case vacate office on attaining the age of seventy years.
- (5) A member may be removed from office only for inability to discharge the functions of the office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.

Remuneration, allowances, benefits and privileges of members

36.(1) A member of the Commission who-

- (a) is a judge of the Constitutional Court, the Supreme Court of Appeal or a High Court will, notwithstanding anything to the contrary contained in any other law, in addition to his or her salary and any allowance, including any allowance for reimbursement of travelling and subsistence expenses, which may be payable to him or her in his or her capacity as such a judge, be entitled to such allowance (if any) in respect of the performance of his or her functions as such a member as the President may determine;
- (b) is not such a judge and is not subject to the provisions of the Public Service Act, 1994 (Proclamation 103 of 1994), will be entitled to such remuneration, allowances (including allowances for reimbursement of travelling and subsistence expenses incurred by him in the performance of his functions under this Act), benefits and privileges as the Minister in consultation with the Minister of Finance may determine.

(2) The remuneration, allowances, benefits or privileges of different members of the Commission may differ according to -

- (a) the different offices held by them in the Commission; or
- (b) the different functions performed, whether in a part-time or full-time capacity, by them from time to time.

(3) In the application of subsections (1) and (2), the President or the Minister, as the case may be, may determine that any remuneration, allowance, benefit or privilege contemplated in those subsections, will be the remuneration, allowance, benefit or privilege determined from time to time by or under any law in respect of any person or category of persons.

Secretary and staff

37.(1) The secretary of the Commission and such other officers and employees as are required for the proper performance of the Commission's functions, will be appointed in terms of the Public Service Act, 1994 (Proclamation 103 of 1994).

(2) The Commission may, with the approval of the Minister in consultation with the Minister of Finance, on a temporary basis or for a particular matter which is being investigated by it, employ any person with special knowledge of any matter relating to the work of the Commission, or obtain the co-operation of any body, to advise or assist the Commission in the performance of its functions under this Act, and fix the remuneration, including reimbursement for travelling, subsistence and other expenses, of such person or body.

Funds

38. Parliament will appropriate annually, for the use of the Commission, such sums of money as may be necessary for the proper exercise, performance and discharge, by the Commission, of its powers, duties and functions under this Act.

Powers and duties of Commission⁸

39.(1) The powers and duties of the Commission will be---

education⁹

- (a) to promote, by education and publicity, an understanding and acceptance of the information privacy principles and of the objects of those principles;

⁸

The current proposal of the Law Commission is that the Information Commission will be responsible for the supervision of both the Promotion of Access to Information Act and the Protection of Personal Information Act. See Chapter 5 and para 4.2.203 in Chapter 4 of the discussion paper. Should this proposal be approved, the powers and duties of the Commission will be extended and PAIA amended accordingly.

- (b) for the purpose of promoting the protection of personal information, to undertake educational programmes on the Commission's own behalf or in co-operation with other persons or authorities acting on behalf of the Commission;
- (c) to make public statements in relation to any matter affecting the protection of the personal information of a person or of any class of persons;

monitor compliance

- (d) to monitor compliance by public and private bodies of the provisions of this Act;
- (e) to undertake research into, and to monitor developments in, information processing and computer technology to ensure that any adverse effects of such developments on the protection of the personal information of persons are minimised, and to report to the responsible Minister the results of such research and monitoring;
- (f) to examine any proposed legislation (including subordinate legislation) or proposed policy of the Government that the Commission considers may affect the protection of the personal information of individuals, and to report to the responsible Minister the results of that examination;
- (g) to report (with or without request) to the Minister from time to time on any matter affecting the protection of the personal information of a person, including the need for, or desirability of, taking legislative, administrative, or other action to give protection or better protection to the personal information of a person;
- (h) when requested to do so by a public or private body, to conduct an audit of personal information maintained by that body for the purpose of ascertaining whether or not the information is maintained according to the information privacy principles;
- (i) to monitor the use of unique identifiers of data subjects, and to report to the Minister from time to time on the results of that monitoring, including any

⁹ Headings inserted for ease of reading, not part of the Bill.

recommendation relating to the need of, or desirability of taking, legislative, administrative, or other action to give protection, or better protection, to the personal information of a person;

- (j) to maintain, and to publish, make available and provide copies of such registers as are prescribed in this Act.
- (k) to examine any proposed legislation that makes provision for -
 - (i) the collection of personal information by any public or private body; or
 - (ii) the disclosure of personal information by one public or private body to any other public or private body, or both; to have particular regard, in the course of that examination, to the matters set out in section 40(3) of this Act, in any case where the Commission considers that the information might be used for the purposes of an information matching programme; and to report to the responsible Minister the results of that examination;

consultation

- (l) to receive and invite representations from members of the public on any matter affecting the personal information of a person;
- (m) to consult and co-operate with other persons and bodies concerned with the protection of information privacy;
- (n) to act as mediator between opposing parties on any matter that concerns the need for, or the desirability of, action by one person in the interests of the protection of the personal information of another person;
- (o) to provide advice (with or without a request) to a Minister or a public or private body on their obligations under the provisions, and generally, on any matter relevant to the operation, of this Act;

complaints

- (p) to receive and investigate complaints about alleged violations of the protection of personal information of persons and in respect thereof make reports to complainants;
- (q) to gather such information as in the Commission's opinion will assist the Commission in discharging the duties and carrying out the Commission's functions under this Act;
- (r) to attempt to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation;
- (s) to serve any notices in terms of this Act and further promote the resolution of disputes in accordance with the prescripts of this Act;

research and reporting

- (t) to report to the Minister from time to time on the desirability of the acceptance, by South Africa, of any international instrument relating to the protection of the personal information of a person;
- (u) to report to the Minister on any other matter relating to protection of information that, in the Commission's opinion, should be drawn to the Minister's attention;

codes of conduct

- (v) to issue, from time to time, codes of conduct, amendment of codes and revocation of codes of conduct;
- (w) to make guidelines to assist bodies to develop codes of conduct or to apply codes of conduct;
- (x) to review an adjudicator's decision under approved codes of conduct;¹⁰

general

- (y) to do anything incidental or conducive to the performance of any of the preceding functions;

¹⁰ This section will only apply if the Act provides for the appointment of self-regulating adjudicators.

