

FIFTH WORKING DRAFT: 26 October 2011

PROTECTION OF PERSONAL INFORMATION BILL

1. *Words underlined "XXX XXX": proposed additions to introduced Bill as per instruction by Technical Committee;*
2. *Words deleted "[XXX XXX]": proposed omissions from introduced Bill as per instruction by Technical Committee.*

GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

B I L L

To promote the protection of personal information processed by public and private bodies; to introduce [information protection principles] certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information [Protection] Regulator; to provide for the issuing of codes of conduct[s]; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; to regulate the flow of personal information across the borders of the Republic; and to provide for matters connected therewith.

PREAMBLE**RECOGNISING THAT—**

- * section 14 of the Constitution of the Republic of South Africa, 1996, provides that everyone has the right to privacy;
- * the right to privacy includes a right to protection against the unlawful collection, retention, dissemination and use of personal information;
- * the State must respect, protect, promote and fulfil the rights in the Bill of Rights;

AND BEARING IN MIND THAT—

- * consonant with the constitutional values of democracy and openness, the need for economic and social progress, within the framework of the information society, requires the removal of unnecessary impediments to the free flow of information, including personal information;

AND IN ORDER TO—

- * regulate, in harmony with international standards, the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that are aimed at protecting other rights and important interests,

PARLIAMENT of the Republic of South Africa therefore enacts as follows:—

CONTENTS OF ACT**CHAPTER 1
DEFINITIONS AND PURPOSE**

1. Definitions
2. Purpose of Act

CHAPTER 2

APPLICATION PROVISIONS

3. Application and interpretation of Act
4. Rights of data subjects
5. Lawful processing of personal information
- [4] 6. Exclusions
- [5. Saving
6. Act applies to public and private bodies]

CHAPTER 3 CONDITIONS FOR LAWFUL PROCESSING OF PERSONAL INFORMATION

Part A

[Information Protection Principles] Conditions for processing of personal information in general

[Principle 1]

Accountability

7. Responsible party to [give effect to principles] ensure conditions for lawful processing

[Principle 2]

Processing limitation

8. Lawfulness of processing
9. Minimality
10. Consent, justification and objection
11. Collection directly from data subject

[Principle 3]

Purpose specification

12. Collection for specific purpose
- [13. Data subject aware of purpose of collection of information]
- [14] 13. Retention of records

[Principle 4]

Further processing limitation

- [15] 14. Further processing to be compatible with purpose of collection

[Principle 5]

Information quality

- [16] 15. Quality of information

[Principle 6]

Openness

- [17] 16. Notification to Regulator [and to data subject]
17. Notification to data subject when collecting personal information

[Principle 7]

Security safeguards

18. Security measures on integrity of personal information
19. Information processed by operator or person acting under authority
20. Security measures regarding information processed by operator
21. Notification of security compromises

[Principle 8]**Data subject participation**

- 22. Access to personal information
- 23. Correction of personal information
- 24. Manner of access

Part B**Processing of special personal information**

- 25. Prohibition on processing of special personal information
- 26. General exemption concerning special personal information
- [26] 27. Exemption concerning data subject's [religion] religious or philosophical beliefs
- [27] 28. Exemption concerning data subject's race
- [28] 29. Exemption concerning data subject's trade union membership
- [29] 30. Exemption concerning data subject's political persuasion
- [30] 31. Exemption concerning data subject's health [or sexual life]
- [31] 32. Exemption concerning data subject's criminal behaviour
- [32. General exemption concerning special personal information]

CHAPTER 4**EXEMPTION FROM [INFORMATION PROTECTION PRINCIPLES] CONDITIONS FOR PROCESSING OF PERSONAL INFORMATION**

- 33. General
- 34. Regulator may authorise processing of personal information

**CHAPTER 5¹
SUPERVISION****Part A****Information [Protection] Regulator**

- 35. Establishment of Information [Protection] Regulator
- 36. [Constitution and period of office of Regulator] Appointment, period of and removal from office of members of Regulator
- 37. Vacancies
- 38. Powers, duties and functions of Chairperson and other members
- 39. Regulator to have regard to certain matters
- 40. Conflict of interest
- [37] 41. Remuneration, allowances, benefits and privileges of members
- [38] 42. [Secretary and staff] Staff
- 43. Powers, duties and functions of Chief Executive Officer
- [39] 44. Committees of Regulator
- 45. Establishment of Enforcement Committee
- 46. Functions of Enforcement Committee
- [40] 47. Meetings of Regulator
- [41] 48. Funds
- [42] 49. Protection of Regulator
- [43] 50. Powers, [and] duties and functions of Regulator
- [44. Regulator to have regard to certain matters]
- 45. Programmes of Regulator]
- 46. Reports of Regulator]
- [47] 51. Duty of confidentiality

¹ The question is raised whether Chapters 8 (Rights of Data Subjects regarding Unsolicited Electronic Communications and Automated Decision Making) and 9 (Transborder Information Flows) should be inserted before Chapter 5.

Part B
Information [Protection] Officer

- [48] 52. Duties and responsibilities of Information [Protection] Officer
- [49] 53. Designation and delegation of deputy information [protection] officers

CHAPTER 6
NOTIFICATION AND PRIOR INVESTIGATION

Part A
Notification

- [50] 54. Notification of processing
- [51] 55. Notification to contain specific particulars
- [52] 56. Exemptions to notification requirements
- [53] 57. Register of information processing
- [54] 58. Failure to notify

Part B
Prior investigation

- [55] 59. Processing subject to prior investigation
- [56] 60. Responsible party to notify Regulator if processing is subject to prior investigation
- 61. Failure to notify processing subject to prior investigation

CHAPTER 7
CODES OF CONDUCT

- [57] 62. Issuing of codes of conduct
- [58] 63. [Proposal] Process for issuing [of] codes of conduct
- [59] 64. Notification, availability and commencement of code
- [60] 65. Amendment and revocation of codes
- 61. Procedure for dealing with complaints
- [62] 66. Guidelines about codes of conduct
- [63] 67. Register of approved codes of conduct
- [64] 68. Review of operation of approved code of conduct
- 69. Procedure for dealing with complaints
- [65] 70. Effect of failure to comply with code

CHAPTER 8
RIGHTS OF DATA SUBJECTS REGARDING UNSOLICITED ELECTRONIC
COMMUNICATIONS AND AUTOMATED DECISION MAKING

- [66] 71. Unsolicited electronic communications
- [67] 72. Directories
- [68] 73. Automated decision making

CHAPTER 9
TRANSBORDER INFORMATION FLOWS

- [69] 74. Transfers of personal information outside Republic

CHAPTER 10
ENFORCEMENT

- [70] 75. Interference with protection of personal information of data subject

- [71] 76. Complaints
- [72] 77. Mode of complaints to Regulator
- [73] 78. Investigation by Regulator
- [74] 79. **Action on receipt of complaint**
- [75] 80. Regulator may decide to take no action on complaint
- [76] 81. Referral of complaint to regulatory body
- [77] 82. Pre-investigation proceedings of Regulator
- [78] 83. Settlement of complaints
- [79] 84. Investigation proceedings of Regulator
- [80] 85. Issue of warrants
- [81] 86. Requirements for issuing of warrant
- [82] 87. Execution of warrants
- [83] 88. Matters exempt from search and seizure
- [84] 89. Communication between legal adviser and client exempt
- [85] 90. Objection to search and seizure
- [86] 91. Return of warrants
- [87] 92. Assessment
- [88] 93. Information notice
- [89] 94. **Parties to be informed of result of assessment**
- [90] 95. Parties to be informed of developments during and result of investigation
- [91] 96. Enforcement notice
- [92] 97. Cancellation of enforcement notice
- [93] 98. Right of appeal
- [94] 99. Consideration of appeal
- [95] 100. Civil remedies

CHAPTER 11 OFFENCES AND PENALTIES

- [95] 100. Obstruction of Regulator
- [96] 101. Breach of confidentiality
- [97] 102. Obstruction of execution of warrant
- [98] 103. Failure to comply with enforcement or information notices
- [99] 104. **Unlawful acts by responsible party in connection with unique identifier**
- [100] 105. **Unlawful acts by third parties in connection with unique identifier**
- [101] 106. **[Penal sanctions] Penalties**
- [102] 107. Magistrate's Court jurisdiction to impose penalties

CHAPTER 12 GENERAL PROVISIONS

- [101] 108. **[Repeal and amendment] Amendment** of laws
- [102] 109. **Fees**
- [103] 110. Regulations
- [104] 111. **Procedure for making regulations**
- [105] 112. Transitional arrangements
- [106] 113. Short title and commencement

SCHEDULE

Laws **[repealed and]** amended by section [101] 108

CHAPTER 1 DEFINITIONS AND PURPOSE

Definitions

1. In this Act, unless the context indicates otherwise—

"automatic calling machine" means a machine that is able to do automated calls without human intervention;

"biometric" means a technique of personal identification that is based on physical characteristics including fingerprinting, DNA analysis², retinal scanning and voice recognition;

"child", for purposes of section 25(1), means a natural person under the age of 18 years;

"code of conduct" means a code of conduct issued in terms of Chapter 7;

"consent" means any voluntary, specific and informed expression of will in terms of which a—

(a) competent person, referred to in section 25(1)(b), agrees to the processing of the personal information of a child as provided for in terms of section 26(a)(i); or

(b) data subject agrees to the processing of personal information relating to him or her;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"data subject" means the person to whom personal information relates;

"de-identify", in relation to personal information of a data subject, means to delete any information that—

(a) identifies the data subject;

(b) can be used or manipulated by a reasonably foreseeable method to identify the data subject; or

(c) can be linked by a reasonably foreseeable method to other information that identifies the data subject[;]

and "de-identified" has a corresponding meaning;

["electronic mail" or "e-mail"] **"electronic communication"** means any text, voice, sound or image message sent over [a public] an electronic communications network³ which [can be] is stored in the network or in the recipient's terminal equipment until it is collected by the recipient;

"enforcement notice" means a notice issued in terms of section [90] 95;

"filing system" means any structured set of personal information which is accessible according to specific criteria;

Option:⁴

"filing system" means any set of information relating to persons to the extent that the set is structured, either by reference to persons or by reference to criteria relating to individuals, in such a way that specific information relating to a particular person is readily accessible whether centralised, de-centralised or dispersed on a functional or geographical basis;

"head" of, or in relation to, a private body means a head of a body as defined in section 1 of the Promotion of Access to Information Act;

"information matching programme" means the comparison, whether manually or by means of any electronic or other device, of any document that contains personal information about ten or more data subjects with one or more documents that contain personal information of ten or more data subjects, for the purpose of producing or verifying information that may be used for the purpose of taking any action in regard to an identifiable data subject;

"information notice" means a notice issued in terms of section [88] 92;

² The Technical Committee requested on 21/5/10 that the word "analysis" should be replaced with "data". This appears not to be possible since the introductory wording of the definition refer to a "technique" of personal identification.

³ A previous draft of the Bill proposed that "electronic communications network" should be defined, to clarify the meaning of the definition "electronic communication", as follows:

"electronic communications network" means any system of electronic communications facilities (excluding subscriber equipment), including—

(a) satellite systems;

(b) fixed systems (circuit- and packet-switched);

(c) mobile systems;

(d) fibre optic cables (undersea and land-based);

(e) electricity cable systems (to the extent used for electronic communications services); and

(f) other transmission systems, used for conveyance of electronic communications;

After having reconsidered the proposal it is now recommended that it is not necessary to define the term in view thereof that the provisions of clause 71, read with the definition of "electronic communication", provide sufficient clarity with regard to the ambit of clause 71, namely, communication in the absence of two individuals communicating directly with each other.

⁴ It is recommended that the term be defined in order to clarify the meaning thereof. The proposed definition is based on Regulation (EC) No. 45 of 2001 of the European Parliament of 18 December 2000.

"information [protection] officer" of, or in relation to, a—

- (a) public body means an information officer or deputy information officer as contemplated in terms of section 1 or 17 of the Promotion of Access to Information Act; or
- (b) private body means the head of a private body as contemplated in section 1 of the Promotion of Access to Information Act;

"Minister" means the Cabinet member responsible for the administration of justice;

"operator" means a person who processes personal information for a responsible party in terms of a contract or mandate, without coming under the direct authority of that party;

"parent" includes either the parent of a child or the child's legal guardian;

"parental consent" means any voluntary, specific and informed expression of will in terms of which the parent of a child agrees to the processing of personal information relating to that child;⁵

"person" means a natural person or a juristic person;

"personal information" means information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing 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;
- (b) information relating to the education or the medical, financial, criminal or employment history of the person;
- (c) any identifying number, symbol, e-mail address, physical address, telephone number or other particular assignment to the person;
- (d) the blood type or any other biometric information of the person;
- (e) the personal opinions, views or preferences of the person;
- (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; and
- (h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person;

"prescribed" means prescribed by regulation or by a code of conduct;

"prior investigation" means an investigation conducted by the Regulator in terms of Part B of Chapter 6;

"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;

"processing" means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
- (b) dissemination by means of transmission, distribution or making available in any other form; or
- (c) merging, linking, as well as blocking, degradation, erasure or destruction of information;

Option:⁶

"processing" means any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including—

- (a) the collection, receipt, recording, [organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use];
- (b) dissemination by means of transmission, distribution or making available in any other form; or
- (c) merging, linking, as well as blocking, degradation, erasure or destruction of information;

⁵ The definitions should, in view of the proposed amendments reflected in clause 25, be omitted from clause 1.

⁶ Option proposed by Dr Oriani-Ambrosini (on 24/2/11).

"professional legal adviser" [means any legally qualified person, whether in private practice or not, who lawfully provides a client, at his or her or its request, with independent, confidential legal advice] means a legal practitioner or a person whose occupation involves the giving of legal advice;⁷

"Promotion of Access to Information Act" means the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);

"public body" means—

- (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;

"public communications network" means an electronic communications network used wholly or mainly for the provision of publicly available electronic communications services;⁸

"public record" means a record that is accessible in the public domain and which is in the possession of or under the control of a public body, whether or not it was created by that public body;

"record" means any recorded information—

- (a) regardless of form or medium, including any of the following:
 - (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 responsible party;
- (c) whether or not it was created by a responsible party; and
- (d) regardless of when it came into existence;

"Regulator" means the Information [Protection] Regulator established in terms of section 35;

"re-identify", in relation to personal information of a data subject, means to resurrect any information that has been de-identified, that—

- (a) identifies the data subject;
- (b) can be used or manipulated by a reasonably foreseeable method to identify the data subject; or
- (c) can be linked by a reasonably foreseeable method to other information that identifies the data subject;

"Republic" means the Republic of South Africa;

"responsible party" means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information;

"subscriber" means any person who is party to a contract with the provider of publicly available electronic communications services for the supply of such services; [and]

"this Act" includes any regulation or code of conduct made under this Act; and

"unique identifier", for the purposes of sections 50(1)(b)(vi) and 59(1)(a), means any identifier that is assigned to a data subject by a responsible party for the purposes of the operations of that responsible party and that uniquely identifies that data subject in relation to that responsible party.

Purpose of Act

⁷ Definition to be omitted if clause 88 "Communication between legal adviser and client exempt" is not retained.

⁸ See footnote 3.

2. **(1)** The purpose of this Act is to—
- (a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at—
 - (i) balancing the right to privacy against other rights, particularly the right of access to information; **and**
 - (ii) protecting important interests, including the free flow of information within the Republic and across international borders;
 - (b) regulate the manner in which personal information may be processed, by establishing **[principles] conditions**, in harmony with international standards, that prescribe the minimum threshold requirements for **the** lawful processing of personal information;
 - (c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and
 - (d) establish voluntary and compulsory measures, including an Information **[Protection]** Regulator, to ensure respect for and to promote, enforce and fulfil the rights protected by this Act.
- (2)** This Act must be interpreted in a manner that—
- (a) gives effect to the purposes of the Act set out in subsection (1); and
 - (b) does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such functions, powers and duties relate to the processing of personal information and such processing is in accordance with this Act or any other legislation that regulates the processing of personal information.⁹

CHAPTER 2 APPLICATION PROVISIONS

Application **and interpretation** of Act

3. **(1)** This Act applies to the processing of personal information— **[entered in a record by or for a responsible party—**
- (a) **domiciled in the Republic; or**
 - (b) **which is not domiciled in the Republic, using automated or non-automated means situated in the Republic, unless those means are used only for forwarding personal information,**
- provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof.]**
- (a) **entered in a record by or for a responsible party by making use of automated or non-automated means: Provided that when the recorded personal information is processed by non-automated means, it forms part of a filing system or is intended to form part thereof; and**
 - (b) **where the responsible party is—**
 - (i) **domiciled in the Republic; or**
 - (ii) **not domiciled in the Republic, but makes use of automated or non-automated means that are situated in the Republic, unless those means are used only to transfer personal information through the Republic.**
- (2)** “Automated means”, for purposes of subsection (1)(b)(ii), means any equipment capable of operating automatically in response to instructions given for the purpose of processing information.
- (3)** **(a)**¹⁰ **This Act applies, subject to paragraph (b), to the exclusion of any provision of any other legislation that regulates the processing of personal information and that is materially inconsistent with an object, or a specific provision, of this Act.**
- (b)** **If any other legislation provides for conditions for the lawful processing of personal information that are more extensive than those set out in Chapter 3, the extensive conditions prevail.**
- (4)** **This Act must be interpreted in a manner that—**

⁹ Subclause (2) duplicated in clause 3(4). Since subclause (2) deals with the interpretation of the Act and not the purpose thereof, it has been inserted in clause 3(4) as per instruction on 8/4/10

¹⁰ The proposed new wording of paragraph (a) aims to clarify the operation of the Act in relation to other legislation that regulates the processing of personal information in a similar fashion to the provisions of section 5 of PAIA. Clause 3(3) represents an alternative version of the original clause 5 (as introduced).

