

Protection of Personal Information Bill

Presentation to the Select Committee on Security and Constitutional Development

Presenter: Ismail Momoniat | DDG Tax and Financial Sector Policy, National Treasury | 28 November 2012



national treasury

Department:
National Treasury
REPUBLIC OF SOUTH AFRICA



Composition of Delegation

- National Treasury:
 - Mr. Ismail Momoniat- DDG: Tax and Financial Sector Policy
 - Ms. Jeannine Bednar-Giyose- Director: Financial Sector Regulation and Legislation
- Financial Services Board (“FSB”), the non-banking financial services regulator
 - Adv. Nonku Tshombe- HOD: Legal Department
 - Ms. Annah Manganyi- Senior Manager : International and Local Affairs Unit

Background on financial sector regulatory reforms

- After 2008 global financial crisis, G20 countries are taking tough steps to regulate and supervise the financial sector more intrusively , NOT light-touch
 - Basel III, Solvency II, OTC derivatives, regulating ratings agencies etc
 - International stds govern our regulatory standards, IMF and World Bank assessments (FSAP) and Peer Reviews on adherence to standards
- Min of Fin announced shift to TWIN PEAKS regulation in 2011 Budget, which was adopted by Cabinet in July 2011 (“A safer fin sector to serve SA better”)
- Twin Peaks refers to two separate regulators, one in the SA Reserve Bank to deal with financial soundness of institutions (prudential supervision), and the second to deal with market conduct and consumer protection (to replace FSB)
- SARB also given mandate to oversee financial stability of entire system (macroprudential supervision)
- Market conduct approach already implemented through Treat Customers Fairly Campaign, action on unsecured credit (inc garnishee orders), fees in the financial sector, retirement reform etc

Key Challenges identified after Global Financial Crisis

- Financial sector is globally integrated, but regulated nationally
 - SIFIS, global and domestic systemically important fin institutions
- Need for international co-ordination between national regulators (supervisory colleges, MoUs)
- Sharing of information between different country regulators is critical to ensure effective supervision over global financial companies
- Prob of co-ordination also affects regulators within the country, who also do not share information (eg Bank of England and FSA in UK)
- How do we co-ordinate the different regulators?
 - Banking, Non-banking, credit, money laundering, competition, consumer protection, information, medical schemes etc
- We have the additional challenge that regulators in other countries in Africa where SA fin institutions operate, also face capacity challenges

History of Engagements on POPI

- POPI is a COMPLEX bill, affecting most regulators
- Engagements with the Department of Justice and Constitutional Development, and the South African Law Reform Commission
- Submissions to the Portfolio Committee on Justice and Constitutional Development
- Many concerns raised in submissions addressed through amendments proposed by the DoJCD and recommended by the Portfolio Committee on Justice and Constitutional Development
- Outstanding concerns in relation to two clauses in the Bill- clauses 38 and 72
- Request to make submissions to the Select Committee on Security and Constitutional Development
- Further engagements with the DoJCD

The FSB as Regulator

- FSB regulates the following financial industries in the public interest:
 - insurance industry
 - retirement funds
 - financial markets [JSE and STRATE]
 - collective investments
 - financial advisory and intermediary services

Mandate of the FSB

- **Primary Mandate:** To supervise and enforce compliance with laws regulating financial institutions and the provision of financial services
- **Mission:** To ensure the -
 - protection of consumers of financial services and products
 - integrity and efficiency of financial markets
 - financial soundness of financial institutions
 - systemic stability of financial services industries

Clause 38(2)- Current Wording

“(2) “**Relevant function**” for purposes of subsection (1), means any function—

- (a) of a public body; or
- (b) conferred on any person in terms of the law,

which is performed with the view to protecting members of the public against—

- (i) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance, investment or other financial services or in the management of bodies corporate; or
- (ii) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity.”

Clause 38(2)- Proposed Amendment

- It is proposed that the provision could be amended to read as follows:

“(2) “**Relevant function**” for purposes of subsection (1), means any function—

(a) of a public body; or

(b) conferred on any person in terms of the law,

which is performed with the view to—

(i) protecting members of the public against –

(aa) financial loss due to dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons concerned in the provision of banking, insurance investment or other financial services or in the management of bodies corporate; or
(bb) dishonesty, malpractice or other seriously improper conduct by, or the unfitness or incompetence of, persons authorised to carry on any profession or other activity; or

(ii) protecting the integrity, stability or soundness of financial institutions or markets.”



Clause 38(2)- Rationale for Proposed Amendment

- The FSB and other financial sector regulators do not process information only to protect members of the public but also as a regulator with other regulators.
- The FSB processes information also in relation to fulfilling the other aspects of its mandate, as described previously.
- It is therefore proposed to include wording that would appropriately encompass the purposes for which financial sector regulators appropriately share information, in fulfillment of their functions and mandate.

Clause 72(3)(a)- current wording

(3)(a) “**accountable**” means that where the recipient of the information, who is a party to a non-binding memorandum of understanding, processes the personal information of a data subject in a manner that would have constituted an interference with the privacy of the data subject in terms of this Act had the information been processed in the Republic, the processing will be regarded as an interference with the privacy of the data subject in terms of this Act and will be regarded as having been processed by the responsible party;

Clause 72(3)(a)- Proposed Amendment

"(3) For the purpose of this section -

(a) "**accountable**" means that where the recipient of the information, who is a party to a non-binding memorandum of understanding, processes the personal information of a data subject in a manner that would have constituted an interference with the privacy of the data subject in terms of this Act had the information been processed in the Republic, the processing will be regarded as an interference with the privacy of the data subject in terms of this Act and will be regarded as having been processed by the responsible party, unless -

- (i) the memorandum of understanding contains protection measures that are consistent with the measures provided for in this legislation; and
- (ii) the responsible party–
 - (aa) informs the Information Regulator of the interference with the privacy of the data subject;
 - (bb) advises the Information Regulator of the steps taken by the responsible party to facilitate adherence with the privacy provisions; and
 - (cc) imposes restrictions on and other measures relating to the further processing of information with the foreign regulator, that may be indicated by the Information regulator after consultation with the responsible party.”

Clause 72(3)(a)- Rationale for Proposed Amendment

- The current wording would leave the FSB and other regulators open to substantial potential liability, if a foreign regulator processes the personal information of a data subject in a manner that would have constituted an interference with the privacy of the data subject in terms of this Act had the information been processed in the Republic.
- The accountability proposed entails requiring that the MOU in terms of which the information is shared must contain protection measures that are consistent with the measures provided for in this legislation.

Clause 72(3)(a)- Rationale for Proposed Amendment (cont.)

- Secondly, the accountability envisages a responsibility on the responsible party (for instance the FSB) to advise the information Regulator whenever the responsible party becomes aware of a breach of the said protection measures.
- Thirdly, the accountability also envisages action on the part of the responsible party wherein the restriction of further processing of information with the foreign regulator must be imposed – in this regard it is also envisaged that such restriction can only be lifted pursuant to a decision by the Information Regulator taken after consultation with the responsible party.
- In other words the responsible party is required to truly **account (as opposed to being liable)** to the Regulator with respect to the information that it processed



Thank you