- (z) to exercise and perform such other functions, powers, and duties as are conferred or imposed on the Commission by or under this Act or any other enactment.

(2) The Commission may, from time to time, in the public interest or in the interests of any person or body of persons, publish reports relating generally to the exercise of the Commission's functions under this Act or to any case or cases investigated by the Commission, whether or not the matters to be dealt with in any such report have been the subject of a report to the responsible Minister.

Commission to have regard to certain matters

40.(1) The Commission is independent in the performance of its functions.

(2) In the performance of its functions, and the exercise of its powers, under this Act, the Commission must -

- (a) have due regard to the protection of personal information as set out in the information protection principles; and
- (b) have due regard for the protection of important human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the right of government and business to achieve their objectives in an efficient way; and
- (c) take account of international obligations accepted by South Africa, including those concerning the international technology of communications; and
- (d) consider any developing general international guidelines relevant to the better protection of individual privacy.

(3) In performing its functions in terms of sec 39(1)(k) of this Act with regard to information matching programmes, the Commission must have particular regard to the following matters -

- (a) whether or not the objective of the programme relates to a matter of significant public importance;
- (b) whether or not the use of the programme to achieve that objective will result in monetary savings that are both significant and quantifiable, or in other comparable benefits to society;
- (c) whether or not the use of an alternative means of achieving that objective would give either of the results referred to in paragraph (b) of this section;

- (d) whether or not the public interest in allowing the programme to proceed outweighs the public interest in adhering to the information protection principles that the programme would otherwise contravene;
- (e) whether or not the programme involves information matching on a scale that is excessive, having regard to -
 - (i) the number of agencies that will be involved in the programme; and
 - (ii) the amount of detail about an individual that will be matched under the programme;

Programmes of Commission

41.(1) In order to achieve its objects the Commission must from time to time draw up programmes in which the various matters which in its opinion require consideration are included in order of preference, and must submit such programmes to the Minister for approval.

(2) The Commission may include in any programme any suggestion relating to its objects received from any person or body.

(3) The Commission may consult any person or body, whether by the submission of study documents prepared by the Commission or in any other manner.

(4) The provisions of sections 2, 3, 4, 5 and 6 of the Commissions Act, 1947 (Act 8 of 1947), will apply mutatis mutandis to the Commission.

Protection of Commission

42. No criminal or civil proceedings lie against the Commission, or against any person acting on behalf or under direction of the Commission, for anything done, reported or said in good faith in the course of the exercise or performance or purported exercise or performance of any power, duty or function of the Commission under this Act.

Meetings of Commission

43.(1) Meetings of the Commission must be held at the times and places determined by the chairperson of the Commission.

(2) The majority of the members of the Commission will constitute a quorum for a meeting.

(3) The Commission may regulate the proceedings at meetings as it may think fit and must keep minutes of the proceedings.

Reports of Commission

- 44.(1) The Commission must prepare a full report in regard to any matter investigated by it and must submit such report to the Minister for information.
- (2) The Commission must within five months of the end of a financial year of the Department for Justice and Constitutional Development submit to the Minister a report on all its activities during that financial year.
- (3) The report referred to in subsection (2) must be laid upon the Table in Parliament within fourteen days after it was submitted to the Minister, if Parliament is then in session, or, if Parliament is not then in session, within 14 days after the commencement of its next ensuing session.

Committees of Commission

- 45.(1) The Commission may, if it deems it necessary for the proper performance of its functions-
- (a) establish a working committee, which must consist of such members of the Commission as the Commission may designate;
 - (b) establish such other committees as it may deem necessary, and which must consist of-
 - (i) such members of the Commission as the Commission may designate; or
 - (ii) such members of the Commission as the Commission may designate and the other persons appointed by the Minister for the period determined by the Minister.
- (2) The Minister may at any time extend the period of an appointment referred to in subsection (1) (b) (ii) or, if in his opinion good reasons exist therefor, revoke any such appointment.
- (3) The Commission must designate the chairman and, if the Commission deems it necessary, the vice-chairman of a committee established under subsection (1).
- (4) (a) A committee referred to in subsection (1) must, subject to the directions of the Commission, perform those functions of the Commission assigned to it by the Commission.
- (b) Any function so performed by the working committee referred to in subsection (1) (a) will be deemed to have been performed by the Commission.

(5) The Minister or the Commission may at any time dissolve any committee established by the Commission.

(6) The provisions of sections 41(4) and 43 will mutatis mutandis apply to a committee of the Commission.

Part B
Information Protection Officer¹¹

Information protection officer to be appointed

46.(1) Each responsible party must ensure that there are, within that body, one or more information protection officers whose responsibilities include -

- (a) the encouragement of compliance, by the body, with the information protection principles;
- (b) dealing with requests made to the body pursuant to this Act;
- (c) working with the Commission in relation to investigations conducted pursuant to Chapter 6 of this Act in relation to the body;
- (d) otherwise ensuring compliance by the body with the provisions of this Act.

(2) Officers must take up their duties only after the responsible party or body which appointed them has registered them with the Commission.

¹¹ See sec 1 of PAIA for the definition of "information officer" and sec 17 regarding the designation of deputy information officers. It is envisaged that one officer should be designated in an organisation to deal with both privacy and information matters. It should be noted that PAIA does not currently make provision for the appointment of officers in private bodies. Comment is invited.