- (a) gives effect to the purpose of the Act set out in section 2; and
- (b) does not prevent any public or private body from exercising or performing its powers, duties and functions in terms of the law as far as such functions, powers and duties relate to the processing of personal information and such processing is in accordance with this Act or any other legislation, as referred to in subsection (3), that regulates the processing of personal information.

Rights of data subjects

4. A data subject has the right to have his, her or its personal information processed by or for a responsible party in accordance with the conditions for the lawful processing of personal information as referred to in section 5, including the right—

- (a) to object, on reasonable grounds relating to his, her or its particular situation to the processing of his, her or its personal information as provided for in terms of section 10;
- (b) to be notified that—
 - (i) personal information about him, her or it is being collected as provided for in terms of section 17; or
 - (ii) his, her or its personal information has been accessed or acquired by an unauthorised person as provided for in terms of section 21;
- (c) to establish whether a responsible party holds personal information of that data subject and to request access to his, her or its personal information as provided for in terms of section 22;
- (d) to request, where necessary, the correction, destruction or deletion of his, her or its personal information as provided for in terms of section 23;
- (e) to refuse to the processing of his, her or its personal information for the purpose of direct marketing by means of unsolicited electronic communications as provided for in terms of section 71;
- (f) not to be subject, under certain circumstances, to a decision which is based solely on the basis of the automated processing of his, her or its personal information intended to provide a profile of such person as provided for in terms of section 73;
- (g) to submit a complaint to the Regulator regarding the alleged interference with the protection of the personal information of any data subject or to submit a complaint to the Regulator in respect of a determination of an adjudicator as provided for in terms of section 76; and
- (h) to institute civil proceedings regarding the alleged interference with the protection of his, her or its personal information as provided for in section 99.

Lawful processing of personal information

5. (1) (a) The conditions for the lawful processing of personal information in general by or for a responsible party are, subject to subsection (2), the following:

- (i) “Accountability”, as referred to in section 7;
 - (ii) “Processing limitation”, as referred to in sections 8 to 11;
 - (iii) “Purpose specification”, as referred to in sections 12 and 13;
 - (iv) “Further processing limitation”, as referred to in section 14;
 - (v) “Information quality”, as referred to in section 15;
 - (vi) “Openness”, as referred to in sections 16 and 17;
 - (vii) “Security safeguards”, as referred to in sections 18 to 21; and
 - (viii) “Data subject participation”, as referred to in sections 22 to 24.
- (b) The conditions for the lawful processing of—
- (i) the personal information of a child, referred to in section 25(1)(a), by or for a responsible party are, in addition to the requirements referred to in paragraph (a)(i) to (viii), but subject to subsection (2), set out in sections 25(1) and 26(a) to (e); and
 - (ii) the special personal information of a data subject, other than a child referred to in subparagraph (i), by or for a responsible party are, in addition to the requirements referred to in paragraph (a)(i) to (viii), but subject to subsection (2), set out in sections 25(2) to 32.

(2) The conditions, as referred to in subsection (1)(a) or (b), are not applicable to the processing of personal information or special personal information, as the case may be, to the extent that—

- (a) such processing is excluded, in terms of section 6, from the operation of this Act; or
- (b) the Regulator has granted an exemption, in terms of Chapter 4, from one or more of the conditions concerned in relation to such processing.

(3) The conditions for the lawful processing of personal information by or for a responsible party for the purpose of direct marketing are reflected—

- (a) in subsection (1)(a)(i) to (viii); and
- (b) insofar as marketing by means of unsolicited electronic communications are concerned, in the provisions of section 71.

(4) Sections 62 to 70 provide for the development, in appropriate circumstances, of codes of conduct for purposes of clarifying how the conditions referred to in subsection (1)(a) or (b) are to be applied, or are to be complied with within a particular sector.

Exclusions¹¹

4] 6. (1) This Act does not apply to the processing of personal information—
(a) in the course of a purely personal or household activity;

Option 1:¹²

(a) in the course of a purely personal non-commercial, non-governmental 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 State] a public body and—

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

(ii) the purpose of which is the prevention, detection, including activities that are aimed at assisting in the identification of the proceeds of unlawful activities and the combating of money laundering activities, investigation or proof of offences, the prosecution of offenders or the execution of sentences or security measures, to the extent that adequate safeguards have been established in specific] legislation for the protection of such personal information;

Option:¹³

To delete paragraph (c).

(d) for exclusively journalistic purposes by responsible parties who are subject to, by virtue of office, employment or profession, a code of ethics that provides adequate safeguards for the protection of personal information;

Option 1:¹⁴

(d) for exclusively journalistic purposes by responsible parties who are subject to, by virtue of office, employment or profession, a code of ethics that provides adequate safeguards for the protection of personal information to the extent that such code provides sufficient guidelines—

¹¹ The inclusion of a separate provision dealing with journalists may require the heading of clause 4 to be changed to, for example to "General exclusions".

¹² Option proposed by Dr Oriani-Ambrosini.

¹³ Option proposed by Dr Oriani-Ambrosini and Ms Smuts.

¹⁴ Option aims to provide more detail with regard to "adequate safeguards".

- (i) for such responsible parties in the processing of personal information which is substantially similar to the conditions for the lawful processing of such information as referred to in section 5(1); and
- (ii) balance the right to privacy against the right to freedom of expression in the particular context of information processing for journalistic purposes;

Option 2:¹⁵

(d) by any person of any journalistic, literary or artistic material;

Option 3:¹⁶

(d) for any purpose embodying the exercise of a right protected under the Constitution, including but not limited to journalistic purposes;

Options 4 and 5:

Refer to clauses 6A and 6B, hereunder.

(e) by the Cabinet and its committees[,] and the Executive Council of a province [and a Municipal Council of a municipality];

Option:

To delete paragraph (e).

(f) relating to the judicial functions of a court referred to in section 166 of the Constitution; or

(g) that has been exempted from the application of the [information protection principles] conditions for the lawful processing of personal information in terms of section 34.

(2) "Terrorist and related activities", for purposes of subsection (1)(c), means those activities referred to in section 4 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004).

Option 4:**Exclusion for journalistic purposes**

6A. (1) This Act does not apply to the processing of personal information for exclusively journalistic purposes by responsible parties who are subject to, by virtue of office, employment or profession, a code of ethics that provides adequate safeguards for the protection of personal information.

(2) In the event that a dispute may arise in respect of whether adequate safeguards have been provided for in a code as required in terms of subsection (1) or not, regard may be had to—

(a) the special importance of the public interest in freedom of expression;

(b) domestic and international standards balancing the—

- (i) public interest in allowing for the free flow of information to the public through the media in recognition of the right of the public to be informed;
- and

- (ii) public interest in safeguarding the protection of personal information of data subjects;

(c) the need to secure the integrity of personal information;

(d) domestic and international standards of professional integrity for journalists; and

(e) the nature and ambit of self-regulatory forms of supervision provided by the profession.

¹⁵ Option aims to provide a blanket exclusion from operation of the Act.

¹⁶ Option proposed by Dr Oriani-Ambrosini.

Option 5:¹⁷**Exclusion for literary and artistic purposes**

6B. (1) This Act does not apply to the processing of personal information which is carried out solely for the purpose of literary or artistic expression—

- (a) where such processing is necessary to reconcile the right to privacy with the right of freedom of expression; and
- (b) the responsible party reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, such processing would be in the public interest.

(2) In considering for the purposes of subsection (1) whether the belief of the responsible party that processing will be in the public interest was or is a reasonable one regard may be had to—

- (a) the special importance of the public interest in freedom of expression;
- (b) domestic and international standards balancing the—
 - (i) public interest in allowing for the free flow of information to the public in recognition of the right of the public to be informed; and
 - (ii) public interest in safeguarding the protection of personal information of data subjects.

[Saving]¹⁸

5. (1) This Act does not affect the operation of any other legislation that regulates the processing of personal information and is capable of operating concurrently with this Act.

(2) If any other legislation provides for safeguards for the protection of personal information that are more extensive than those set out in the information protection principles, the extensive safeguards prevail.

Act applies to public and private bodies

6. This Act applies to all public and private bodies.]

CHAPTER 3 CONDITIONS FOR LAWFUL PROCESSING OF PERSONAL INFORMATION

Part A

[Information Protection Principles] Conditions for processing of personal information in general

[Principle 1]

Accountability

Responsible party to [give effect to principles] ensure conditions for lawful processing

7. The responsible party must ensure that the [principles] conditions set out in this Chapter, and all the measures that give effect to [the principles] such conditions, are complied with.

[Principle 2]

Processing limitation

Lawfulness of processing

8. Personal information must be processed—
- (a) lawfully; and
 - (b) in a reasonable manner that does not infringe the privacy of the data subject unnecessarily¹⁹.

¹⁷ Option requested by Chairperson of Technical Committee.

¹⁸ Clause 5 has been inserted in clause 3(3). As far as clause 6 is concerned, it should be noted that the terms “responsible party”, “public body” and “private body” is defined and it is therefore clear that the Act applies to both public and private bodies. It is recommended that clause 6 should be omitted from the Bill.

Minimality

9. Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive.

Option:²⁰

[Minimality] Right to privacy

9. [Personal information may only be processed if, given the purpose for which it is processed, it is adequate, relevant and not excessive.] Unless authorised under the law or objectively necessary for the completion of the transaction concerned, no-one shall be required to provide or disclose personal information as a condition for the completion of a transaction or the receipt of a benefit.

Consent, justification and objection

10. (1) Personal information may only be processed if—

- (a) subject to section 25(1),²¹ the data subject consents to the processing;
- (b) processing is necessary to carry out actions for the conclusion or performance of a contract to which the data subject is party;
- (c) processing complies with an obligation imposed by law on the responsible party;
- (d) processing protects a legitimate interest of the data subject;
- (e) processing is necessary for the proper performance of a public law duty by a public body;

or

- (f) processing is necessary for pursuing the legitimate interests of the responsible party or of a third party to whom the information is supplied.

(2) A data subject may object, at any time, on reasonable grounds relating to his, her or its particular situation, in the prescribed manner, to the processing of personal information in terms of subsection (1)(d) to (f), [unless otherwise provided for in national legislation] UNLESS legislation provides for such processing.²²

(3) If a data subject has objected to the processing of personal information in terms of subsection (2), the responsible party may no longer process the personal information.

Collection directly from data subject

11. (1) Personal information must be collected directly from the data subject, except as otherwise provided for in subsection (2).

(2) It is not necessary to comply with subsection (1) if—

- (a) the information is contained in or derived from a public record or has deliberately been made public by the data subject;
- (b) the data subject has consented to the collection of the information from another source;
- (c) collection of the information from another source would not prejudice a legitimate interest of the data subject;
- (d) collection of the information from another source 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;
 - (ii) [to enforce a law imposing a pecuniary penalty;
 - (iii)] to comply with an obligation imposed by law or²³ to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);

¹⁹ Technical Committee agreed on 4/6/10 that the word “unnecessarily” should be inserted at end of paragraph (b) to highlight the notion that some degree of *prima facie* infringement is permissible.

²⁰ Option proposed by Dr Oriani-Ambrosini.

²¹ Clause 25(1) introduces an exception, in the case of children under certain circumstances, to the general rule that a data subject may consent to processing.

²² The amendment is proposed for clarity purposes.

²³ Amendment proposed by FIC.

- ~~[(iv)](iii)~~ for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated;
 - ~~[(v)](iv)~~ in the ~~[legitimate]~~ interests of national security; or
 - ~~[(vi)](v)~~ to maintain the legitimate interests of the responsible party or of a third party to whom the information is supplied;
- (e) compliance would prejudice a lawful purpose of the collection; or
- (f) compliance is not reasonably practicable in the circumstances of the particular case.

[Principle 3]

Purpose specification

Collection for specific purpose

12. **(1)** Personal information must be collected for a specific, explicitly defined and lawful purpose related to a function or activity of the responsible party.

(2) Steps must be taken in accordance with section 17(1) to ensure that the data subject is aware of the purpose of the collection of the information unless the provisions of section 17(4) are applicable.²⁴

[Data subject aware of purpose of collection of information]

13. Steps must be taken in accordance with section 17(2) to ensure that the data subject is aware of the purpose of the collection of the information as referred to in section 12.]

Retention of records

[14] 13. (1) Subject to subsections (2) and (3), records of personal information must not be retained any longer than is necessary for achieving the purpose for which the information was collected or subsequently processed, unless—

- (a) retention of the record is required or authorised by law;
- (b) the responsible party reasonably requires the record for lawful purposes related to its functions or activities;
- (c) retention of the record is required by a contract between the parties thereto; or
- (d) the data subject has consented to the retention of the record.

Option.²⁵

(1) Subject to subsections (2) and (3), records of personal information must not be retained ~~[any]~~ longer than ~~[is]~~ necessary for achieving the purpose for which the information was collected or subsequently processed, unless—

- (a) retention of the record is required or authorised by law;
- (b) the responsible party reasonably requires the record for lawful purposes related to its functions or activities;
- (c) retention of the record is required by a contract between the parties thereto; ~~[or]~~
- (d) the data subject has ~~[consented]~~ assented to the retention of the record; ~~or~~
- (e) the purpose for which the information was collected or subsequently processed is or becomes part of a data bank: Provided that such data bank²⁶—
 - (i) is maintained and operated under a code of conduct; and
 - (ii) data from it is made available only—
 - (aa) to persons operating under a code of conduct; or
 - (bb) subject to the restrictions set out in a code of conduct.

(2) Records of personal information may be retained for periods in excess of those contemplated in subsection (1) for historical, statistical or research purposes if the

²⁴ The Technical Committee requested that clause 13 should be inserted in clause 12 because of the close link between the two clauses.

²⁵ Proposal by Dr Oriani-Ambrosini.

²⁶ Refer to subclause (6) for proposed definition of "data bank".

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 of a data subject to make a decision about the data subject, must—

- (a) retain the record for such period as may be required or prescribed by law or a code of conduct; or
- (b) if there is no law or code of conduct prescribing a retention period, retain the record 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 the responsible party is no longer authorised to retain the record in terms of subsection (1) or (2).

(5) The destruction or deletion of a record of personal information in terms of subsection (4) must be done in a manner that prevents its reconstruction in an intelligible form.

(6) “Data bank”, for the purposes of subsection (1)(e), means a collection or grouping of all personal information under the control of a responsible party that—

- (a)** has been processed, is being processed or is available for processing; or
- (b)** is organised or intended to be retrieved by the name of a data subject or by an unique identifier.

[Principle 4]

Further processing limitation

Further processing to be compatible with purpose of collection

[15] 14. (1) Further processing of personal information must be in accordance or compatible with the purpose for which it was collected in terms of [principle 3] section 12.

(2) To assess whether further processing is compatible with the purpose of collection, the responsible party must take account of—

- (a) the relationship between the purpose of the intended further processing and the purpose for which the information has been collected;
- (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 collected; and
- (e) any contractual rights and obligations between the parties.

(3) The further processing of personal information is [compatible] not incompatible²⁷ with the purpose of collection if—

- (a) the data subject has consented to the further processing of the information;
- (b) the information is available in or derived from a public record or has deliberately been made public by the data subject;
- (c) further processing 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;
 - (ii) [to enforce a law imposing a pecuniary penalty;
 - (iii)]** to comply with an obligation imposed by law or²⁸ to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);
 - [(iv)](iii)** for the conduct of proceedings in any court or tribunal that have commenced or are reasonably contemplated; or
 - [(v)](iv)** in the [legitimate] interests of national security;
- (d) the further processing of the information is necessary to prevent or mitigate a serious and imminent threat to—

²⁷ Proposed amendment to be inserted to clarify meaning of subclause.

²⁸ Amendment proposed by FIC.

- (i) public health or public safety; or
- (ii) the life or health of the data subject or another individual;
- (e) the information is used for historical, statistical or research purposes and the responsible party ensures that the further processing is carried out solely for such purposes and will not be published in an identified form; or
- (f) the further processing of the information is in accordance with an authority granted under section 34.

[Principle 5]

Information quality

Quality of information

[16] 15. (1) The responsible party must take reasonably practicable steps to ensure that the personal information is complete, accurate, not misleading and updated where necessary.

(2) In taking the steps referred to in subsection (1), the responsible party must have regard to the purpose for which personal information is collected or further processed.

[Principle 6]

Openness

Notification to Regulator [and to data subject]

[17] 16. (1) Personal information may only be processed by a responsible party that has notified the Regulator in terms of Chapter 6.