CHAPTER 6

NOTIFICATION AND PRIOR INVESTIGATION

Part A

Notification

Processing to be notified to Commission

47.(1) The fully or partly automated processing of personal information intended to serve a single purpose or different related purposes, must be notified to the Commission before the processing is started.

(2) The non-automated processing of personal information intended to serve a single purpose or different related purposes, must be notified where this is subject to a prior investigation.

Notification to contain specific particulars

48.(1) The notification must contain the following particulars -

- (a) the name and address of the responsible party;
- (b) the purpose or purposes of the processing;
- (c) a description of the categories of data subjects and of the information or categories of information relating thereto;
- (d) the recipients or categories of recipients to whom the information may be supplied;
- (e) planned cross-border transfers of information;
- (f) a general description allowing a preliminary assessment of the suitability of the planned information security measures to be implemented by the responsible party, intended to safeguard the confidentiality, integrity and availability of the information which is to be processed.

(2) Changes in the name or address of the responsible party must be notified within one week and changes to the notification which concern (1)(b) to (f) must be notified in each case within one year of the previous notification, where they appear to be of more than incidental importance.

(3) Any processing which departs from that which has been notified in accordance with the provisions of (1)(b) to (f) must be recorded and kept for at least three years.

(4) More detailed rules can be issued by or under regulation concerning the procedure for submitting notifications.

Exemptions to notification requirements

49.(1) It may be laid down by regulation that certain categories of information processing which are unlikely to infringe the fundamental rights and freedoms of the data subject, are exempted from the notification requirement referred to in section 47.¹²

(2). Where it is necessary in order to detect criminal offences in a particular case, it may be laid down by regulation that certain categories of processing by responsible parties who are vested with investigating powers by law, are exempt from notification.

(3) The notification requirement does not apply to public registers set up by law or to information supplied to an administrative body pursuant to a legal obligation.

Register of information processing

50.(1) The Information Protection Commission must maintain an up-to-date register of the information processing notified to it, which register must contain, as a minimum, the information provided in accordance with section 48(1)(a) to (f).

(2) The register may be consulted by any person free of charge.

(3) The responsible party must provide any person who so requests with the information referred to in section 48(1)(a) to (f) concerning information processing exempted from the notification requirement.

(4) The provisions of subsection (3) do not apply to -

- (a) information processing which is covered by an exemption under Chapter 4.
- (b) public registers set up by law.

¹² It is envisaged that the exemptions granted to certain categories of bodies from the provisions set out in Chapter 2 (publication and availability of certain records) of PAIA will also be applicable in so far as the notification requirements in terms of this Act are concerned.

Failure to notify

51.(1) If section 47(1) is contravened, the responsible party is guilty of an offence.

(2) Any person who fails to comply with the duty imposed by notification regulations made by virtue of section 96 is guilty of an offence.

Part B Prior investigation

Processing subject to prior investigation

52.(1) The Commission must initiate an investigation prior to any processing for which responsible parties plan to -

- (a) process a number identifying persons for a purpose other than the one for which the number is specifically intended with the aim of linking the information together with information processed by other responsible parties, unless the number is used for the cases defined in Chapter 4;¹³
- (b) process information on criminal behaviour or on unlawful or objectionable conduct for third parties;
- (c) process information for the purposes of credit reporting; and
- (d) transfer special personal information, as referred to in section 24, to third countries without adequate information protection laws.

(2) The provisions of subsection (1) may be rendered applicable to other types of information processing by law or regulation where such processing carries a particular risk for the individual rights and freedoms of the data subject.

Responsible party to notify Commission where processing is subject to prior investigation

53.(1) Information processing to which section 52 (1) is applicable must be notified as such by the responsible party to the Commission.

(2) The notification of such information processing requires responsible parties to suspend the processing they are planning to carry out until the Commission has completed its investigation or until they have received notice that a more detailed investigation will not be conducted.

¹³ Exemptions.

- (3) In the case of the notification of information processing to which section 52 (1) is applicable, the Commission must communicate its decision in writing within four weeks of the notification as to whether or not it will conduct a more detailed investigation.
- (4) In the event that the Commission decides to conduct a more detailed investigation, it must indicate the period of time within which it plans to conduct this investigation, which period must not exceed thirteen weeks.
- (5) The more detailed investigation referred to under (4) leads to a statement concerning the lawfulness of the information processing.
- (6) The statement by the Commission is deemed to be equivalent to an enforcement notice served in terms of sec 83 of this Act.

CHAPTER 7

CODES OF CONDUCT

Issuing of codes of conduct

54.(1) The Commission may from time to time issue a code of conduct.

- (2) A code of conduct must---
- (a) incorporate all the information protection principles or set out obligations that, overall, are the equivalent of all the obligations set out in those principles; and
 - (b) prescribe how the information protection principles are to be applied, or are to be complied with, given the particular features of the sector or sectors of society in which these bodies are operating.
- (3) A code of conduct may apply in relation to any one or more of the following -
- (a) any specified information or class or classes of information;
 - (b) any specified body or class or classes of bodies;
 - (c) any specified activity or class or classes of activities;
 - (d) any specified industry, profession, or calling or class or classes of industries, professions, or callings.
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(4) A code of conduct must also---

- (a) impose, in relation to any body that is not a public body, controls in relation to the comparison (whether manually or by means of any electronic or other device) of personal information with other personal information for the purpose of producing or verifying information about an identifiable person;
- (b) provide for the review of the code by the Commission;
- (c) provide for the expiry of the code.

Proposal for issuing of code of conduct

55.(1) The Commission may issue a code of conduct under section 54 of this Act on the Commission's own initiative or on the application of any person.

(2) Without limiting subsection (1) of this section, but subject to subsection (3) of this section, any person may apply to the Commission for the issuing of a code of conduct in the form submitted by the applicant.

(3) An application may be made pursuant to subsection (2) of this section only -

- (a) by a body which is, in the opinion of the Commission, sufficiently representative of any class or classes of bodies, or of any industry, profession, or calling as defined in the code; and
- (b) where the code of conduct sought by the applicant is intended to apply in respect of the class or classes of body, or the industry, profession, or calling, that the applicant represents, or any activity of any such class or classes of body or of any such industry, profession, or calling.

(4) Where an application is made to the Commission pursuant to subsection (2) of this section, or where the Commission intends to issue a code on its own initiative, the Commission must give public notice in the Gazette that the issuing of a code of conduct is being considered, which notice must contain a statement that -

- (a) the details of the code of conduct being considered, including a draft of the proposed code, may be obtained from the Commission; and
- (b) submissions on the proposed code may be made in writing to the Commission within such period as is specified in the notice.

(5) The Commission must not issue a code of conduct unless it has considered the submissions made to the Commission in terms of subsection (4) and is satisfied that all persons affected by the proposed code has had a reasonable opportunity to be heard.

(6) The decision as to whether an application for the issuing of a code has been successful must be made within a reasonable period of time which must not exceed fourteen weeks.

Notification, availability and commencement of code

56.(1) Where a code of conduct is issued under section 54 of this Act,---

- (a) the Commission must ensure that there is published in the Gazette, as soon as reasonably practicable after the code is issued, a notice---
 - (i) indicating that the code has been issued; and
 - (ii) indicating where copies of the code are available for inspection free of charge and for purchase; and
- (b) The Commission must ensure that so long as the code remains in force, copies of the code are available -
 - (i) for inspection by members of the public free of charge; and
 - (ii) for purchase by members of the public at a reasonable price.

(2) Every code of conduct issued under section 54 of this Act comes into force on the 28th day after the date of its notification in the Gazette or on such later day as may be specified in the code and is binding on every class or classes of body, industry, profession or calling referred to therein.

Amendment and revocation of codes

57.(1) The Commission may from time to time issue an amendment or revocation of a code of conduct issued under section 54 of this Act.

(2) The provisions of sections 54 to 58 of this Act must apply in respect of any amendment or revocation of a code of conduct.

Procedure for dealing with complaints

58.(1) The code may prescribe procedures for making and dealing with complaints alleging a breach of the code, but no such provision may limit or restrict any provision of Chapter 8 (Complaints and proceedings by the Commission) of this Act;

(2) If the code sets out procedures for making and dealing with complaints, the Commission must be satisfied that:

- (a) the procedures meet the:
 - (i) prescribed standards; and
 - (ii) Commission's guidelines (if any) in relation to making and dealing with complaints; and
- (b) the code provides for the appointment of an independent adjudicator to whom complaints may be made; and
- (c) the code provides that, in performing his or her functions, and exercising his or her powers, under the code, an adjudicator for the code must have due regard to the matters that section 40(2) requires the Commission to have due regard to; and
- (d) the code requires a report (in a form satisfactory to the Commission) to be prepared and submitted to the Commission within five months of the end of a financial year of the Department for Justice and Constitutional Development on the operation of the code during that financial year; and
- (e) the code requires the report prepared for each year to include the number and nature of complaints made to an adjudicator under the code during the relevant financial year.

(3) A person who is aggrieved by a determination, including any finding, declaration, order or direction that is included in the determination, made by an adjudicator (other than the Commission) under an approved code of conduct after investigating a complaint may apply to the Commission for review of the determination.

(4) The adjudicator's determination continues to have effect unless and until the Commission makes a determination under Chapter 8 relating to the complaint.

Guidelines about codes of conduct

59.(1) The Commission may provide written guidelines -

- (a) to assist bodies to develop codes of conduct or to apply approved codes of conduct; and
- (b) relating to making and dealing with complaints under approved codes of conduct; and
- (c) about matters the Commission may consider in deciding whether to approve a code of conduct or a variation of an approved code of conduct.

(2) Before providing guidelines for the purposes of paragraph (1)(b), the Commission must give everyone the Commission considers has a real and substantial interest in the matters covered by the proposed guidelines an opportunity to comment on them.

(3) The Commission may publish guidelines provided under subsection (1) in any way the Commission considers appropriate.

Register of approved codes of conduct

60.(1) The Commission must keep a register of approved codes of conduct.

(2) The Commission may decide the form of the register and how it is to be kept.

(3) The Commission must make the register available to the public in the way that the Commission determines.

(4) The Commission may charge reasonable fees for -

- (a) making the register available to the public; or
- (b) providing copies of, or extracts from, the register.

Review of operation of approved code of conduct

61.(1) The Commission may review the operation of an approved code of conduct.

(2) The Commission may do one or more of the following for the purposes of the review:

- (a) consider the process under the code for making and dealing with complaints;
- (b) inspect the records of an adjudicator for the code;

- (c) consider the outcome of complaints dealt with under the code;
- (d) interview an adjudicator for the code;
- (e) appoint experts to review those provisions of the code that the Commission believes require expert evaluation.

(3) The review may inform a decision by the Commission under section 57 to revoke the approved code of conduct with immediate effect or at a future date to be determined by the Commission.

Effect of code

62. Where a code of conduct issued under section 54 of this Act is in force, failure to comply with the code, must, for the purposes of Chapter 8 of this Act, be deemed to be a breach of an information protection principle.