(2) [If personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of—

- (a) the information being collected;
- (b) the name and address of the responsible party;
- (c) the purpose for which the information is being collected;
- (d) whether or not the supply of the information by that data subject is voluntary or mandatory;
- (e) the consequences of failure to provide the information;
- (f) any particular law authorising or requiring the collection of the information; and
- (g) any further information such as the—
 - (i) recipient or category of recipients of the information;
 - (ii) nature or category of the information; and
 - (iii) existence of the right of access to and the right to rectify the information collected,

which is necessary, having regard to the specific circumstances in which the information is or is not to be processed, to enable processing in respect of the data subject to be reasonable.

(3) The steps referred to in subsection (2) must be taken—

- (a) if the personal information is collected directly from the data subject, before the information is collected, unless the data subject is already aware of the information referred to in that subsection; or
- (b) in any other case, before the information is collected or as soon as reasonably practicable after it has been collected.

(4) A responsible party that compiles or has compiled a manual and made it available in terms of section 14 or 51 of the Promotion of Access to Information Act, does not have to comply with subsection (1) if all the particulars referred to in section **[51] 55** of this Act are contained in the manual.

(5) A responsible party that has previously taken the steps referred to in subsection (2) complies with subsection (2) in relation to the subsequent collection from the data subject of the same information or information of the same kind if the purpose of collection of the information is unchanged.

(6) It is not necessary for a responsible party to comply with subsection (2) if—

- (a) the data subject has provided consent for the non-compliance;
- (b) non-compliance would not prejudice the legitimate interests of the data subject as set out in terms of this Act;
- (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;
 - (ii) to enforce a law imposing a pecuniary penalty;
 - (iii) to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);
 - (iv) for the conduct of proceedings in any court or tribunal that have been commenced or are reasonably contemplated; or
 - (v) in the interests of national security;

- (d) compliance would prejudice a lawful purpose of the collection;
- (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 may be identified; or
 - (ii) be used for historical, statistical or research purposes.]

Notification to data subject when collecting personal information²⁹

17. (1) If personal information is collected, the responsible party must take reasonably practicable steps to ensure that the data subject is aware of—

- (a) the information being collected;
- (b) the name and address of the responsible party;
- (c) the purpose for which the information is being collected;
- (d) whether or not the supply of the information by that data subject is voluntary or mandatory;
- (e) the consequences of failure to provide the information;
- (f) any particular law authorising or requiring the collection of the information; and
- (g) any further information such as the—
 - (i) recipient or category of recipients of the information;
 - (ii) nature or category of the information; and
 - (iii) existence of the right of access to and the right to rectify the information collected,
 which is necessary, having regard to the specific circumstances in which the information is or is not to be processed, to enable processing in respect of the data subject to be reasonable.

(2) The steps referred to in subsection (1) must be taken—

- (a) if the personal information is collected directly from the data subject, before the information is collected, unless the data subject is already aware of the information referred to in that subsection; or
- (b) in any other case, before the information is collected or as soon as reasonably practicable after it has been collected.

(3) A responsible party that has previously taken the steps referred to in subsection (1) complies with subsection (1) in relation to the subsequent collection from the data subject of the same information or information of the same kind if the purpose of collection of the information is unchanged.

(4) It is not necessary for a responsible party to comply with subsection (1) if—

- (a) the data subject has provided consent for the non-compliance;
- (b) non-compliance would not prejudice the legitimate interests of the data subject as set out in terms of this Act;
- (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;
 - (ii) to comply with an obligation imposed by law or³⁰ to enforce legislation concerning the collection of revenue as defined in section 1 of the South African Revenue Service Act, 1997 (Act No. 34 of 1997);
 - (iii) for the conduct of proceedings in any court or tribunal that have been commenced or are reasonably contemplated; or
 - (iv) in the interests of national security;
- (d) compliance would prejudice a lawful purpose of the collection;
- (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 may be identified; or
 - (ii) be used for historical, statistical or research purposes.

[Principle 7]

²⁹ Technical Committee requested that provisions of clause 17, dealing with notification of data subject should be distinguished from provisions of that clause dealing with notification of Regulator. The provisions of clause 16(2), (3), (5) and (6) are now reflected in clause 17(1) to (4).

³⁰ Insertion of words "to comply with an obligation imposed by law or" proposed by FIC.

Security Safeguards

Security measures on integrity of personal information

18. (1) A responsible party must secure the integrity of personal information in its possession or under its control by taking appropriate, reasonable technical and organisational measures to prevent—

- (a) loss of, damage to or unauthorised destruction of personal information; and
- (b) unlawful access to or processing of personal information.

(2) In order to give effect to subsection (1), the responsible party must take reasonable measures to—

- (a) identify all reasonably foreseeable internal and external risks to personal information in its possession or under its control;
- (b) establish and maintain appropriate safeguards against the risks 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 be required in terms of specific industry or professional rules and regulations.

Information processed by operator or person acting under authority

19. An operator or anyone processing personal information on behalf of a responsible party or an operator, must—

- (a) process such information only with the knowledge or authorisation of the responsible party; and
- (b) treat personal information which comes to their knowledge as confidential and must not disclose it,

unless required by law or in the course of the proper performance of their duties.

Security measures regarding information processed by operator

20. (1) A responsible party must ensure that an operator which processes personal information for the responsible party establishes and maintains the security measures referred to in section 18.

(2) The processing of personal information for a responsible party by an operator on behalf of the responsible party must be governed by a written contract between the operator and the responsible party, which requires the operator to establish and maintain confidentiality and security measures to ensure the integrity of the personal information.

(3) If the operator is not domiciled in the Republic, the responsible party must take reasonably practicable steps to ensure that the operator complies with the laws, if any, relating to the protection of personal information of the territory in which the operator is domiciled.

Notification of security compromises

21. (1) Where there are reasonable grounds to believe that the personal information of a data subject has been accessed or acquired by any unauthorised person, the responsible party, or any third party processing personal information under the authority of a responsible party, must notify the—

- (a) Regulator; and
- (b) data subject, unless the identity of such data subject cannot be established.

(2) The notification referred to in subsection (1) must be made as soon as reasonably possible after the discovery of the compromise, taking into account the legitimate needs of law enforcement or any measures reasonably necessary to determine the scope of the compromise and to restore the integrity of the responsible party's information system.

(3) The responsible party may only delay notification of the data subject if the South African Police Service, the National Intelligence Agency or the Regulator determines that notification will impede a criminal investigation.

(4) The notification to a data subject referred to in subsection (1) must be in writing and communicated to the data subject in at least one of the following ways:

- (a) Mailed to the data subject's last known physical or postal address;
- (b) sent by e-mail to the data subject's last known e-mail address;
- (c) placed in a prominent position on the website of the responsible party;
- (d) published in the news media; or
- (e) as may be directed by the Regulator.

(5) A notification must provide sufficient information to allow the data subject to take protective measures against the potential consequences of the compromise, including, if known to the responsible party, the identity of the unauthorised person who may have accessed or acquired the personal information.

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

[Principle 8]

Data subject participation

Access to personal information

22. (1) A data subject, having provided adequate proof of identity, has the right to—

- (a) request a responsible party to confirm, free of charge, whether or not the responsible party holds personal information about the data subject; and
- (b) request from a responsible party **the record or** a description of the personal information about the data subject held by the responsible party, including information about the identity of all third parties, or categories of third parties, who have, or have had, access to the information—
 - (i) within a reasonable time;
 - (ii) at a prescribed fee, if any, **that is not excessive**;
 - (iii) in a reasonable manner and format; and
 - (iv) in a form that is generally understandable.

(2) If, in accordance with subsection (1)(b), personal information is communicated to a data subject, the data subject must be advised of the right in terms of section 23 to request the correction of information.

(3) If a data subject is required by a responsible party to pay a fee for services provided to the data subject in terms of subsection (1)(b) to enable the responsible party to respond to a request, the responsible party—

- (a) must give the applicant a written estimate of the fee before providing the services; and
- (b) may require the applicant to pay a deposit for all or part of the fee.

(4) A responsible party may or must refuse, as the case may be, to disclose any information requested in terms of subsection (1) to which the grounds for refusal of access to records set out in the applicable sections of Chapter 4 of Part 2 and Chapter 4 of Part 3 of the Promotion of Access to Information Act apply.

(5) If a request for access to personal information is made to a responsible party and part of that information may or must be refused in terms of subsection (4), every other part must be disclosed.

Correction of personal information

23. (1) A data subject may request a responsible party to—

- (a) correct or delete personal information about the data subject in its possession or under its control that is inaccurate, irrelevant, excessive, out of date, incomplete, misleading or obtained unlawfully; or
- (b) destroy or delete a record of personal information about the data subject that the responsible party is no longer authorised to retain in terms of section ~~14~~ 13.

(2) On receipt of a request in terms of subsection (1) a responsible party must—

- (a) correct the information;
- (b) destroy or delete the information;
- (c) provide the data subject, to his or her satisfaction, with credible evidence in support of the information; or
- (d) where agreement cannot be reached between the responsible party and the data subject, and if the data subject so requests, take such steps as are reasonable in the circumstances, to attach to the information in such a manner that it will always be read with the information, an indication that a correction of the information has been requested but has not been made.

(3) If the responsible party has taken steps under subsection (2) that result in a change to the information and the changed information has an impact on decisions that have been or will be taken in respect of the data subject in question, the responsible party must, if reasonably practicable, inform each person or body or responsible party to whom the personal information has been disclosed of those steps.

(4) The responsible party must notify a data subject, who has made a request in terms of subsection (1), of the action taken as a result of the request.

Manner of access

24. The provisions of sections 18 and 53 of the Promotion of Access to Information Act apply to requests made in terms of sections 22 and 23 of this Act.

Part B **Processing of special personal information**

Prohibition on processing of special personal information

25. **[Unless specifically permitted by this Part a responsible party may not process personal information concerning**

a—

(a) child who is subject to parental control in terms of the law; or

(b) data subject's religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, sexual life or criminal behaviour.]

(1) (a) A responsible party may not process personal information concerning a child in those circumstances where that child is not legally competent, without the assistance of a competent person, to take any action or decision in respect of any matter concerning him or her.³¹

(b) A "competent person", for purposes of paragraph (a), means any person who is legally competent to consent to any action or decision being taken in respect of any matter concerning a child.

(2) A responsible party may not process personal information concerning the religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, DNA, sexual life or criminal behaviour of a data subject.

(3) "Criminal behaviour", for purposes of this section and section 31, means the commission or alleged commission by a data subject of any offence or any proceedings in

³¹ The definitions of "parent" and "parental consent" are restrictive and do not take account of cases where a child may act with the assistance of another person who is not a parent of the child. The provision has been drafted to provide for those cases where a child can act on his or her own without the assistance of another person.

respect of any offence committed or allegedly committed by a data subject, the disposal of such proceedings or any sentence that has been imposed by a court in such proceedings.³²

Option:³³

(2) A responsible party may not process personal information concerning—

- (a) the religious or philosophical beliefs, race or ethnic origin, trade union membership, political opinions, health, DNA or sexual life of a data subject; or
- (b) the criminal behaviour of a data subject to the extent that such information relate to—
 - (i) the commission or alleged commission by a data subject of any offence; or
 - (ii) any proceedings in respect of any offence committed or allegedly committed by a data subject, the disposal of such proceedings or any sentence that has been imposed by a court in such proceedings.

General exemption concerning special personal information

[32.]26. [Without prejudice to sections 26 to 31, the] The prohibition on processing personal information, as referred to in section 25, does not apply if—

- (a) if the processing is carried out with—
 - (i) prior [parental consent where the data subject is a child and is subject to parental control in terms of the law] consent of a competent person in respect of a child referred to in section 25(1)(a);
 - or
 - (ii) the consent of a data subject referred to in section 25(2);
- (b) if the processing is necessary for the establishment, exercise or defence of a right or obligation in law;
- (c) if the processing is necessary to comply with an obligation of international public law;
- (d) if the Regulator has granted authority in terms of section 34 for processing in the public interest, and appropriate guarantees have been put in place in law to protect the data subject's privacy; [or]
- (e) if the processing is for historical, statistical or (academic or scientific)³⁴ research purposes to the extent that—
 - (i) the purpose serves a public interest and the processing is necessary for the purpose concerned; or
 - (ii) it appears to be impossible or would involve a disproportionate effort to ask for express consent,

and sufficient guarantees are provided for to ensure that the processing does not adversely affect the individual privacy of the data subject to a disproportionate extent; or
- (f) insofar as section [25(b)] 25(2) is concerned if—
 - (i) [processing is carried out with the consent of the data subject; or
 - (ii) the information has deliberately been made public by the data subject; or
 - (ii) the provisions of sections 27 to 32 are, as the case may be, complied with.

Exemption concerning data subject's religious or philosophical beliefs

[26] 27. (1) The prohibition on processing personal information concerning a data subject's religious or philosophical beliefs, as referred to in section 25(2), does not apply if the processing is carried out by—

³² Subclause (3), previously clause 31(5), is based on section 2(g) and (h) of the UK Act. Subclause (3) is restricted to, among others, "any sentence that has been imposed by a court". The question is raised whether reference to "any order by a court", and possibly reference to "expunged convictions" should also be included in subclause (3). The proposed definition appears not to fit in subclause (2). The option proposed aims to address this concern.

³³ Option inserted to collapse subclauses (2) and (3) in one subclause.

³⁴ The term "historical, statistical or research purposes" is used in clauses 14(2), 15(3)(e) and 17A(4)(f)(ii). It is submitted recommended that the term should be used consistently throughout the Bill. It is recommended that the words "academic or scientific" should be omitted from the above clause.

- (a) spiritual or religious organisations, or independent sections of those organisations: **Provided that** if—
- (i) the information concerns data subjects belonging to those organisations; **or**
 - (ii) **it is necessary to achieve their aims and principles.**³⁵
- (b) institutions founded on religious or philosophical principles with respect to their members or employees or other persons belonging to the institution, if it is necessary to achieve their aims and principles; or
- (c) other institutions: Provided that the processing is necessary to protect the spiritual welfare of the data subjects, unless they have indicated that they object to the processing.

(2) In the cases referred to in subsection (1)(a), the prohibition does not apply to processing of personal information concerning the religion or philosophy of life of family members of the data subjects, if—

- (a) the association concerned maintains regular contact with those family members in connection with its aims; and
- (b) the family members have not objected in writing to the processing.

(3) In the cases referred to in subsections (1) and (2), personal information concerning a data subject's religious or philosophical beliefs may not be supplied to third parties without the consent of the data subject.

Exemption concerning data subject's race

[27] 28. The prohibition on processing personal information concerning a data subject's race, as referred to in section **25(2)**, does not apply if the processing is carried out to—

- (a) identify data subjects and only when this is essential for that purpose; and
- (b) comply with laws and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

Exemption concerning data subject's trade union membership

[28] 29. (1) The prohibition on processing personal information concerning a data subject's trade union membership, as referred to in section **25(2)**, does not apply to the processing by the trade union to which the data subject belongs or the trade union federation to which that trade union belongs, if such processing is necessary to achieve 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 concerning data subject's political persuasion

[29] 30. (1) The prohibition on processing personal information concerning a data subject's political persuasion, as referred to in section **25(2)**, does not apply to processing by **or for** an institution founded on political principles of the personal information **of—**

- (a) **[their] its** members or employees or other persons belonging to the institution, if such processing is necessary to achieve the aims or principles of the institution **[s]; or**
- (b) **a data subject if such processing is necessary for the purposes of—**³⁶
 - (i) **forming a political party;**
 - (ii) **participating in the activities of, or engaging in the recruitment of members for or canvassing supporters or voters for, a political party with the view to—**
 - (aa) an election of the National Assembly or the provincial legislature as regulated in terms of the Electoral Act, 1998 (Act No. 73 of 1998);**
 - (bb) municipal elections as regulated in terms of the Local Government: Municipal Electoral Act, 2000 (Act No. 27 of 2000); or**

³⁵ The proposed amendment aims to extend the ambit of paragraph (a) beyond members of the organisations concerned, in line with the request by the Technical Committee.

³⁶ Article 8(4) of the EU Directive allows for additional exemptions "for reasons of substantial public interest". It therefore appears that the proposed amendment is in line with article 8.

(cc) a referendum as regulated in terms of the Referendums Act, 1983 (Act No. 108 of 1983); or

(iii) campaigning for a political party or cause.

(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 concerning data subject's health [or sexual life]

31. (1) The prohibition on processing personal information concerning a data subject's health [or sexual life], as referred to in section 25(2), does not apply to the processing by—

- (a) medical professionals, healthcare institutions or facilities or social services, if such processing 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, medical aid schemes, medical aid scheme administrators and managed healthcare organisations, if such processing is necessary for—
 - (i) assessing the risk to be insured by the insurance company or covered by the medical aid scheme and the data subject has not objected to the processing;
 - (ii) the performance of an insurance or medical aid agreement; or
 - (iii) the enforcement of any contractual rights and obligations;
- (c) schools, if such processing is necessary to provide special support for pupils or making special arrangements in connection with their health [or sexual life];
- (d) institutions of probation, child protection or guardianship, if such processing is necessary for the performance of their legal duties;
- (e) the Minister and the Minister of Correctional Services, if such processing 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, if such processing is necessary for—
 - (i) the 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 responsible parties subject to an obligation of confidentiality by virtue of office, employment, profession or legal provision, or established by a written agreement between the responsible party and the data subject.