CHAPTER 8 ENFORCEMENT

Interference with the protection of the personal information of a person -

63. For the purposes of this Chapter, an action is an interference with the protection of the personal information of a person if, in relation to that person -

- (a) the action breaches an information privacy principle; or
- (b) the provisions of section 20 of this Act have not been complied with; or
- (c) the provisions of section 93 of this Act have not been complied with;¹⁴ or
- (d) the provisions of section 94 of this Act have not been complied with.

¹⁴ The New Zealand definition includes subparagraph (b) set out below. Comment is invited.

- 1.(1) For the purposes of this Part of this Act, an action is an interference with the privacy of a person if ---
- (a) In relation to that person,---
 - (i) The action breaches an information privacy principle; or
 - (ii) The provisions of Part X of this Act (which relates to information matching) have not been complied with; and
 - (b) The action has ---
 - (i) Caused, or may cause, loss, detriment, damage, or injury to that person; or
 - (ii) Adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that person; or
 - (iii) Resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that person

Complaints

64. Any person may submit a complaint to the Commission in the prescribed manner and form alleging that any action is or appears to be an interference with the protection of the personal information of a person.

Mode of complaint to Commission

65.(1) A complaint to the Commission may be made either orally or in writing.

(2) A complaint made orally must be put in writing as soon as reasonably practicable.

(3) The Commission must give such reasonable assistance as is necessary in the circumstances to enable an individual, who wishes to make a complaint to the Commission, to put the complaint in writing.

Investigation by Commission

66. (1) The functions of the Commission under this Chapter of this Act are to --

- (a) investigate any action that is or appears to be an interference with the protection of the personal information of a person;
- (b) act as conciliator in relation to any such action;
- (c) take such further action as is contemplated by this Chapter of this Act.

(2) The Commission may commence an investigation under subsection (1)(a) of this section either on complaint made to the Commission or on the Commission's own initiative.

Action on receipt of complaint

67. (1) On receiving a complaint under this Chapter of this Act, the Commission may -

- (a) investigate the complaint; or
- (b) decide, in accordance with section 68 of this Act, to take no action on the complaint.

(2) The Commission must, as soon as practicable, advise the complainant and the person to whom the complaint relates of the procedure that the Commission proposes to adopt under subsection (1) of this section.

Commission may decide to take no action on complaint

68.(1) The Commission may in its discretion decide to take no action or, as the case may require, no further action, on any complaint if, in the Commission's opinion -

- (a) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date when the complaint was made is such that an investigation of the complaint is no longer practicable or desirable; or
- (b) the subject-matter of the complaint is trivial; or
- (c) the complaint is frivolous or vexatious or is not made in good faith; or
- (d) the person alleged to be aggrieved does not desire that action be taken or, as the case may be, continued; or
- (e) the complainant does not have a sufficient personal interest in the subject-matter of the complaint; or
- (f) where -
 - (i) the complaint relates to a matter in respect of which a code of conduct issued under section 54 of this Act is in force; and
 - (ii) the code of conduct makes provision for a complaints procedure, the complainant has failed to pursue, or to pursue fully, an avenue of redress available under that complaints procedure that it would be reasonable for the complainant to pursue.

(2) Notwithstanding anything in subsection (1) of this section, the Commission may in its discretion decide not to take any further action on a complaint if, in the course of the investigation of the complaint, it appears to the Commission that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

(3) In any case where the Commission decides to take no action, or no further action, on a complaint, the Commission must inform the complainant of that decision and the reasons for it.

Referral of complaint to regulatory body

69.(1) Where, on receiving a complaint under this part of the Act, the Commission considers that the complaint relates, in whole or in part, to a matter that is more properly within the jurisdiction of another regulatory body, the Commission must forthwith determine whether the complaint should be dealt with, in whole or in part, under this Act after consultation with the body concerned.

(2) If the Commission determines that the complaint should be dealt with by another body as described above, the Commission must forthwith refer the complaint to this body to be dealt with accordingly and must notify the complainant of the action that has been taken.

Pre-investigation Proceedings of Commission

70. Before proceeding to investigate any matter under this Chapter of this Act, the Commission must inform -

- (a) the complainant, the person to whom the investigation relates, and any individual alleged to be aggrieved (if not the complainant), of the Commission's intention to conduct the investigation; and
- (b) the person to whom the investigation relates of the ---
 - (i) details of the complaint or, as the case may be, the subject-matter of the investigation; and
 - (ii) right of that person to submit to the Commission, within a reasonable time, a written response in relation to the complaint or, as the case may be, the subject-matter of the investigation.

Settlement of complaints

71. Where it appears from a complaint, or any written response made in relation to a complaint under section 70(b)(ii) of this Act, that it may be possible to secure a settlement between any of the parties concerned and, if appropriate, a satisfactory assurance against the repetition of any action that is the subject-matter of the complaint or the doing of further actions of a similar kind by the person concerned, the Commission may, without investigating the complaint or, as the case may be, investigating the complaint further, use his or her best endeavours to secure such a settlement and assurance.

Investigation proceedings of the Commission

72. For the purposes of the investigation of a complaint the Commission may -

- (a) summon and enforce the appearance of persons before the Commission and compel them to give oral or written evidence on oath and to produce any records and things that the Commission considers necessary to investigate the complaint, in the same manner and to the same extent as a superior court of record;
- (b) administer oaths;

- (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Commission sees fit, whether or not it is or would be admissible in a court of law;
- (d) at any reasonable time, subject to sec 73, enter and search any premises occupied by a responsible party;
- (e) converse in private with any person in any premises entered under section 75 subject to sec 73; and
- (f) otherwise carry out in those premises any inquiries that the Commission sees fit in terms of sec 73.

Issue of warrants

73.(1) If a judge of the High Court, a regional magistrate or a magistrate is satisfied by information on oath supplied by the Commission that there are reasonable grounds for suspecting that -

- (a) a responsible party is interfering with the protection of the personal information of a person, or
- (b) an offence under this Act has been or is being committed,

and that evidence of the contravention or of the commission of the offence is to be found on any premises specified in the information, it may, subject to subsection 2, provided the premises are within the jurisdiction of that judge or magistrate, grant a warrant to enter and search such premises to the Commission.

(2) A warrant issued under subsection (1) authorises the Commission or any of its officers or staff, subject to section 75, at any time within seven days of the date of the warrant to enter the premises as identified in the warrant, to search them, to inspect, examine, operate and test any equipment found there which is used or intended to be used for the processing of personal information and to inspect and seize any record, other material or equipment found there which may be such evidence as is mentioned in that sub-section.

Requirements for issuing of warrant

74.(1) A magistrate or judge must not issue a warrant under section 73 unless he or she is satisfied-

- (a) that the Commission has given seven days' notice in writing to the occupier of the premises in question demanding access to the premises, and

- (b) that either-
 - (i) access was demanded at a reasonable hour and was unreasonably refused, or
 - (ii) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by any of the Commission's members or officers or staff to permit the members or the officer or member of staff to do any of the things referred to in section 73(2), and
- (c) that the occupier, has, after the refusal, been notified by the Commission of the application for the warrant and has had an opportunity of being heard by the judge on the question whether or not it should be issued.

(2) Subsection (1) must not apply if the judge or magistrate is satisfied that the case is one of urgency or that compliance with those provisions would defeat the object of the entry.

(3) A judge or magistrate who issues a warrant under section 73 must also issue two copies of it and certify them clearly as copies.

Execution of warrants

75.(1) A person executing a warrant issued under section 73 may use such reasonable force as may be necessary.

(2) A warrant issued under this section must be executed at a reasonable hour unless it appears to the person executing it that there are grounds for suspecting that the evidence in question would not be found if it were so executed.

(3) If the person who occupies the premises in respect of which a warrant is issued under section 73 is present when the warrant is executed, he or she must be shown the warrant and supplied with a copy of it; and if that person is not present a copy of the warrant must be left in a prominent place on the premises.

(4) A person seizing anything in pursuance of a warrant under section 73 must give a receipt for it if asked to do so.

(5) Anything so seized may be retained for so long as is necessary in all the circumstances but the person in occupation of the premises in question must be given a copy of anything that is

seized if he or she so requests and the person executing the warrant considers that it can be done without undue delay.

(6) A person authorised to conduct an entry and search in terms of section 73 may be accompanied and assisted by a police officer.

(7) A person who enters and searches any premises under this section must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(8) A person who enters and searches premises under this section, before questioning any person

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- (a) must advise that person of the right to be assisted at the time by an advocate or attorney; and
- (b) allow that person to exercise that right.

Matters exempt from search and seizure

76. The powers of search and seizure conferred by a warrant issued under section 73 must not be exercisable in respect of personal information which by virtue of section 32 (exemptions) are exempt from any of the provisions of this Act.

Communication between legal adviser and client exempt

77.(1) Subject to the provisions of this section, the powers of search and seizure conferred by a warrant issued under section 73 must not be exercisable in respect of -

- (a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or
- (b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the court) and for the purposes of such proceedings.

(2) Subsection (1) applies also to-

- (a) any copy or other record of any such communication as is there mentioned, and

- (b) any document or article enclosed with or referred to in any such communication if made in connection with the giving of any advice or, as the case may be, in connection with or in contemplation of and for the purposes of such proceedings as are there mentioned.

Objection to search and seizure

78. If the person in occupation of any premises in respect of which a warrant is issued under this Schedule objects to the inspection or seizure under the warrant of any material on the ground -

- (a) that it contains privileged information and refuses the inspection or removal of such article or document, the person executing the warrant or search must, if he or she is of the opinion that the article or document contains information that has a bearing on the investigation and that such information is necessary for the investigation, request the registrar of the High Court which has jurisdiction or his or her delegate, to attach and remove that article or document for safe custody until a court of law has made a ruling on the question whether the information concerned is privileged or not;
- (b) that it consists partly of matters in respect of which those powers are not exercisable, he or she must, if the person executing the warrant so requests, furnish that person with a copy of so much of the material as is not exempt from those powers.

Return of warrants

79. A warrant issued under this section must be returned to the court from which it was issued-

- (a) after being executed, or
- (b) if not executed within the time authorised for its execution;

and the person by whom any such warrant is executed shall make an endorsement on it stating what powers have been exercised by him or her under the warrant.

Assessment

80. (1) The Commission, acting in its official capacity, or at a request made to the Commission by or on behalf of any person who is, or reasonably believes himself to be, affected by an action in terms of sec 63, must make an assessment, subject to subparagraph (2), as to whether it is likely or unlikely that the processing being conducted has been or is being carried out in compliance with the provisions of this Act.

(2) The Commission must make the assessment in such manner as appears to be appropriate, unless, where the assessment is made on request, it has not been supplied with such information as it may reasonably require in order to -

- (a) satisfy itself as to the identity of the person making the request, and
- (b) enable it to identify the action in question.

(3) The matters to which the Commission may have regard in determining in what manner it is appropriate to make an assessment include the extent to which the request appears to it to raise a matter of substance, and where the assessment is made on request -

- (a) any undue delay in making the request, and
- (b) whether or not the person making the request is entitled to make an application under Principle 7 (access) in respect of the personal information in question.

(4) Where the Commission has received a request under this section it must notify the person who made the request-

- (a) whether it has made an assessment as a result of the request, and
- (b) to the extent that it considers appropriate, having regard in particular to any exemption from Principle 7 applying in relation to the personal information concerned, of any view formed or action taken as a result of the request.