(3) A responsible party that is permitted to process information concerning a data subject's health [or sexual life] in terms of this section and is not subject to an obligation of confidentiality by virtue of office, profession or legal provision, must treat the information as confidential, unless the responsible party is required by law or in connection with their duties to communicate the information to other parties who are authorised to process such information in accordance with subsection (1).

(4) The prohibition on processing any of the categories of personal information referred to in section 25(2), does not apply if it is necessary to supplement the processing of personal information concerning a data subject'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 not be processed in respect of a data subject from whom the information concerned has been obtained, unless—

- (a) a serious medical interest prevails; or
- (b) the processing is necessary for [the purpose of scientific research or statistics] historical, statistical or research activity.

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

Exemption concerning data subject's criminal behaviour

32. (1) The prohibition on processing personal information concerning a data subject's criminal behaviour, as referred to in section 25(2), does not apply if the processing is carried out by bodies charged by law with applying criminal law or by responsible parties who have obtained that information in accordance with the law.

(2) The prohibition does not apply to responsible parties who process the information for their own lawful purposes to—

- (a) assess an application by a data subject in order to take a decision about, or provide a service to, that data subject; or
- (b) protect their legitimate interests in relation to criminal offences which have been, or can reasonably be expected to be, committed against them or against persons in their service.

(3) The processing of 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 any of the categories of **personnel** personal information referred to in section 26(2) does not apply if such processing is necessary to supplement the processing of information on criminal behaviour permitted by this section.

General exemption concerning special personal information

32. Without prejudice to sections 26 to 31, the prohibition on processing personal information, as referred to in section 25, does not apply if—

- (a) processing is carried out with prior parental consent where the data subject is a child and is subject to parental control in terms of the law;
- (b) processing is necessary for the establishment, exercise or defence of a right or obligation in law;
- (c) processing is necessary to comply with an obligation of international public law;
- (d) the Regulator has granted authority in terms of section 34 for processing in the public interest, and appropriate guarantees have been put in place in law to protect the data subject's privacy; or
- (e) insofar as section 25(b) is concerned if—
 - (i) processing is carried out with the consent of the data subject; or
 - (ii) the information has deliberately been made public by the data subject.³⁷

CHAPTER 4

EXEMPTION FROM CONDITIONS FOR PROCESSING OF PERSONAL INFORMATION [INFORMATION PROTECTION PRINCIPLES]

General

33. Processing of personal information is not in breach of **an information protection principle** a condition for the processing of such information if the processing is authorised by the Regulator in terms of section 34.

Regulator may authorise processing of personal information

34. (1) The Regulator may authorise³⁸ a responsible party to process personal information, even if that processing is in breach of **an information protection principle** a condition for the processing of such information if the Regulator is satisfied that, in the circumstances of the case—

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

(2) The public interest referred to in subsection (1) includes—

- (a) the **legitimate** interests of **State** national security;
- (b) the prevention, detection and prosecution of offences;
- (c) important economic and financial interests of **the State or** a public body;

³⁷ The clause has, at the request of the Technical Committee, been inserted at the beginning of Part B of Chapter 3. See clause 26.

³⁸ Section 15 of the Interpretation Act provides that an act like "authorisation" by the Regulator should be published in the *Gazette*. However, question is raised whether the phrase "by notice in the *Gazette*" should not be inserted for purposes of clarity.

- (d) fostering compliance with legal provisions established in the interests referred to under paragraphs (b) and (c); or
- (e) historical, statistical or research activity.
- (3) The Regulator may impose reasonable conditions in respect of any authorisation granted under subsection (1).

CHAPTER 5 SUPERVISION

Part A **Information ~~[Protection]~~ Regulator³⁹**

Establishment of Information ~~[Protection]~~ Regulator

- 35.** There is hereby established a juristic person to be known as the Information ~~[Protection]~~ Regulator, which—
- (a) has jurisdiction throughout the Republic;
- (b) is independent and is subject only to the Constitution and to the law and must be impartial and perform its functions and exercise its powers without fear, favour or prejudice; and
- (c) must perform its functions and exercise its powers in accordance with this Act and the Promotion of Access to Information Act.

~~[Constitution and period of office of Regulator]~~ Appointment, period of and removal from office of members of Regulator

- 36.** (1) (a) The Regulator consists of the following members:
- (i) A Chairperson; and
- (ii) four other persons, as ordinary members of the Regulator.
- (b) Members of the Regulator must be appropriately qualified, fit and proper persons ~~[for appointment]~~—
- (i) ~~at least one of whom must be appointed on account of experience as a [practicing] practising advocate or attorney or a professor of law at a university[, or] ; and~~
- (ii) ~~the remainder of whom must be appointed on account of any other qualifications, expertise and experience⁴⁰ relating to the objects of the Regulator.~~
- (c) The Chairperson of the Regulator must ~~perform his or her functions under the Act and the Promotion of Access to Information Act⁴¹ be appointed in a full-time capacity and [must not be employed in any other capacity] may, subject to subsection (4), not perform or undertake to perform any other remunerative work during the period in which he or she holds office as Chairperson.~~
- (d) ~~[The other members of the Regulator must be appointed in a part-time capacity.] The ordinary members of the Regulator must be appointed as follows:~~
- (i) ~~Two ordinary members in full-time capacity; and~~
- (ii) ~~two ordinary members in a full-time or part-time capacity.~~
- (e) ~~The—~~
- (i) ~~members referred to in paragraph (d)(i); and~~
- (ii) ~~member or members referred to in paragraph (d)(ii),~~
- ~~who are appointed in a full-time capacity, may, subject to subsection (4), not perform or undertake to perform any other remunerative work during the period in which they hold office.~~
- ~~[(e) (f) The Chairperson must direct the work of the Regulator and the [Secretariat] staff of the Regulator.⁴²~~
- ~~[(f) (g) [No person will be qualified for appointment as a member of the Regulator if that person] A person may not be appointed as a member of the Regulator if he or she⁴³—~~
- ~~(i) is a member of a legislature;~~

³⁹ It is proposed that the name of the Regulator be changed from "Information Protection Regulator" to "Information Regulator".

⁴⁰ Wording based on section 5(3)(b)(ii) of ICASA Act.

⁴¹ Final decision regarding PAIA functions to be transferred to Regulator still pending.

⁴² The term "Secretariat" is not appropriate in view of request by Technical Committee to provide for a Chief Executive Officer.

⁴³ Wording of proposed additional provisions have been taken from section 6 of the ICASA Act.

- (ii) is a councilor of a local authority;
- (i) is not a citizen of the Republic;
- (ii) [is a public servant or the holder of any other remunerated position under a public body];⁴⁴
- (iii) is a member of Parliament, any provincial legislature or any municipal council;
- (iv) is an office-bearer or employee of any political party;⁴⁵
- (iii)(v) is an unrehabilitated insolvent; [or]
- (vi) has been declared by a court to be mentally ill or unfit; or
- (iv)(vii) has at any time been convicted, whether in the Republic or elsewhere, of any offence involving dishonesty.

(2) (a) Members of the Regulator referred to in subsection (1)(a) must be appointed by the President on recommendation of the National Assembly [and must be persons approved by Parliament, after considering proposals made by interested parties in terms of subsection (4)]⁴⁶.

(b) The National Assembly must recommend persons—

- (i) nominated by a committee of the Assembly composed of members of parties represented in the Assembly; and
- (ii) approved by the Assembly by a resolution adopted with a supporting vote of a majority of the members of the Assembly.

(3) The President may appoint one or more additional members if he or she considers it necessary for the investigation of any particular matter or the performance of any duty by the Regulator.

(4) Before the members of the Regulator are appointed the Minister must invite interested parties through the media and by notice in the *Gazette* to propose candidates within 30 days of the publication of such notice, for consideration as contemplated in subsection (2)]⁴⁷.

(5)(3) The members of the Regulator 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) The Chairperson of the Regulator or a member who has been appointed in a full-time capacity may, notwithstanding the provisions of subsection (1)(c) or (e), only perform or undertake to perform any other remunerative work during the period that he or she holds office as Chairperson or member with the prior written consent of the Minister.

(6)(5) A person appointed as a member of the Regulator may, upon at least three months' written notice to the President, 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 70 years].

(7)(6) (a)⁴⁸ A member may be removed from office only on— [by the President on the request of Parliament 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]

- (i) the ground of misconduct, incapacity or incompetence;
- (ii) a finding to that effect by a committee of the National Assembly; and
- (iii) the adoption by the National Assembly of a resolution calling for that person's removal from office.

(b) A resolution of the National Assembly concerning the removal from office of a member of the Regulator must be adopted with a supporting vote of a majority of the members of the Assembly.

(c) The President—

- (i) may suspend a member from office at any time after the start of the proceedings of a committee of the National Assembly for the removal of that member; and
- (ii) must remove a member from office upon adoption by the Assembly of the resolution calling for that member's removal.

Vacancies

[36A] 37. (1) A vacancy in the Regulator occurs if a member—

⁴⁴ Disqualification of public servant for appointment as member: Pending final decision by Technical Committee.

⁴⁵ Section 6(1)(e) of ICASA Act refers to an "... an office-bearer or employee of any party, movement or organisation of a party-political nature".

Proposed amendment is based on provisions of section 193 of the Constitution. It has recently been proposed that it should be expressly stated that the National Assembly should recommend who the Chairperson should be.

⁴⁷ Subclauses (3) and (4) do not serve any useful purpose in view of the proposed amendment of subclause (2).

⁴⁸ Proposed amendment of subclause (7) is based on provisions of section 194 of the Constitution dealing with removal from office of a member of a Chapter 9 institution.

- (a) becomes subject to a disqualification referred to in section 36(1)(g);
- (b) tenders his or her resignation as contemplated in section 36(5) and the resignation takes effect;
- (c) is removed from office in terms of section 36(6);
- (d) dies; or
- (e) becomes permanently incapable of doing his or her work.

(2) (a) Where a vacancy has arisen as contemplated in subsection (1), the procedure contemplated in section 36(2) applies.

(b) Any member appointed under this subsection holds office for the rest of the period of the predecessor's term of office, unless the President, following approval by the National Assembly, directs that such member holds office for a longer period which may not exceed one subsequent term of five years.

Powers, duties and functions of Chairperson and other members

[36AA] 38. (1) The Chairperson—
(a) must exercise the powers and perform the duties and functions conferred on or assigned to him or her by the Regulator in terms of this Act and the Promotion of Access to Information Act; and

(b) is, for the purposes of exercising the powers and performing the duties and functions conferred on or assigned to him or her by the Regulator in terms of this Act and the Promotion of Access to Information Act, accountable to the Regulator.

(2) (a) The members referred to in section 36(1)(d)(i) must exercise their powers and perform their duties and functions as follows:

(i) One member in terms of this Act; and

(ii) one member in terms of the Promotion of Access to Information Act.

(b) The members referred to in section 36(1)(d)(ii) must exercise their powers and perform their duties and functions either in terms of this Act or the Promotion of Access to Information Act, or both.

(c) The members, referred to in paragraphs (a) and (b), are, for the purposes of exercising their powers and performing their duties and functions, accountable to the Chairperson.

Regulator to have regard to certain matters

[44] 39. (1) The Regulator is independent in the performance of its functions as set out in section 35(b).

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

(a) have due regard to the protection of personal information as set out in [the information protection principles] Chapter 3;

(b) have due regard for the protection of all human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the legitimate interests of [government and business] public and private bodies in achieving their objectives in an efficient way;

(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.

Conflict of interest

[36C] 40. (1) If any member of the Regulator or member of the staff of the Regulator referred to in section 42(1) or (7) has a material interest in any matter which could conflict with the proper performance of his or her duties in terms of this Act, he or she must disclose that interest, as prescribed, as soon as practicable after the relevant facts came to his or her knowledge.

- (2) (a) If a member of the Regulator or person referred to in subsection (1)–
- (i) is present at a meeting of the Regulator or committee referred to in section 44 or 45 at which a matter contemplated in that subsection is to be considered, the member or person concerned must disclose the nature of his or her interest to the meeting before the matter is considered; or
- (ii) fails to make a disclosure as required by this subsection and is present at a meeting of the Regulator or committee, as the case may be, or in any other manner participates in the proceedings, such proceedings in relation to the relevant matter must, as soon as the non-disclosure is discovered, be reviewed and be varied or set aside by the Regulator or the committee, as the case may be, without the participation of the member or person concerned.
- (b) A member of the Regulator or person referred to in subsection (1) who is obliged to make a disclosure in terms of this subsection may not be present during any deliberation, or take part in any decision, in relation to the matter in question.
- (c) Any disclosure made in terms of this subsection must be noted in the minutes of the relevant meeting of the Regulator or committee.
- (3) A member of the Regulator or person referred to in subsection (1) who has disclosed a conflict of interest in terms of subsection (1)–
- (a) may perform all duties relating to the matter in question if a decision has been taken that the interest is trivial or irrelevant; or
- (b) must be relieved of all duties relating to the matter in question and such duties must be performed by another member of the Regulator or by another person referred to in subsection (1), as the case may be, who has no such conflict of interest.

Remuneration, allowances, benefits and privileges of members

[37] **41.** (1) A member of the Regulator who is not subject to the provisions of the Public Service Act, 1994 (Proclamation No. 103 of 1994)⁴⁹, will be entitled to such remuneration, allowances, including allowances for reimbursement of travelling and subsistence expenses incurred by him or her in the performance of his or her functions under this Act and the Promotion of Access to Information Act, benefits and privileges as [the Minister in consultation with the Minister of Finance may determine] Parliament may determine in terms of section 48.

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

(a) [offices] positions held by them in the Regulator; or

(b) 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.]⁵⁰

[Secretary and staff] Staff

[38] **42.** (1) [The Secretary of the Regulator and such other officers and employees as are required for the proper performance of the Regulator's functions, will be appointed in terms of the Public Service Act, 1994 (Proclamation No. 103 of 1994).] The Regulator must establish its own administration to assist it in the performance of its functions and to this end the Regulator must appoint—⁵¹

(a) a suitably qualified and experienced person, or secure the secondment of such person in terms of subsection (6), as chief executive officer of the Regulator for the purpose of assisting the Regulator, subject to the Regulator's direction and supervision, in the performance of all financial and administrative functions in terms of this Act and the

⁴⁹ See clause 36(1)(f)(ii), decision regarding disqualification of public servants for appointment as members of Regulator still pending. It has recently been proposed that reference to Public Service Act should be deleted.

⁵⁰ In view thereof that Parliament will determine remuneration it is recommended that subclause (3) should be deleted.

⁵¹ Clause represents the proposal that a clearer distinction should be drawn between the functions of the Chairperson and the chief executive officer.

Promotion of Access to Information Act, work arising from the administration of this Act and the Promotion of Access to Information Act and to exercise any power delegated by the Regulator to him or her; and

(b) such other member of staff, or secure the secondment of such persons in terms of subsection (6), as the Regulator may deem necessary to assist the Regulator and the chief executive officer, as the case may be, with all such work as may arise through the performance of its functions.

(2)⁵² (a) The chief executive officer may appoint a senior member of staff as acting chief executive officer to perform the functions of the chief executive officer in his or her absence.

(b) A member of the Regulator may not be appointed as acting chief executive officer.

(c) In the event that the chief executive officer is absent for a longer period the Regulator must appoint an acting chief executive officer.

(3) The Regulator must, in the appointment of the staff of the Regulator—
(a) provide for the advancement of persons disadvantaged by unfair discrimination, with the aim that its staff, when viewed collectively, represents a broad cross-section of the population of the Republic; and

(b) subject to paragraph (a), apply equal opportunity employment practices.

(4) The Regulator may pay to the persons in its employ such remuneration and allowances and provide them with such pension and other employment benefits as are consistent with that paid in the public sector.⁵³

(5) In exercising its powers in terms of subsections (1) and (4), the Regulator must consult with the Minister of Finance.

(6) The Regulator may, in the performance of the functions contemplated in subsection (1), at its request, be assisted by officials in the Public Service seconded to the service of the Regulator in terms of any law regulating such secondment.

(2)(7) The Regulator may, [with the approval of the Minister]⁵⁴ 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 Regulator, or obtain the co-operation of any body, to advise or assist the Regulator in the performance of its functions under this Act and the Promotion of Access to Information Act, and fix the remuneration, including reimbursement for travelling, subsistence and other expenses, of such person or body.

Powers, duties and functions of Chief Executive Officer

[38A] 43. The chief executive officer—

(a) is the head of administration and the accounting officer, as referred to in section 48(3), of the Regulator;

(b) may appoint a senior member of staff, other than a member of the Regulator, as acting chief executive officer to perform the functions of the chief executive officer in his or her absence;

(c) is responsible for the—

(i) management of the affairs and operations of the Regulator;

(ii) formation and development of an efficient administration;

(iii) organisation and management of, and administrative control over, all the members of staff appointed in terms of section 42(1)(b), all the persons seconded in terms of section 42(6);

(iv) maintenance of discipline in respect of the members of staff; and

(v) execution of the decisions of the Regulator;

and is for those purposes accountable to the Regulator and must report thereon to the Regulator as often as may be required by the Regulator; and

⁵² Subclause (2) could be replaced with clause 43 in order to clarify what the functions of the chief executive officer are.