Information notice

81.(1) If the Commissioner -

- (a) has received a request under section 80 in respect of any processing of personal information, or
- (b) reasonably requires any information for the purpose of determining whether the responsible party has interfered or is interfering with the protection of the personal information of a person,

it may serve the responsible party with a notice (in this Act referred to as "an information notice") requiring the responsible party, within such time as is specified in the notice, to furnish the Commission, in such form as may be so specified, with an independent auditor's report indicating that the processing is occurring in compliance with the principles of the Act, or with such information relating to the request or to compliance with the principles as is so specified.

(2) An information notice must contain -

- (a) in a case falling within subsection (1)(a), a statement that the Commission has received a request under section 80 in relation to the specified processing, or
- (b) in a case falling within subsection (1)(b), a statement that the Commission regards the specified information as relevant for the purpose of determining whether the responsible party has complied, or is complying, with the information protection principles and his reasons for regarding it as relevant for that purpose.

(3) An information notice must also contain particulars of the rights of appeal conferred by section 85.

(4) Subject to subsection (5), the time specified in an information notice must not expire before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the information need not be furnished pending the determination or withdrawal of the appeal.

(5) If by reason of special circumstances the Commission considers that the information is required as a matter of urgency, it may include in the notice a statement to that effect and a statement of its reasons for reaching that conclusion; and in that event subsection (4) must not apply, but the notice must not require the information to be furnished before the end of the period of seven days beginning with the day on which the notice is served.

(6) A person must not be required by virtue of this section to furnish the Commissioner with any information in respect of -

- (a) any communication between a professional legal adviser and his client in connection with the giving of legal advice to the client with respect to his obligations, liabilities or rights under this Act, or
- (b) any communication between a professional legal adviser and his client, or between such an adviser or his client and any other person, made in connection with or in contemplation of proceedings under or arising out of this Act (including proceedings before the court) and for the purposes of such proceedings.

(7) In subsection (6) references to the client of a professional legal adviser include references to any person representing such a client.

(8) A person shall not be required by virtue of this section to furnish the Commissioner with any information if the furnishing of that information would, by revealing evidence of the commission of any offence other than an offence under this Act, expose him to proceedings for that offence.

(9) The Commissioner may cancel an information notice by written notice to the person on whom it was served.

(10) After completing the assessment the Commission must report to the responsible party the results of the assessment and any recommendations that the Commission considers appropriate and where appropriate a request, that within a time specified therein, notice be given to the Commission of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken.

(11) The Commission may make public any information relating to the personal information management practices of an organisation if the Commission considers it in the public interest to do so.

(12) A report made by the Commission under section 81(10) is deemed to be the equivalent to an enforcement order served in terms of sec 83 of this Act.

Parties to be informed of result of investigation

82. Where any investigation is made following a complaint, and the Commission in its discretion does not believe that an action in terms of section 63 has taken place and hence do not serve an enforcement notice, the complainant must be informed accordingly as soon as reasonably practicable after the conclusion of the investigation and in such manner as the Commission thinks proper, of the result of the investigation.

Enforcement notice

83.(1) If the Commission is satisfied that a responsible party has interfered or is interfering with the protection of the personal information of a person, the Commission may serve the responsible party with a notice (in this Act referred to as "an enforcement notice") requiring the responsible party to do either or both of the following -

- (a) to take within such time as may be specified in the notice, or to refrain from taking after such time as may be so specified, such steps as are so specified, or

- (b) to refrain from processing any personal information, or any personal information of a description specified in the notice, or to refrain from processing them for a purpose so specified or in a manner so specified, after such time as may be so specified.

(2) An enforcement notice must contain -

- (a) a statement indicating the nature of the interference with the protection of the personal information of the person and the reasons for reaching that conclusion, and
- (b) particulars of the rights of appeal conferred by section 85.

(3) Subject to subsection (4), an enforcement notice must not require any of the provisions of the notice to be complied with before the end of the period within which an appeal can be brought against the notice and, if such an appeal is brought, the notice need not be complied with pending the determination or withdrawal of the appeal.

(4) If by reason of special circumstances the Commission considers that an enforcement notice should be complied with as a matter of urgency it may include in the notice a statement to that effect and a statement of its reasons for reaching that conclusion; and in that event subsection (3) must not apply but the notice must not require the provisions of the notice to be complied with before the end of the period of seven days beginning with the day on which the notice is served.

Cancellation of enforcement notice

84.(1) A person on whom an enforcement notice has been served may, at any time after the expiry of the period during which an appeal can be brought against that notice, apply in writing to the Commission for the cancellation or variation of that notice on the ground that, by reason of a change of circumstances, all or any of the provisions of that notice need not be complied with in order to ensure compliance with the information protection principle or principles to which that notice relates.

(2) If the Commission considers that all or any of the provisions of an enforcement notice need not be complied with in order to ensure compliance with the information protection principle or principles to which it relates, it may cancel or vary the notice by written notice to the person on whom it was served.

Right of appeal

85. A person on whom an information or enforcement notice has been served may appeal to the any court of competent jurisdiction for cancellation or variation of the notice within thirty days.

Consideration of appeal

86.(1) If on an appeal under section 85 the court considers-

- (a) that the notice against which the appeal is brought is not in accordance with the law, or
- (b) to the extent that the notice involved an exercise of discretion by the Commission, that it ought to have exercised its discretion differently,

the court must allow the appeal or substitute such other notice or decision as could have been served or made by the Commission; and in any other case the court must dismiss the appeal.

(2) On such an appeal, the court may review any determination of fact on which the notice in question was based.