⁵³ It has recently been proposed that "public sector" remuneration should be deleted in order to secure the services of specialists.

⁵⁴ Proposed amendment as a result of provisions of clause 45(1)(b).

(d) must exercise the powers and perform the duties and functions which the Regulator may from time to time confer upon or assign to him or her in order to achieve the objects of the Regulator, and is for those purposes accountable to the Regulator.

Committees of Regulator

[39] 44. (1) The Regulator may, if it considers it necessary for the proper performance of its functions establish one or more committees, which must consist of—

(a) a working committee, which must consist of such members of the Regulator as the Regulator may designate;
(b) such other committees as it may deem necessary, and which must consist of—

(i)(a) such members of the Regulator as the Regulator may designate; or

(ii)(b) such members of the Regulator as the Regulator may designate and other persons appointed by the [Minister] Regulator, as referred to in section 38(5), for the period determined by the [Minister] Regulator.

(2) The [Minister] Regulator may at any time extend the period of an appointment referred to in subsection (1)(b)(ii) or, if in [his or her] its opinion good reasons exist therefor, revoke any such appointment.

(3) The Regulator must designate the chairperson and, if the Regulator deems it necessary, the vice-chairperson of a committee established under subsection (1).

(4) (a) A committee referred to in subsection (1) must, subject to the directions of the Regulator, perform those functions of the Regulator assigned to it by the Regulator.

(b) Any function so performed by [the working] a committee referred to in subsection (1)(a) and (b) will be deemed to have been performed by the Regulator.

(5) The Regulator may at any time dissolve any committee established by the Regulator.

(6) The provisions of sections [40] 47 and [45(4)] 50(4)⁵⁵ will apply, with the necessary changes, to a committee of the Regulator.

Establishment of Enforcement Committee

45. (1) The Regulator must establish an Enforcement Committee which must consist of—

(a) at least one member of the Regulator; and

(b) such other persons appointed by the Regulator, as referred to in section 42(5), for the period determined by the Regulator.

(2) The Chairperson of the Enforcement Committee must be—

(a) a judge of the High Court of South Africa, whether in active service or not;

(b) an advocate or attorney with at least 10 years' appropriate experience; or

(c) a magistrate with at least 10 years' appropriate experience, whether in active service or not.

(3) The Chairperson of the Enforcement Committee must manage the work of and preside at hearings of the Enforcement Committee.

(4) (a) A member referred to in subsection (1)(a) may not participate in any proceedings of the Regulator in terms of which a decision is taken with regard to a finding or recommendation of the Enforcement Committee as referred to in section 46.

(b) A person referred to in subsection (1)(b) must be a fit and proper person and must comply with the criteria, referred to in section 36(1)(f), for appointment as a member of the Regulator.

Functions of Enforcement Committee⁵⁶

⁵⁵ Refer to footnote under clause 45.

⁵⁶ Provisions dealing with "Procedure of Enforcement Committee", "Findings by Enforcement Committee" and "Decision by Regulator" have not been included in the draft amendments. The inclusion of such provisions, which may be similar to the provisions of sections 17C to E of ICASA, will depend on the powers to be exercised by the Regulator in terms of PAIA and the distinction between internal systemic PPI matters and complaints.

- 46.** ~~The Enforcement Committee—~~
- (a) ~~must consider, and hear if appropriate, and make a finding on—~~
- (i) ~~all matters referred to it by the Regulator in terms of this Act; and~~
- (ii) ~~complaints referred to it by the Regulator in terms of the Promotion of Access to Information Act; and~~
- (b) ~~may make any recommendation to the Regulator necessary or incidental to—~~
- (i) ~~the performance of the functions of the Regulator in terms of this Act or the Promotion of Access to Information Act; or~~
- (ii) ~~achieving the objects of this Act and the Promotion of Access to Information Act.~~

Meetings of Regulator

~~[40] 47.~~ (1) Meetings of the Regulator must be held at the times and places determined by the Chairperson of the Regulator.

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

(3) The ~~[Regulator] Chairperson~~ may regulate the proceedings at meetings as ~~[it] he or she~~ may think fit and must keep minutes of the proceedings.⁵⁷

(4) (a) ~~Subject to subsection (2), a decision of the Regulator is taken by resolution agreed to by the majority of members at any meeting of the Regulator.~~

(b) ~~In the event of an equality of votes regarding any matter the Chairperson has a casting vote in addition to his or her deliberative vote.~~

Funds

~~[41] 48.~~ (1) ~~[Parliament must appropriate annually, for the use of the Regulator, such sums of money as may be necessary for the proper exercise, performance and discharge, by the Regulator, of its powers, duties and functions under this Act and the Promotion of Access to Information Act.] Funds of the Regulator consist of—~~

(a) ~~such sums of money that Parliament appropriates annually, for the use of the Regulator as may be necessary for the proper exercise, performance and discharge, by the Regulator, of its powers, duties and functions under this Act and the Promotion of Access to Information Act; and~~

(b) ~~fees prescribed in terms of section 109(1)(a) and (b)(ii).~~

(2) The financial year of the Regulator is the period from 1 April in any year to 31 March in the following year, except that the first financial year of the Regulator begins on the date that this ~~[Act] Chapter~~ comes into operation, and ends on 31 March next following that date.

(3) The ~~[Chairperson of the Regulator is the accounting authority] chief executive officer~~ of the Regulator ~~is~~ for purposes of the Public Finance Management Act, 1999 (Act No. 1 of 1999), ~~the accounting officer~~ and must execute his or her duties in accordance with that Act.

(4) Within six months after the end of each financial year, the Regulator must prepare financial statements in accordance with established accounting practice, principles and procedures, comprising—

(a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Regulator during the preceding financial year; and

(b) a balance sheet showing the state of its assets, liabilities and financial position as at the end of that financial year.

(5) The Auditor-General must audit the Regulator's financial records each year.

Protection of Regulator⁵⁸

⁵⁷ It is recommended that provision should be made for the absence of the Chairperson at a meeting as follows:

"If the Chairperson is absent from a meeting the members present shall elect one of their number to preside at that meeting".

⁵⁸ The Portfolio Committee noted that the provisions of the clause require further discussion. The concern was raised that the ambit of the provision may be too wide. Similar provisions in other legislation, for example section 14D of the ICASA Act, tend to limit the liability of members of institutions in respect of civil claims, for example—
Limitation of liability

[42] 49. [The Regulator, or any] Any person acting on behalf or under the direction of the Regulator, is not civilly or criminally liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power, duty or function of the Regulator in terms of this Act or the Promotion of Access to Information Act.

Option.⁵⁹

To delete clause 42.

Powers, [and] duties and functions of Regulator

- [43] 50. (1) The powers and duties of the Regulator in terms of this Act are—
- (a) by means of education to—
- (a) (i) [to] promote[, by education and publicity,] an understanding and acceptance of the [information protection principles] conditions for the lawful processing of personal information and of the objects of those [principles] conditions;
- (b) (ii) undertake educational programmes, for the purpose of promoting the protection of personal information, [to undertake educational programmes] on the Regulator's own behalf or in co-operation with other persons or authorities acting on behalf of the Regulator; [and]
- (c) (iii) [to] make public statements in relation to any matter affecting the protection of the personal information of a data subject or of any class of data subjects; and
- (iv) to give advice to data subjects in the exercise of their rights;⁶⁰
- (b) to monitor and enforce compliance by—
- (d) (i) [to monitor and enforce compliance by] public and private bodies of the provisions of this Act;
- (e) (ii) undertaking [to undertake] research into, and [to monitor] monitoring developments in, information processing and computer technology to ensure that any adverse effects of such developments on the protection of the personal information of data subjects are minimised, and [to report] reporting to the Minister the results of such research and monitoring;
- (f) (iii) examining [to examine] any proposed legislation, including subordinate legislation, or proposed policy of the Government that the Regulator considers may affect the protection of the personal information of data subjects, and [to report] reporting to the Minister the results of that examination;
- (g) (iv) reporting [to report,] with or without request, to Parliament from time to time on any policy⁶¹ matter affecting the protection of the personal information of a data subject, 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 data subject;
- (v) submitting a report to Parliament, within five months of the end of its financial year, on all its activities in terms of this Act during that financial year;⁶²
- (h) (vi) conducting an assessment, on its own initiative or when requested to do so [by] , of a public or private body, [to conduct an audit] in respect of the processing of personal information [maintained] by that body for the purpose of ascertaining whether or not the information is [maintained] processed according to the [information protection principles] conditions for the lawful processing of personal information;
- (f) (vii) monitoring [to monitor] the use of unique identifiers of data subjects, and [to report] reporting to Parliament from time to time on the results of that monitoring, including any recommendation relating to the need of, or desirability of taking, legislative, administrative,

14D A councilor or person in the employ of the Authority is not personally liable for any damage or loss suffered by any person in consequence of any act which in good faith was performed or omitted in the performance of any function in terms of this Act or the underlying statutes.

However, it should be noted section 89 of the Promotion of Access to Information Act, 2000, provides for the following: "No person is criminally or civilly liable for anything done in good faith in the exercise or performance or purported exercise or performance of any power or duty in terms of this Act or the rules made under section 79."

⁵⁹ Option proposed by Dr Oriani-Ambrosini and Ms Smuts.

⁶⁰ Proposal by IT Governance.

⁶¹ Technical Committee requested on 8/4/10 that clause 46(1) be inserted under clause 50.

⁶² Clause 46(2) inserted under clause 43.

or other action to give protection, or better protection, to the personal information of a data subject;

- ~~(j)~~ ~~(viii)~~ ~~maintaining, publishing and making available and providing~~ ~~[to maintain, and to publish, make available and provide]~~ copies of such registers as are prescribed in this Act; ~~and~~
- ~~(k)~~ ~~(ix)~~ ~~examining~~ ~~[to examine]~~ any proposed legislation that makes provision for the—
~~(i)~~~~(aa)~~ collection of personal information by any public or private body; or
~~(ii)~~~~(bb)~~ 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 44(3) of this Act]~~ ~~subsection (4)~~, in any case where the Regulator considers that the information might be used for the purposes of an information matching programme,
and ~~[to report]~~ ~~reporting~~ to the Minister and Parliament the results of that examination;
- ~~(c)~~ ~~by means of~~ ~~consultation to—~~
- ~~(j)~~ ~~(i)~~ ~~[to]~~ receive and invite representations from members of the public on any matter affecting the personal information of a data subject;
- ~~(m)~~ ~~(ii)~~ ~~[to]~~ consult and co-operate ~~on a national and international basis~~ with other persons and bodies concerned with the protection of personal information ~~[principles]~~;
- ~~(n)~~ ~~(iii)~~ ~~[to]~~ act as mediator between opposing parties on any matter that concerns the need for, or the desirability of, action by a responsible party in the interests of the protection of the personal information of a data subject; ~~and~~
- ~~(o)~~ ~~(iv)~~ ~~[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;
- ~~(d)~~ ~~to handle~~ ~~complaints by—~~
- ~~(p)~~ ~~(i)~~ ~~receiving and investigating~~ ~~[to receive and investigate]~~ complaints about alleged violations of the protection of personal information of data subjects and ~~[in respect thereof make reports]~~ ~~reporting~~ to complainants ~~in respect of such complaints~~;
- ~~(q)~~ ~~(ii)~~ ~~gathering~~ ~~[to gather]~~ such information as in the Regulator's opinion will assist the Regulator in discharging the duties and carrying out the Regulator's functions under this Act;
- ~~(r)~~ ~~(iii)~~ ~~attempting~~ ~~[to attempt]~~ to resolve complaints by means of dispute resolution mechanisms such as mediation and conciliation; ~~and~~
- ~~(s)~~ ~~(iv)~~ ~~serving~~ ~~[to serve]~~ any notices in terms of this Act and further ~~[promote]~~ ~~promoting~~ the resolution of disputes in accordance with the prescripts of this Act;
- ~~(e)~~ ~~to conduct~~ ~~research~~ ~~and to report to Parliament—~~
- ~~(j)~~ ~~(i)~~ ~~[to report to Parliament]~~ 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 data subject; ~~and~~
- ~~(u)~~ ~~(ii)~~ ~~[to report to Parliament]~~ on any other matter, ~~including necessary legislative amendments~~, relating to protection of personal information that, in the Regulator's opinion, should be drawn to Parliament's attention;
- ~~(f)~~ ~~in respect of~~ ~~codes of conduct to—~~
- ~~(v)~~ ~~(i)~~ ~~[to]~~ issue, from time to time, codes of conduct, ~~[amendment of]~~ ~~amend~~ codes and ~~[revocation of]~~ ~~to revoke~~ codes of conduct;
- ~~(w)~~ ~~(ii)~~ ~~[to]~~ make guidelines to assist bodies to develop codes of conduct or to apply codes of conduct; ~~and~~
- ~~(x)~~ ~~(iii)~~ ~~[to review an adjudicator's decision]~~ ~~consider afresh, upon application, determinations by adjudicators~~ under approved codes of conduct; ~~and~~
- ~~(g)~~ ~~to participate in any initiative that is aimed at facilitating cross-border~~ ~~cooperation~~ ~~in the enforcement of privacy laws~~;
- ~~(g)~~ ~~(h)~~ ~~in general to—~~
- ~~(y)~~ ~~(i)~~ ~~[to]~~ do anything incidental or conducive to the performance of any of the preceding functions;
- ~~(z)~~ ~~(ii)~~ ~~[to]~~ exercise and perform such other functions, powers, and duties as are conferred or imposed on the Regulator by or under this Act or any other ~~[enactment]~~ ~~legislation~~;

(iii) **[to]** require the responsible party to disclose to any person affected by a compromise to the confidentiality or integrity of personal information, **[this fact] such compromise** in accordance with section 21 of this Act; and

(iv) **[to]** exercise the powers conferred upon the Regulator by this Act in matters relating to the access of information as provided by the Promotion of Access to Information Act.

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

(3) **In performing its functions in terms of subsection (1)(b)(viii) with regard to information matching programmes, the Regulator must have particular regard to whether or not the—**

(a) **objective of the programme relates to a matter of significant public importance;**

(b) **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) **use of an alternative means of achieving that objective would give either of the results referred to in paragraph (b);**

(d) **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; and**

(e) **programme involves information matching on a scale that is excessive, having regard to—**

(i) **the number of responsible parties or operators that will be involved in the programme; and**

(ii) **the amount of detail about a data subject that will be matched under the programme.**

(4) **The provisions of sections 3 and 4 of the Commission's Act, 1947 (Act No. 8 of 1947), will apply, with the necessary changes, to the Regulator.**

(3)(5) **The powers and duties of the Regulator in terms of the Promotion of Access to Information Act are set out in Part 5 of that Act.**

[Regulator to have regard to certain matters]⁶³

44. (1) **The Regulator is independent in the performance of its functions as set out in section 35(b).**

(2) **In the performance of its functions, and the exercise of its powers, under this Act the Regulator must—**

(a) **have due regard to the protection of personal information as set out in the information protection principles;**

(b) **have due regard for the protection of all human rights and social interests that compete with privacy, including the general desirability of a free flow of information and the recognition of the legitimate interests of government and business in achieving their objectives in an efficient way;**

(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)⁶⁴ **In performing its functions in terms of section 43(1)(k) with regard to information matching programmes, the Regulator must have particular regard to whether or not the—**

(a) **objective of the programme relates to a matter of significant public importance;**

(b) **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) **use of an alternative means of achieving that objective would give either of the results referred to in paragraph (b);**

(d) **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; and**

(e) **programme involves information matching on a scale that is excessive, having regard to—**

(i) **the number of responsible parties or operators that will be involved in the programme; and**

(ii) **the amount of detail about a data subject that will be matched under the programme.]**

[Programmes of Regulator]

45. (1) **In order to achieve its objects in terms of this Act the Regulator 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 table such programmes in Parliament for information.**

⁶³ Clause 44(2) has been moved to clause 39.

⁶⁴ Subclause (3) has been moved to clause 50(3).

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

(3)⁶⁵ The Regulator may consult any person or body, whether by the submission of study documents prepared by the Regulator or in any other manner.

(4) The provisions of sections 2, 3, 4, 5 and 6 of the Commission's Act, 1947 (Act No. 8 of 1947), will apply, with the necessary changes, to the Regulator⁶⁶.

[Reports of Regulator]

46. (1) The Regulator must prepare a full report in regard to any matter investigated by it in terms of this Act and must submit such report to Parliament for information.

(2) The Regulator must within five months of the end of a financial year of the Department of Justice and Constitutional Development submit to the Minister a report on all its activities in terms of this Act during that financial year.

(3) The report referred to in subsection (2) must be tabled in Parliament within 14 days after it was submitted to the Minister, if Parliament is then in session, or, if Parliament is not in session, within 14 days after the commencement of its next ensuing session].

Duty of confidentiality

[47] 51. [A] Any member of the Regulator or⁶⁷ person acting on behalf or under the direction of the Regulator, must treat as confidential the personal information which comes to his or her knowledge, except if the communication of such information is required by law or in the proper performance of his or her duties.

Part B

Information [Protection] Officer

Duties and responsibilities of Information [Protection] Officer⁶⁸

- [48] 52. (1) An information [protection] officer's responsibilities include—
- (a) the encouragement of compliance, by the body, with the [information protection principles] conditions for the lawful processing of personal information;
 - (b) dealing with requests made to the body pursuant to this Act;
 - (c) working with the Regulator in relation to investigations conducted pursuant to Chapter 6 in relation to the body; [and]
 - (d) otherwise ensuring compliance by the body with the provisions of this Act; and
 - (e) as may be prescribed.

(2) Officers must take up their duties in terms of this Act only after the responsible party has registered them with the Regulator.

Designation and delegation of deputy information [protection] officers

[49] 53. Each public and private body must make provision, in the manner prescribed in section 17 of the Promotion of Access to Information Act, with the necessary changes, for the designation of—

- (a) such a number of persons, if any, as deputy information [protection] officers as is necessary to perform the duties and responsibilities as set out in section [48(1)] 52(1) of this Act; and

⁶⁵ Technical Committee requested on 8/4/10 that clause 45(3) be inserted in clause 50. Since clause 50(1)(c) is broad enough to cover the provisions of subclause (3) that subclause was deleted.

⁶⁶ The Technical Committee requested that clause 45(4) be inserted in clause 83. In a previous working draft of the Bill it was pointed out that "... the powers referred to in sections 2 to 6 of the Commissions Act, 1947, are already provided for in clause 79." and that "... clause 45(4) be deleted. However, after having reconsidered the provisions concerned it is recommended that an amended clause 45(4) be inserted in clause 50(4) insofar as it refers to sections 3 and 4 of the Commissions Act and that section 6 of the Commissions Act be inserted in the sanctions clause – clause 103A.

⁶⁷ The proposed amendment aims to clarify that the duty of confidentiality is also applicable to the members of the Regulator.

⁶⁸ The Technical Committee received an input in terms of which it is recommended that the duties of the information officers be further explained in terms of clause 52. It is, however, recommended that it may be more appropriate to provide for regulations to be issued in order to provide more detail with regard to the duties and responsibilities of the information officers.

- (b) any power or duty conferred or imposed on an information [protection] officer by this Act to a deputy information [protection] officer of that public or private body.

CHAPTER 6 NOTIFICATION AND PRIOR INVESTIGATION

Part A *Notification*

Notification of processing

[50] **54.** (1) A responsible party must, subject to section 56, notify the Regulator before commencing the—

- (a) fully or partly automated processing of personal information or categories of personal information intended to serve a single purpose or different related purposes; and] or
- (b) non-automated processing of personal information intended to serve a single purpose or different related purposes, must be notified if this] if such processing is subject to a prior investigation.

(2) The notification referred to in subsection (1) must be noted in a register kept by the Regulator for this purpose.

Notification to contain specific particulars

[51] **55.** (1) The notification must contain the following particulars:

- (a) The name and address of the responsible party;
- (b) the purpose 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 personal information may be supplied;
- (e) planned transborder flows of personal information; and
- (f) a general description allowing a preliminary assessment of the suitability of the information security measures to be implemented by the responsible party to ensure the confidentiality, integrity and availability of the information which is to be processed.

(2) Subject to subsection (3) a responsible party will only have to give notice once, and not each time personal information is received or processed.

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

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

(5) More detailed rules may be prescribed concerning the procedure for submitting notifications.

Exemptions to notification requirements

[52] **56.** (1) The Regulator may by notice exempt certain categories of information processing which are unlikely to infringe the legitimate interests of a data subject from the notification requirement referred to in section [50] 54.

(2) If processing of personal information is necessary in order to detect offences in a particular case, it may be prescribed 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 a public body pursuant to a legal obligation.

(4) Any exemption granted to a responsible party from the provisions set out in section 14 or 51 of the Promotion of Access to Information Act will also apply as an exemption of the notification requirements set out in terms of this Act.

Register of information processing

[53] 57. (1) The Regulator 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 **[51(1)] 55(1)**.

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

(3) The responsible party must provide any person who requests information referred to in section **[50(1)] 54(1)** with the information so requested.

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

- (a) information processing which **[is covered by an exemption under Chapter 4] has been authorised in terms of section 34**; and
- (b) public registers set up by law.

Failure to notify

[54] 58. (1) If section **[50(1)] 54(1)** is contravened, the responsible party is guilty of an offence and liable to a penalty as set out in section **[99] 106**.

(2) Any responsible party who fails to comply with the duty imposed by notification regulations made by virtue of sections **[102] 55(5) and 110** is guilty of an offence and liable to a penalty as set out in section **[99] 106**.⁶⁹

Option:

(2) Regulations made in terms of sections 55(5) and 110 may, in respect of any contravention thereof or failure to comply therewith, prescribe as a penalty a fine or imprisonment for a period not exceeding 12 months.

Part B **Prior investigation**

Processing subject to prior investigation

[55] 59. (1) The Regulator must initiate an investigation prior to any processing if a responsible party plans to—

- (a) **[process a number identifying data subjects 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];**
process any unique identifiers of data subjects—⁷⁰
 - (i) for a purpose other than the one for which the identifier was specifically intended at collection; and**
 - (ii) with the aim of linking the information together with information processed by other responsible parties,****unless the processing is authorised by the Regulator in terms of section 34;**
- (b) process information on criminal behaviour or on unlawful or objectionable conduct on behalf of third parties;
- (c) process information for the purposes of credit reporting; **[and] or**
- (d) transfer special personal information, as referred to in section **[26] 25**, to foreign countries without adequate information protection laws.

(2) The provisions of subsection (1) may be applied by the Regulator to other types of information processing by law or regulation if such processing carries a particular risk for the legitimate interests of the data subject.

⁶⁹ The alternative proposal aims to clarify that offences may be created in terms of the regulations if necessary.

⁷⁰ Paragraph (a) has been reworded to clarify the meaning thereof.

(3) **[Part B of Chapter 6 will not be] This section and section 60 are not** applicable if a code of conduct has been issued and has come into force in terms of Chapter 7 in a specific sector or sectors of society.

Responsible party to notify Regulator if processing is subject to prior investigation

[56] 60. (1) Information processing **[under a code of conduct]** as contemplated in section **[55(3)] 59(1)** must be notified as such by the responsible party to the Regulator.

(2) Responsible parties may not carry out information processing that has been notified to the Regulator in terms of subsection (1) until the Regulator has completed its investigation or until they have received notice that a more detailed investigation will not be conducted.

(3) In the case of the notification of information processing to which section **[55(1)] 59(1)** is applicable, the Regulator must inform the responsible party 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 Regulator decides to conduct a more detailed investigation, it must indicate the period within which it plans to conduct this investigation, which period must not exceed 13 weeks.

(5) On conclusion of the more detailed investigation referred to in subsection (4) the Regulator must issue a statement concerning the lawfulness of the information processing.

(6) A statement by the Regulator in terms of subsection (5), **to the extent that the information processing is not lawful,**⁷¹ is deemed to be an enforcement notice served in terms of section **[90] 95** of this Act.

(7) A responsible party that has suspended its processing as required by subsection (2), and which has not received the Regulator's decision within the time limits specified in subsections (3) and (4), may presume a decision in its favour and continue with its processing.

Failure to notify processing subject to prior investigation

61. **If section 60(1) or (2) is contravened, the responsible party is guilty of an offence and liable to a penalty as set out in section 106.**

CHAPTER 7 CODES OF CONDUCT

Issuing of codes of conduct

[57] 62. (1) The Regulator may from time to time issue **[a code] codes** of conduct.

(2) A code of conduct must—

- (a) incorporate all the **[information protection principles] conditions for the lawful processing of personal information** or set out obligations that provide a functional equivalent of all the obligations set out in those **[principles] conditions**; and
- (b) prescribe how the **[information protection principles] conditions for the lawful processing of personal information** are to be applied, or are to be complied with, given the particular features of the sector or sectors of society in which the relevant responsible parties 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 of information;
- (b) any specified body or class of bodies;
- (c) any specified activity or class of activities;
- (d) any specified industry, profession, or calling or class of industries, professions, or callings.

(4) A code of conduct must also—

- (a) **[in relation to any body that is not a public body, provide for 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**

⁷¹ Proposed wording have been inserted in an attempt to clarify the meaning of subclause (6).

- producing or verifying information about an identifiable data subject] provide for controls in relation to information matching programmes if such programmes are used within a specific sector;⁷²
- (b) provide for the review of the code by the Regulator; and
 - (c) provide for the expiry of the code.

[Proposal] **Process for issuing [of] codes of conduct**

- [58] 63.** (1) The Regulator may issue a code of conduct under section **[57] 62 [of this Act]**—
- (a) on the Regulator's own initiative, but **[in] after**⁷³ consultation with affected stakeholders or a body representing such stakeholders; or
 - (b) on the application, **in the prescribed form, [by of any person as provided in subsection (3). or—**
 - (i)** by a body which is, in the opinion of the Regulator, sufficiently representative of any class of bodies, or of any industry, profession, or calling as defined in the code]; and
 - (ii)** if the code of conduct sought by the applicant is intended to apply in respect of the class of body, or the industry, profession, or calling, that the applicant represents,]
in respect of such class of [body] bodies or of any such industry, profession or calling.
- (2) **[Without limiting subsection (1), but subject to subsection (3), any person may apply to the Regulator for the issuing of a code of conduct in the prescribed form submitted by the applicant.**
- (3) **An application may be made pursuant to subsection (2) only—**
- (a)** by a body which is, in the opinion of the Regulator, sufficiently representative of any class of bodies, or of any industry, profession, or calling as defined in the code; and
 - (b)** if the code of conduct sought by the applicant is intended to apply in respect of the class of body, or the industry, profession, or calling, that the applicant represents,
in respect of such class of body or of any such industry, profession or calling.
- (4) **If an application is made to the Regulator pursuant to subsection (2), or if the Regulator intends to issue a code on its own initiative, the] The** Regulator must give 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 Regulator; and
 - (b) submissions on the proposed code may be made in writing to the Regulator within such period as is specified in the notice.

[5] (3) The Regulator must not issue a code of conduct unless it has considered the submissions made to the Regulator in terms of subsection **[(4)] (2)**, if any, and is satisfied that all persons affected by the proposed code have had a reasonable opportunity to be heard.

[6] (4) The decision as to whether an application for the issuing of a code has been successful must be made within a reasonable period which must not exceed 13 weeks.

Notification, availability and commencement of code

- [59] 64.** (1) If a code of conduct is issued under section **[57] 62 the Regulator must ensure that—**
- (a) **[the Regulator must ensure that]** there is published in the *Gazette*, as soon as reasonably practicable after the code is issued, a notice indicating—
 - (i) that the code has been issued; and
 - (ii) where copies of the code are available for inspection free of charge and for purchase; and
 - (b) **[the Regulator must ensure that]** as long as the code remains in force, copies of it are available—
 - (i) on the Regulator's website;
 - (ii) for inspection by members of the public free of charge at the Regulator's offices; and
 - (iii) for purchase or copying by members of the public at a reasonable price at the Regulator's offices.

⁷² The proposed amendment aims to clarify the meaning of the paragraph by introducing the term "information matching programme" which is defined in clause 1.

⁷³ The Technical Committee requested on 9/4/10 that the words "with due regard to inputs" be inserted after the word "after consultation". This appears not be necessary in view of provisions of subclause (3).

(2) A code of conduct issued under section [57] 62 comes into force on the 28th day after the date of its notification in the *Gazette* or on such later date 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

[60] 65. (1) The Regulator may amend or revoke a code of conduct issued under section [57] 62.

(2) The provisions of sections [57, 58, 59 and 61] 62, 63, 64 and 69 apply in respect of any amendment or revocation of a code of conduct.

(3) Any matter pending before an adjudicator on the date when a code is amended or revoked must be disposed of by that adjudicator as if the code concerned was not amended or revoked.⁷⁴

[Procedure for dealing with complaints

61.]⁷⁵

Guidelines about codes of conduct

[62] 66. (1) The Regulator may provide written guidelines—

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

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

(3) The Regulator must publish guidelines provided under subsection (1) in the *Gazette*.

Register of approved codes of conduct

[63] 67. (1) The Regulator must keep a register of approved codes of conduct.

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

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

(4) The Regulator 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

[64] 68. (1) The Regulator may, on its own initiative, review the operation of an approved code of conduct.

(2) The Regulator 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; and
- (e) appoint experts to review those provisions of the code that the Regulator believes require expert evaluation.

⁷⁴ Subclause inserted to avoid any uncertainty regarding pending cases when a code is amended or revoked.

⁷⁵ Clause 61 has been moved to clause 69.

(3) The review may inform a decision by the Regulator under section [60] 65 to revoke the approved code of conduct with immediate effect or at a future date to be determined by the Regulator.

Procedure for dealing with complaints⁷⁶

[61] 69. (1) A code of conduct 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] 10.

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

- (a) the procedures meet the—
 - (i) prescribed standards; and
 - (ii) guidelines issued by the Regulator in terms of section [62] 66, relating to the making of and dealing with complaints;
- (b) the code provides for the appointment of an independent adjudicator to whom complaints may be made;
- (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 listed in section [44(2)] 39;
- (d) the code requires the adjudicator to prepare and submit a report, in a form satisfactory to the Regulator, to the Regulator within five months of the end of a financial year of the [Department of Justice and Constitutional Development] Regulator on the operation of the code during that financial year; and
- (e) the code requires the report prepared for each year to specify the number and nature of complaints made to an adjudicator under the code during the relevant financial year.

(3) A responsible party or data subject who is aggrieved by a determination, including any declaration, order or direction that is included in the determination, made by an adjudicator, other than the Regulator, after investigating having investigated a complaint relating to the protection of personal information under an approved code of conduct, may submit lodge a complaint in terms of section 76(2) with the Regulator against the determination on , upon payment of a prescribed fee.

(4) The adjudicator's determination continues to have effect unless and until the Regulator makes a determination under Chapter 10 relating to the complaint or unless the Regulator determines otherwise.

Effect of failure to comply with code

[65] 70. If a code issued under section [57 of this Act] is in force, failure to comply with the code is deemed to be a breach of [an information protection principle] the conditions for the lawful processing of personal information and is dealt with in terms of Chapter 10.

CHAPTER 8⁷⁷

RIGHTS OF DATA SUBJECTS REGARDING UNSOLICITED ELECTRONIC COMMUNICATIONS AND AUTOMATED DECISION MAKING

Unsolicited electronic communications

[66] 71. (1) The processing of personal information of a data subject for the purpose of direct marketing by means of any form of electronic communication, including automatic calling machines, facsimile machines, SMSs or electronic e-mail is prohibited unless the data subject—

- (a) has given his, her or its consent to the processing; or
- (b) is, subject to subsection [2] (3), a customer of the responsible party.

⁷⁶ Clause 61 inserted before clause 65 in order to provide logical structure to Chapter 7.

⁷⁷ It is recommended that Chapter 8 and 9 be inserted before Chapter 4.

(2) A responsible party may approach the data subject referred to in subsection (1)(a) once in order to obtain the consent of the data subject for such processing.⁷⁸

(3) A responsible party may only process the personal information of a data subject who is a customer of the responsible party in terms of subsection (1)(b)—

- (a) if the responsible party has obtained the contact details of the data subject in the context of the sale of a product or service;
- (b) for the purpose of direct marketing of the responsible party's own similar products or services; and
- (c) if the data subject has been given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its electronic details—
 - (i) at the time when the information was collected; and
 - (ii) on the occasion of each communication with the data subject for the purpose of marketing if the data subject has not initially refused such use.

~~(3)~~ (4) Any communication for the purpose of direct marketing must contain—

- (a) details of the identity of the sender or the person on whose behalf the communication has been sent; and
- (b) an address or other contact details to which the recipient may send a request that such communications cease.

Directories

~~[67]~~ **72.** (1) A data subject who is a subscriber to a printed or electronic directory of subscribers available to the public or obtainable through directory enquiry services, in which his, her or its personal information is included, must be informed, free of charge and before the information is included in the directory—

- (a) about the purpose of the directory; and
- (b) about any further uses to which the directory may possibly be put, based on search functions embedded in electronic versions of the directory.

(2) A data subject must be given a reasonable opportunity to object, free of charge and in a manner free of unnecessary formality, to such use of his, her or its personal information or to request verification, confirmation or withdrawal of such information if the data subject has not initially refused such use.

(3) Subsections (1) and (2) do not apply to editions of directories that were produced in printed or off-line electronic form prior to the commencement of this section.

(4) If the personal information of data subjects who are subscribers to fixed or mobile public voice telephony services have been included in a public subscriber directory in conformity with the information protection principles prior to the commencement of this section, the personal information of such subscribers may remain included in this public directory in its printed or electronic versions, after having received the information required by subsection (1).

Automated decision making

~~[68]~~ **73.** (1) Subject to subsection (2), [no one may] a data subject has the right not to be subject to a decision which [are attached] results in legal consequences for [him or her] him, her or it, or which affects [him or her] him, her or it to a substantial degree, [that has been taken solely on the basis of] which is based 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,] such person including his or her performance at work, or his, her or its credit worthiness, reliability and conduct.

(2) The provisions of subsection (1) do not apply if the decision—

- (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 legitimate interests; or
- (b) is governed by a law or code in which appropriate measures are specified for protecting the legitimate interests of data subjects.