Civil remedies

87.(1) Either the data subject(s), or the Commission, at the request of the data subject(s), may institute civil action in any court of competent jurisdiction against any responsible party who has contravened or not complied with any provision of this Act for payment of -

- (a) an amount determined by the Court as compensation for patrimonial and non-patrimonial damages suffered by the data subject(s) in consequence of such contravention or non-compliance;
- (b) an amount, for compensatory or punitive purposes, in a sum determined in the discretion of the Court but not exceeding three times the amount of any profit or gain which may have accrued to the person involved as a result of any such act or omission;
- (c) interest; and
- (d) costs of suit on such scale as may be determined by the Court.

(2) Any amount recovered by the Commission in terms of subsection (1) must be deposited by the Commission directly into a specially designated trust account established by the Commission with an appropriate financial institution, and thereupon-

- (a) the Commission is, as a first charge against the trust account, entitled to reimbursement of all expenses reasonably incurred in bringing proceedings under subsection (1) and in administering the distributions made to the person(s) in terms of subsection (4);
- (b) the balance, if any (hereinafter referred to as the 'distributable balance') must be distributed by the Commission to the person(s) referred to in subsection (4), any funds remaining, accruing to the Commission in the Commission's official capacity.

(3) Any amount not claimed within three years from the date of the first distribution of payments in terms of subsection (2), accrues to the Commission in the Commission's official capacity.

(4) The distributable balance must be distributed on a pro rata basis to the data subject(s) referred to in subsection (1): Provided that no money may be distributed to a person who has contravened or failed to comply with any provision of this Act.

(5) A Court issuing any order under this section must order it to be published in the Gazette and by such other appropriate public media announcement as the Court considers appropriate.

(6) Any civil proceedings instituted under this section may be withdrawn, abandoned or compromised, but any agreement or compromise must be made an order of Court and the amount of any payment made in terms of any such compromise must be published in the Gazette and by such other public media announcement as the Court considers appropriate.

(7) Where civil proceedings have not been instituted, any agreement or settlement (if any) may, on application to the Court by the Commission after due notice to the other party, be made an order of Court and must be published in the Gazette and by such other public media announcement as the Court considers appropriate.

CHAPTER 9

OFFENCES AND PENALTIES

Obstruction of Commission

88. Any person who hinders, obstructs or unduly influences the Commission or any person acting on behalf or under the direction of the Commission in the performance of the Commission's duties and functions under this Act, is guilty of an offence.

Obstruction of execution of warrant

89. Any person who-

- (a) intentionally obstructs a person in the execution of a warrant issued under section 73, or
- (b) fails without reasonable excuse to give any person executing such a warrant such assistance as he may reasonably require for the execution of the warrant, is guilty of an offence.

Failure to comply with enforcement or information notices

90.(1) A person who fails to comply with an enforcement notice served in terms of sec 83, is guilty of an offence.

(2) A person who, in purported compliance with an information notice -

- (a) makes a statement which he knows to be false in a material respect, or
- (b) recklessly makes a statement which is false in a material respect, is guilty of an offence.

Penal sanctions

91. Any person convicted of an offence in terms of this Act, is liable -

- (a) in the case of a contravention of section 88, to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- (b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

Magistrate's Court jurisdiction to impose penalties

92. Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 91.

CHAPTER 10 MISCELLANEOUS

Automated decision making

93.(1) Subject to subsection 2, no one may be subject to a decision to which are attached legal consequences for him or her, or which affects him or her to a substantial degree, where this decision has been taken solely on the basis of the automated processing of personal information intended to provide a profile of certain aspects of his or her personality or personal habits.

(2) The provisions of subsection (1) do not apply where the decision referred to therein:

- a) has been taken in connection with the conclusion or execution of a contract, and
 - (i) the request of the data subject in terms of the contract has been met; or
 - (ii) appropriate measures have been taken to protect the data subject's lawful interests; or
- b) is based on a law or code of conduct in which measures are laid down for protecting the lawful interests of data subjects.

(3) Appropriate measures, as referred to under subparagraph 2(a), must be considered as taken where the data subjects have been given the opportunity to put forward their views on the decisions as referred to under subsection (1).

(4) In the case referred to under subsection (2), the responsible party must inform a data subject about the underlying logic of the automated processing of the information relating to him or her.

Transborder information flows

94. A responsible party in South Africa may transfer personal information about a data subject to someone (other than the responsible party or the data subject) who is in a foreign country only if

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- (a) the recipient of the information is subject to a law, binding scheme or contract which effectively upholds principles for fair handling of the information that are substantially similar to the Information Protection Principles set out in Chapter 3 of this Act; or
- (b) the data subject consents to the transfer; or
- (c) the transfer is necessary for the performance of a contract between the individual and the organisation, or for the implementation of pre-contractual measures taken in response to the data subject's request; or
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the individual between the organisation and a third party; or
- (e) all of the following apply:
 - (i) the transfer is for the benefit of the individual;
 - (ii) it is reasonably impracticable to obtain the consent of the data subject to that transfer;
 - (iii) if it were reasonably practicable to obtain such consent, the individual would be likely to give it.

Repeal and amendment of laws

95. The laws mentioned in the Schedule to this Act are hereby amended to the extent indicated in the third column thereof.

Regulations

96. The Minister for Justice and Constitutional Development may make regulations on –

- (a) any matter which is required or permitted in terms of this Act to be prescribed;
- (b) the monitoring of this Act and the establishment of the Office of the Information Commissioner; and
- (c) any other matter which may be necessary for the application of this Act.

Short title and commencement

97.(1) This Act is the Protection of Personal Information Act, 2005, which takes effect on a date fixed by the President by notice in the Gazette.

(2) Different dates may be fixed under subsection (1) in respect of different provisions of this Act or in respect of different industries.

SCHEDULE 1
AMENDMENT OF LAWS

Number and year of law	Short title	Extent of amendment
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