⁷⁸

Provision has been inserted to clarify that responsible party may approach data subject once to obtain his or her consent.

- (3) The appropriate measures, referred to in subsection (2)(a)(ii), must—
- (a) provide an opportunity for a data subject to make representations about a decision referred to in subsection (1); and
 - (b) require a responsible party to provide a data subject with sufficient information about the underlying logic of the automated processing of the information relating to him or her to enable him or her to make representations in terms of paragraph (a).

CHAPTER 9 TRANSBORDER INFORMATION FLOWS

Transfers of personal information outside Republic

[69] 74. A responsible party in the Republic may not transfer personal information about a data subject to a third party who is in a foreign country unless—

- (a) the recipient of the information is subject to a law, binding code of conduct or **[contract binding agreement]**⁷⁹ which—
 - (i) effectively upholds principles for reasonable processing of the information that are substantially similar to the **[information protection principles] conditions for the lawful processing of personal information relating to a data subject who is a natural person and, where applicable, a juristic person;** and
 - (ii) includes provisions, that are substantially similar to this section, relating to the further transfer of personal information from the recipient to third parties who are in a foreign country;
- (b) the data subject consents to the transfer;
- (c) the transfer is necessary for the performance of a contract between the data subject and the responsible party, or for the implementation of pre-contractual measures taken in response to the data subject's request;
- (d) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the responsible party and a third party; or
- (e) the transfer is for the benefit of the data subject, and—
 - (i) it is not reasonably practicable to obtain the consent of the data subject to that transfer; and
 - (ii) if it were reasonably practicable to obtain such consent, the data subject would be likely to give it.

CHAPTER 10 ENFORCEMENT

Interference with protection of personal information of data subject

[70] 75. For the purposes of this Chapter, interference with the protection of the personal information of a data subject consists, in relation to that data subject, of—

- (a) any breach of the **[information protection principles] conditions for the lawful processing of personal information as** set out in Chapter 3;
- (b) non-compliance with section 21, **[47, 66, 67, 68 or 69] 51, 71, 72, 73 or 74;** or
- (c) a breach of the provisions of a code of conduct issued in terms of section **[57] 62.**

Complaints

[71] 76. (1) Any person may submit a complaint to the Regulator in the prescribed manner and form—

- [a)]** alleging interference with the protection of the personal information of a data subject; or
- [b)] (2)** A responsible party or data subject may, in terms of section **[61(3)] 69(3),** submit a complaint to the Regulator if **[the data subject] he, she or it** is aggrieved by the determination of an adjudicator.

⁷⁹ Amendment proposed by FIC.

Mode of complaints to Regulator

- ~~72~~ **77.** (1) A complaint to the Regulator ~~[may] must~~ be made ~~[either orally or]~~ in writing.
- (2) ~~[A complaint made orally must be put in writing as soon as reasonably practicable.]~~
- (3) The Regulator must give such reasonable assistance as is necessary in the circumstances to enable a person, who wishes to make a complaint to the Regulator, to put the complaint in writing.

Investigation by Regulator⁸⁰

- ~~73.~~ (1) ~~[The Regulator, after receipt of a complaint made in terms of section 71, must—~~
- (a) ~~investigate any alleged interference with the protection of the personal information of a data subject in the prescribed manner;~~
- (b) ~~act, where appropriate, as conciliator in relation to any such interference in the prescribed manner; and~~
- (c) ~~take such further action as is contemplated by this Chapter.~~
- (c) ~~decide, in accordance with section 79, to take no action or, as the case may be, require no further action in respect of the complaint.~~
- (2) The Regulator may, on its own initiative, commence an investigation under subsection (1).

Action on receipt of complaint

- ~~74.~~ (1) ~~On receiving a complaint in terms of section 71, the Regulator may—~~
- (a) ~~investigate the complaint; or~~
- (b) ~~decide, in accordance with section 75, to take no action on the complaint.~~
- (2) ~~The Regulator must, as soon as is reasonably practicable, advise the complainant and the responsible party to whom the complaint relates of the course of action that the Regulator proposes to adopt under subsection (1).]~~
- ~~78.~~ (1) ~~On receiving a complaint in terms of section 76, the Regulator may—~~
- (a) ~~investigate the complaint; or~~
- (b) ~~decide, in accordance with section 79, to take no action on the complaint or, as the case may be, require no further action in respect of the complaint.~~
- (2) ~~During the investigation the Regulator may —~~
- (a) ~~act, where appropriate, as conciliator in relation to any interference with the protection of the personal information of a data subject in the prescribed manner; or~~
- (b) ~~take such further action as is contemplated by this Chapter;~~
- ~~(2) (3)~~ The Regulator may, on its own initiative, commence an investigation under subsection (1).
- (4) ~~The Regulator must, as soon as is reasonably practicable, advise the complainant and the responsible party to whom the complaint relates of the course of action that the Regulator proposes to adopt under subsection (1).~~

Regulator may decide to take no action on complaint

- ~~75~~ **79.** (1) The Regulator, after investigating a complaint received in terms of section ~~71~~ **76**, may decide to take no action or, as the case may be, require no further action in respect of the complaint if, in the Regulator'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;
- (b) the subject matter of the complaint is trivial;
- (c) the complaint is frivolous or vexatious or is not made in good faith;
- (d) the complainant does not desire that action be taken or, as the case may be, continued;
- (e) the complainant does not have a sufficient personal interest in the subject matter of the complaint; or

⁸⁰ Provisions of clause 74 are closely related to that of clause 73. Technical Committee requested that provisions of clauses 73 and 74 be combined.

(f) in cases where the complaint relates to a matter in respect of which a code of conduct is in force and 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), the Regulator 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 Regulator that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

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

Referral of complaint to regulatory body

[76] 80. (1) If, on receiving a complaint in terms of section **[71] 76**, the Regulator considers that the complaint relates, in whole or in part, to a matter that is more properly within the jurisdiction of another regulatory body established in terms of any legislation⁸¹, the Regulator 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 Regulator determines that the complaint should be dealt with by another body, the Regulator must forthwith refer the complaint to that body to be dealt with accordingly and must notify the complainant of the referral.

Pre-investigation proceedings of Regulator

[77] 81. Before proceeding to investigate any matter in terms of this Chapter, the Regulator must, in the prescribed manner, inform—

- (a) the complainant, the data subject to whom the investigation relates (if not the complainant) and any person alleged to be aggrieved (if not the complainant), of the Regulator's intention to conduct the investigation; and
- (b) the responsible party 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 responsible party to submit to the Regulator, within a reasonable period, a written response in relation to the complaint or, as the case may be, the subject-matter of the investigation.

Settlement of complaints

[78] 82. If it appears from a complaint, or any written response made in relation to a complaint under section **[77(b)(ii)] 81(b)(ii)**, that it may be possible to secure—

- (a) a settlement between any of the parties concerned; and
- (b) 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 Regulator may, without investigating the complaint or, as the case may be, investigating the complaint further, in the prescribed manner, use its best endeavours to secure such a settlement and assurance.

Investigation proceedings of Regulator⁸²

⁸¹ Wording inserted to clarify what is meant with term "regulatory body".

⁸² The need for clause 83 was questioned. Other statutory bodies, such as Public Protector and Human Rights Commission, have similar powers to ensure co-operation during investigations. However, terminology used differs, for example, other legislation refer to written notices, determinations or directions. All of which are delivered by an authorized person or sheriff. Non-compliance with such notices, determinations or directions is met with a criminal sanction.

- [79] 83. For the purposes of the investigation of a complaint the Regulator may—
- (a) summon and enforce the appearance of persons before the Regulator and compel them to give oral or written evidence on oath and to produce any records and things that the Regulator considers necessary to investigate the complaint, in the same manner and to the same extent as the High Court;
 - (b) administer oaths;
 - (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Regulator sees fit, whether or not it is or would be admissible in a court of law;
 - (d) at any reasonable time, subject to section [80] 84, enter and search any premises occupied by a responsible party;
 - (e) ~~converse in~~ conduct a private interview with any person in any premises entered under section [82] 86 subject to section [80] 84; and
 - (f) otherwise carry out in those premises any inquiries that the Regulator sees fit in terms of section [80] 84.

Option⁸³

Investigation proceedings of Regulator

- [79] 83. For the purposes of the investigation of a complaint the Regulator may—
- (a) ~~[summon and enforce the appearance of persons]~~ invite a person to appear before the Regulator and ~~[compel them]~~ to give oral or written evidence on oath and ~~[to]~~ produce any records and things that the Regulator considers necessary to investigate the complaint, [in the same manner and to the same extent as the High Court]; Provided that if such person fails to voluntarily abide by with such invitation, the Regulator may, on probable and good cause shown, approach the High Court for a warrant to enforce the appearance of such person or the production of such records or things, and further provided that the High Court may draw no inference from such person's failure to abide by such invitation, and further provided that no-one may be compelled to give oral or written evidence which may incriminate him or her;
 - (b) administer oaths;
 - (c) receive and accept any evidence and other information, whether on oath, by affidavit or otherwise, that the Regulator sees fit, whether or not it is or would be admissible in a court of law; and
 - (d) at any reasonable time, subject to section [80] 84, enter and search any premises occupied by a responsible party;
 - ~~(e) converse in private with any person in any premises entered under section 82 subject to section 80; and~~
 - ~~(f) otherwise carry out in those premises any inquiries that the Regulator sees fit in terms of section 80].~~

Issue of warrants

[80] 84. (1) A judge of the High Court, a regional magistrate or a magistrate, if satisfied by information on oath supplied by the Regulator that there are reasonable grounds for suspecting that—

- (a) a responsible party is interfering with the protection of the personal information of a data subject; 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, that are within the jurisdiction of that judge or magistrate, may, subject to subsection (2), grant a warrant to enter and search such premises.

(2) A warrant issued under subsection (1) authorises ~~[the Regulator or any of its officers or staff]~~ any of the Regulator's members or staff members, subject to section [82] 86, 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

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Option proposed by Dr Oriani-Ambrosini.

record, other material or equipment found there which may be such evidence as is mentioned in that subsection.

Requirements for issuing of warrant

[81] 85. (1) A judge or magistrate must not issue a warrant under section **[80] 84** unless satisfied that —

- (a) the Regulator has given seven days' notice in writing to the occupier of the premises in question demanding access to the premises;
- (b) 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 Regulator's members **[or officers]** or staff to permit the members or the **[officer or member] members** of staff to do any of the things referred to in section **[80(2)] 84(2)**; and
- (c) that the occupier, has, after the refusal, been notified by the Regulator of the application for the warrant and has had an opportunity of being heard on the question whether the warrant should be issued.

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

(3) A judge or magistrate who issues a warrant under section **[80] 84** must also issue two copies of it and certify them clearly as copies.

Execution of warrants

[82] 86. (1) A police officer who is assisting a person authorised to conduct an entry and search in terms of a warrant issued under section **[80] 84** may overcome resistance to the entry and search by using such force as is reasonably 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 reasonable 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 **[80] 84** 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 **[80] 84** must give a receipt to the occupier or leave the receipt on the premises.

(5) Anything so seized may be retained for as long as is necessary in all circumstances but the person in occupation of the premises in question must be given a copy of any documentation 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 **[80] 84** must 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 to each person's right to dignity, freedom, security and privacy.

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

- (a) 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.

(9) No self-incriminating answer given or statement made to a person who conducts a search in terms of a warrant issued under section **[80] 84** is admissible as evidence against the person who gave the answer or made the statement in criminal proceedings, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section **[97] 102** and then only to the extent that the answer or statement is relevant to prove the offence charged.

Matters exempt from search and seizure

[83] 87. If the Regulator has authorised the processing of personal information in terms of section 34, that information is not subject to search and seizure empowered by a warrant issued under section **[80] 84**.

Communication between legal adviser and client exempt⁸⁴

[84] 88. (1) Subject to the provisions of this section, the powers of search and seizure conferred by a warrant issued under section **[80] 84** must not be exercised in respect of—

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

Option⁸⁵

To delete clause 88.

Objection to search and seizure

[85] 89. If the person in occupation of any premises in respect of which a warrant is issued under this Act objects to the inspection or seizure under the warrant of any material on the ground that it—

- (a) 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; or
- (b) consists partly of matters in respect of which those powers are not exercised, 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

⁸⁴ The question was raised whether the clause is not already covered by legal professional privilege. The requirements for privilege are that a communication must be made in confidence to a legal adviser, who acts in a professional capacity, with the view to pending litigation or to obtain advice. The requirement that an adviser must act in a professional capacity applies equally to a salaried legal "in-house" adviser and an attorney or advocate in private practice. Whether a communication was made in confidence is a factual question. It is not a requirement that the confidential communication, between a client and legal adviser, should be with the view to actual or pending litigation. However, communication between a legal adviser and a third party will only be privileged if it is made in connection with contemplated litigation. It is with reference to the aforementioned requirement that the usefulness of clause 84 should be considered. Subclause (1)(a) appears to fall squarely within the parameters of privilege. However, subclause (1)(b) aims to extend privilege to those cases where a legal adviser and a third party communicates with the view to "proceedings under or arising out of this Act" which proceedings are not only limited to contemplated litigation. It is recommended that the clause be retained in view of the aforementioned.

⁸⁵ Technical Committee requested that in view thereof that clause aims to extend the common law as far as privilege is concerned and in view thereof that such proposed amendment should be addressed in other legislation, that clause should be deleted.

[86] 90. A warrant issued under section **[80] 84** 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 who has executed the warrant must make an endorsement on it stating what powers have been exercised by him or her under the warrant.

Assessment

[87] 91. (1) The Regulator, on its own initiative, or at the request by or on behalf of the responsible party, data subject or any other person must make an assessment in the manner prescribed of whether an instance of processing of personal information complies with the provisions of this Act.

(2) The Regulator must make the assessment if it appears to be appropriate, unless, where the assessment is made on request, the Regulator 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 Regulator may have regard in determining whether it is appropriate to make an assessment include—

- (a) the extent to which the request appears to it to raise a matter of substance, **and if the assessment is made on request—**
- (b) any undue delay in making the request; and
- (c)** whether or not the person making the request is entitled to make an application **[under Principle 8] in terms of section 22 or 23** in respect of the personal information in question.⁸⁶

(4) If the Regulator has received a request under this section it must notify the requester—

- (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] authorisation by the Regulator in terms of section 34** from **[Principle 8] section 22 or 23** applying in relation to the personal information concerned, of any view formed or action taken as a result of the request.

Information notice

- [88] 92.** (1) If the Regulator—
- (a) has received a request under section **[87] 91** 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 personal information of a data subject,

the Regulator may serve the responsible party with an information notice requiring the responsible party to furnish the Regulator, within a specified period, in a form specified in the notice, with **[an independent auditor's] a** report indicating that the processing is taking place in compliance with the provisions of the Act, or with such information relating to the request or to compliance with the Act as is so specified.

(2) An information notice must contain particulars of the right of appeal conferred by section **[92] 97**, and—

- (a) in a case falling within subsection (1)(a), a statement that the Regulator has received a request under section **[87] 91** in relation to the specified processing; or
- (b) in a case falling within subsection (1)(b), a statement that the Regulator 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] conditions for the lawful processing of personal information** and the reasons for regarding it as relevant for that purpose.

⁸⁶ Proposed amendment aims to clarify meaning of clause and to harmonise it with clause 50(1)(b)(v).

(3) Subject to subsection (5), the period 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.

(4) If the Regulator 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 (3) does not apply.

(5) A notice in terms of subsection (4) may not require the information to be furnished before the end of a period of three days beginning with the day on which the notice is served.

(6) An information notice may not require a responsible party to furnish the Regulator with any communication between a—

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

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

(8) An information notice may not require a responsible party to furnish the Regulator with information that would, by revealing evidence of the commission of any offence other than an offence under this Act, expose the responsible party to criminal proceedings.

(9) The Regulator may cancel an information notice by written notice to the responsible party on whom it was served.

[10) After completing the assessment referred to in section 87 the Regulator—

- (a) must report to the responsible party the results of the assessment and any recommendations that the Regulator considers appropriate; and**
- (b) may, in appropriate cases, require the responsible party, within a specified time, to inform the Regulator 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 Regulator may make public any information relating to the personal information management practices of a responsible party that has been the subject of an assessment under this section if the Regulator considers it in the public interest to do so.

(12) A report made by the Regulator under subsection (10) is deemed to be the equivalent of an enforcement notice in terms of section 90.⁸⁷

Parties to be informed of result of assessment

[88A] 93. (1) After completing the assessment referred to in section 91 the Regulator—

- (a) must report to the responsible party the results of the assessment and any recommendations that the Regulator considers appropriate; and**
- (b) may, in appropriate cases, require the responsible party, within a specified time, to inform the Regulator 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.**

(2) The Regulator may make public any information relating to the personal information management practices of a responsible party that has been the subject of an assessment under this section if the Regulator considers it in the public interest to do so.

(3) A report made by the Regulator under subsection (1) is deemed to be the equivalent of an enforcement notice in terms of section 95.

Parties to be informed of developments during and result of investigation

⁸⁷ Subclauses (10) to (12) inserted in separate clause to place better emphasis on the requirement that parties must be informed. The question is raised, in view thereof that a responsible party, a data subject or any other person may request an assessment, whether clause 93(1) should also require that a data subject or other person (if any of them requested an assessment) should be informed of the result of the assessment.

- [89] 94.** If an investigation is made following a complaint, and—
- (a) the Regulator believes that no interference with the protection of the personal information of a data subject has taken place and therefore does not serve an enforcement notice;
 - (b) an enforcement notice is served in terms of section **[90] 95**;
 - (c) a served enforcement notice is cancelled in terms of section **[91] 96**;
 - (d) an appeal is lodged against the enforcement notice for cancellation or variation of the notice in terms of section **[92] 97**; or
 - (e) an appeal against an enforcement notice is allowed, the notice is substituted or the appeal is dismissed in terms of section **[93] 98**,

the Regulator must inform the complainant and the responsible party, as soon as reasonably practicable, in the manner prescribed of any development mentioned in paragraphs (a) to (e) and the result of the investigation.

Enforcement notice

[90] 95. (1) If the Regulator is satisfied that a responsible party has interfered or is interfering with the protection of the personal information of a data subject, the Regulator may serve the responsible party with an enforcement notice requiring the responsible party to do either or both of the following:

- (a) To take specified steps within a period specified in the notice, or to refrain from taking such steps; or
- (b) to stop processing personal information specified in the notice, or to stop processing personal information for a purpose or in a manner specified in the notice within a period specified in the notice.

(2) An enforcement notice must contain—

- (a) a statement indicating the nature of the interference with the protection of the personal information of the data subject and the reasons for reaching that conclusion; and
- (b) particulars of the rights of appeal conferred by section **[92] 97**.

(3) Subject to subsection (4), an enforcement notice may not require any of the provisions of the notice to be complied with before the end of the period within which an appeal may 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 the Regulator considers that an enforcement notice should be complied with as a matter **[or] 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) does not apply.

(5) A notice in terms of subsection (4) may not require any of the provisions of the notice to be complied with before the end of a period of three days beginning with the day on which the notice is served.

Option.⁸⁸

(5) A notice in terms of subsection (4) may not require any of the provisions of the notice to be complied with before the end of a period of **[three] ten** days beginning with the day on which the notice is served.

Cancellation of enforcement notice

[91] 96. (1) A responsible party on whom an enforcement notice has been served may, at any time after the expiry of the period during which an appeal may be brought against that notice, apply in writing to the Regulator 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 principles] conditions for the lawful processing of personal information**.

(2) If the Regulator 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**

⁸⁸ Option proposed by Dr Oriani-Ambrosini (on 24/2/11).

protection principle or principles] a condition for the lawful processing of personal information or conditions to which it relates, it may cancel or vary the notice by written notice to the responsible party on whom it was served.

Right of appeal

[92] 97. (1) A responsible party on whom an information or enforcement notice has been served may, within **[30] 180**⁸⁹ days of receiving the notice, appeal to the High Court having jurisdiction for the setting aside or variation of the notice.

(2) A complainant, who has been informed of the result of the investigation in terms of section **[75(3) or 91,]**⁹⁰ **79(3) or 96,** may, within **[30] 180** days of receiving the result, appeal to the High Court having jurisdiction against the result.

Consideration of appeal

[93] 98. (1) If in an appeal under section **[92] 97** the court considers—

(a) that the notice **or decision** against which the appeal is brought is not in accordance with the law; or

(b) that the notice **or decision** involved an exercise of discretion by the Regulator that ought to have been exercised differently,

the court must allow the appeal and may set aside the notice or substitute such other notice or decision as should have been served or made by the Regulator.

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

Civil remedies

[94] 99. (1) A data subject or, at the request of the data subject, the Regulator, may institute a civil action for damages in a court having jurisdiction against a responsible party for breach of any provision **[of this Act]** referred to in section **[70] 72,** whether or not there is intent or negligence on the part of the responsible party.

(2) In the event of a breach the responsible party may raise any of the following defences against an action for damages:

- (a) **[Vis maior] Force majeure (overwhelming force of nature leading to unavoidable consequences);**
- (b) consent of the plaintiff;
- (c) fault on the part of the plaintiff;
- (d) compliance was not reasonably practicable in the circumstances of the particular case; or
- (e) the Regulator authorised the breach in terms of section 34.

(3) A court hearing proceedings in terms of subsection (1) may award an amount that is just and equitable, including—

- (a) payment of damages as compensation for patrimonial and non-patrimonial loss suffered by a data subject as a result of breach of the provisions of this Act;
- (b) aggravated damages, in a sum determined in the discretion of the Court;
- (c) interest; and
- (d) costs of suit on such scale as may be determined by the Court.

(4) Any amount awarded to the Regulator in terms of subsection (3) must be dealt with in the following manner:

- (a) the full amount must be deposited into a specifically designated trust account established by the Regulator with an appropriate financial institution;
- (b) as a first charge against the amount, the Regulator may recover all reasonable expenses incurred in bringing proceedings at the request of a data subject in terms of subsection (1) and in administering the distributions made to the data subject in terms of subsection (5); and

⁸⁹ Proposed amendment to PAIA in this regard will be addressed in terms of the Judicial Matters Amendment Bill.

⁹⁰ The question is raised whether any party should be allowed to appeal to the high court.

(c) the balance, if any (in this section referred to as the “distributable balance”), must be distributed by the Regulator to the data subject at whose request the proceedings were brought.

(5) Any amount not distributed within three years from the date of the first distribution of payments in terms of subsection (2), accrue to the Regulator in the Regulator’s official capacity.

(6) The distributable balance must be distributed on a pro rata basis to the data subject referred to in subsection (1).

(7) 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.

(8) Any civil action instituted under this section may be withdrawn, abandoned or compromised, but any agreement or compromise must be made an order of Court.

(9) If civil action has not been instituted, any agreement or settlement, if any, may, on application to the Court by the Regulator 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 11 OFFENCES AND PENALTIES

Obstruction of Regulator

[95] 100. Any person who hinders, obstructs or unlawfully influences the Regulator or any person acting on behalf of or under the direction of the Regulator in the performance of the Regulator’s duties and functions under this Act, is guilty of an offence.

Breach of confidentiality

[96] 101. Any person who contravenes the provisions of section **[47] 51**, is guilty of an offence.

Obstruction of execution of warrant

[97] 102. Any person who—

(a) intentionally obstructs a person in the execution of a warrant issued under section **[80] 84**;
or

(b) fails without reasonable excuse to give any person executing such a warrant such assistance as he or she may reasonably require for the execution of the warrant,
is guilty of an offence.

Failure to comply with enforcement or information notices

[98] 103. (1) A responsible party which fails to comply with an enforcement notice served in terms of section **[90] 95**, is guilty of an offence.

(2) A responsible party which, in purported compliance with an information notice—

(a) makes a statement knowing it to be false; or

(b) recklessly makes a statement which is false, in a material respect,
is guilty of an offence.

Offences by witnesses⁹¹

103A. (1) Any person summoned in terms of section 83 to attend and give evidence or to produce any book, document or object before the Regulator (or Enforcement Committee??) who, without sufficient cause fails—

⁹¹ Provision moved from clause 45(4) with reference to section 6 of the Commissions Act.

- (a) to attend at the time and place specified in the summons;
- (b) to remain in attendance until conclusion of the proceedings or until he or she is excused by the Chairperson of the Regulator (or Enforcement Committee??) from further attendance;
- (c) having attended, refuses to be sworn or to make an affirmation as witness after he or she has been required by the Chairperson of the Regulator (or Enforcement Committee??) to do so;
- (d) having been sworn or having made an affirmation, to answer fully and satisfactorily any question lawfully put to him or her; or
- (e) to produce any book, document or object in his or her possession or custody or under his or her control, which he or she has been summoned to produce.

is guilty of an offence.

(2) Any person who after having been sworn or having made an affirmation, gives false evidence before the Regulator (or Enforcement Committee??) on any matter, knowing such evidence to be false or not knowing or believing it to be true, is guilty of an offence.

Unlawful acts by responsible party in connection with unique identifier⁹²

104. (1) A responsible party who contravenes the provisions of section 7 insofar as those provisions relate to the processing of a unique identifier of a data subject is, subject to subsections (2) and (3), guilty of an offence.

(2) The contravention referred to in subsection (1) must—

- (a) be of a serious or persistent nature; and
- (b) likely cause substantial damage or distress to the data subject.

(3) The responsible party must—

- (a) have known or ought to have known that—
 - (i) there was a risk that the contravention would occur; and
 - (ii) such contravention would likely cause substantial damage or distress to the data subject; and
- (b) have failed to take reasonable steps to prevent the contravention.

(4) Whenever a responsible party is charged with an offence under subsection (1), it is a valid defence to such a charge to contend that he or she has taken all reasonable steps to comply with the provisions of section 7.

(5) “Unique identifier”, for purposes of this section and section 105, means any number of characters or any other means of identification that has been assigned—

- (a) to one data subject only; or
- (b) jointly to more than one data subject,

by a financial or other institution which enables the data subject, referred to in paragraph (a), to access his, her or its own funds or to access credit facilities or which enables a data subject, referred to in paragraph (b), to access joint funds or to access joint credit facilities.

Unlawful acts by third parties in connection with unique identifier

105. (1) A person who knowingly or recklessly, without the consent of the responsible party—

- (a) obtains or discloses a unique identifier of a data subject; or
 - (b) procure the disclosure of a unique identifier of a data subject to another person,
- is, subject to subsection (2), guilty of an offence.

(2) Whenever a person is charged with an offence under subsection (1), it is a valid defence to such a charge to contend that—

- (a) the obtaining, disclosure or procuring of the unique identifier was—
 - (i) necessary for the purpose of the prevention, detection, investigation or proof of an offence; or
 - (ii) required or authorised in terms of the law or in terms of a court order;

⁹² If the proposal with regard to the inclusion of administrative fines is not accepted, an alternative approach for purposes of strengthening the enforcement powers of the Regulator would be to extend the ambit of the offences to all processing.

(b) he or she acted in the reasonable belief that he or she was legally entitled to obtain or disclose the unique identifier or, as the case may be, to procure the disclosure of the unique identifier to the other person;

(c) he or she acted in the reasonable belief that he or she would have had the consent of the responsible party if the responsible party had known of the obtaining, disclosing or procuring and the circumstances of it; or

(d) in the particular circumstances the obtaining, disclosing or procuring was in the public interest.

(3) A person who sells a unique identifier which he or she has obtained in contravention of subsection (1), is guilty of an offence.

(4) A person who offers to sell the unique identifier of a data subject which that person—

(a) has obtained; or

(b) subsequently obtained,

in contravention of subsection (1), is guilty of an offence.

(5) For the purposes of subsection (4), an advertisement indicating that a unique identifier of a data subject is or may be for sale is an offer to sell the information.

[Penal sanctions] Penalties

[99] **106.** Any person convicted of an offence in terms of this Act, is liable, in the case of a contravention of—

(a) [in the case of a contravention of section 95] section 100, to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment; or

(b) [in any other case] section [96] 51, read with section 101, section 102 or 103(2), to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and such imprisonment; or

(c) section 103(1), 104(1) or 105(1), (3) or (4) to a fine not exceeding R1 million or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment.

Magistrate's Court jurisdiction to impose penalties

[100] **107.** Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section [99] 106.

Option⁹³

To delete clause 107.

Option⁹⁴

Administrative fines

107A. (1) If a responsible party is alleged to have committed an offence referred to in section 103, the Regulator may cause to be delivered by hand to that person (hereinafter referred to as the infringer) an infringement notice which must contain the particulars contemplated in subsection (2).

(2) A notice referred to in subsection (1) must—

(a) specify the name and address of the infringer;

(b) specify the particulars of the alleged offence; and

⁹³ Technical Committee questioned why jurisdiction of magistrates' court should be extended and whether it is a general legislative practice. In access of 113 different pieces of legislation contain provisions that extend the jurisdiction of the aforementioned courts in similar fashion, for example, s19 of Act 36 of 1947, s2A(3) of Act 71 of 1962, s45(2) of Act 15 of 1976, s35(3) of Act 53 of 1976, s8 of Act 9 of 1978, s25(2) of Act 62 of 1998, s47(2)(b) of Act 12 of 1998, s70(3) of Act 18 of 1998, s162 of Act 34 of 2005 and s217 of Act 71 of 2008.

⁹⁴ Heading of Chapter 11 will have to be amended as follows: **OFFENCES, [AND] PENALTIES AND ADMINISTRATIVE FINES** if option is approved.

- (c) specify the amount of the administrative fine payable, which amount may not exceed R1 000 000;
- (d) inform the infringer that, not later than 30 days after the date of service of the infringement notice, the infringer may—
- (i) pay the administrative fine;
 - (ii) make arrangements with the Regulator to pay the administrative fine in instalments; or
 - (iii) elect to be tried in court on a charge of having committed the alleged offence referred to in section 103; and
- (e) state that a failure to comply with the requirements of the notice within the time permitted, will result in the administrative fine becoming recoverable as contemplated in subsection (4).

(3) When determining an appropriate fine, the Regulator must consider the following factors:

- (a) The nature of the personal information involved;
- (b) the duration and extent of the contravention;
- (c) the number of data subjects affected or potentially affected by the contravention;
- (d) whether or not the contravention raises an issue of public importance;
- (e) the likelihood of substantial damage or distress, including injury to feelings or anxiety suffered by data subjects;
- (f) whether the responsible party or a third party could have prevented the contravention from occurring;
- (g) any failure to carry out a risk assessment or a failure to operate good policies, procedures and practices to protect personal information; and
- (h) whether the responsible party has previously contravened section 103 of the Act.

(4) If an infringer elects to be tried in court on a charge of having committed the alleged failure referred to in section 103, the Regulator must hand the matter over to the prosecuting authority and inform the infringer accordingly.

(5) If an infringer fails to comply with the requirements of a notice, the Regulator may file with the clerk or registrar of any competent court a statement certified by him or her as correct, setting forth the amount of the administrative fine payable by the infringer, and such statement thereupon has all the effects of a civil judgment lawfully given in that court in favour of the Regulator for a liquid debt in the amount specified in the statement.

(6) The Regulator may not impose an administrative fine contemplated in this section if the responsible party concerned has been charged with a criminal offence in terms of section 103 in respect of the same set of facts.

(7) No prosecution may be instituted against a responsible party if the responsible party concerned has paid an administrative fine in terms of this section in respect of the same set of facts.

(8) An administrative fine imposed in terms of this section does not constitute a previous conviction as contemplated in Chapter 27 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

CHAPTER 12 GENERAL PROVISIONS

[Repeal and amendment] **Amendment of laws**⁹⁵

[101] **108.** The laws mentioned in the Schedule are amended to the extent indicated in the third column of the Schedule.

Fees

109. (1) The Minister must—

⁹⁵

It is recommended that clause 108 be inserted before clause 113 "Short title and commencement".

- (a) subject to subsection (2) and section 111, upon request by and after consultation with the Regulator, prescribe an annual administrative fee to be paid by responsible parties referred to in section 54; and
- (b) subject to section 111 and after consultation with the Regulator prescribe fees to be paid by data subjects—
- (i) as referred to in section 22(1)(b); and
- (ii) who apply to the Regulator for complaints to be considered as referred to in section 69(3).
- (2) The Regulator may only request the Minister to prescribe an annual administrative fee referred to in subsection (1)(a) after a period of at least three years have elapsed after the implementation of the Act for the purposes of ensuring the financial independence of the Regulator.
- (3) Different fees may be prescribed in respect of different categories of responsible parties and data subjects referred to in subsection (1)(a) and (b), respectively.
- (4) Regulations made in terms of subsection (1)(a) may, in respect of any contravention thereof or failure to comply therewith, prescribe as a penalty a fine or imprisonment which does not exceed five times the amount of the annual administrative fee concerned.

Regulations

- [102] 110.** The Minister may make regulations on—
- (a) any matter which this Act requires or permits to be prescribed;
- (b) the monitoring of this Act and the establishment of the Regulator; and
- (c) any other matter which may be necessary for the application of this Act.

Option 1:⁹⁶

- 110.** The Regulator may, subject to section 111, [the Minister may] make regulations on—
- (a) any matter which this Act requires or permits to be prescribed;
- (b) the monitoring of this Act [and the establishment of the Regulator]; and
- (c) any other matter which may be necessary for the application of this Act, provided that the Minister may make regulations on the establishment of the Regulator.

Option 2:⁹⁷

- 110.** The [Minister] Regulator may make regulations on—
- (a) any matter which this Act requires or permits to be prescribed;
- (b) the monitoring of this Act [and the establishment of the Regulator]; and
- (c) any other matter which may be necessary for the application of this Act.

Option 3:⁹⁸

- 110.** (1) The Minister may, subject to section 111, make regulations relating to the establishment of the Regulator.
- (2) The Regulator may, subject to section 111, make regulations relating to—
- (a) the manner in terms of which a data subject may object to the processing of personal information as referred to in section 10(2);
- (b) the processing of health information by certain responsible parties as referred to in section 31(6);

⁹⁶ Option proposed by Dr Oriani-Ambrosini. Dr Ambrosini argues that the regulatory power of the Minister defeats the entire purpose of the Bill, as it can override any of the contents of the regulations, codes and guidelines issued by the Regulator in terms of clauses but without any of the guarantees and participatory tools set out therein.

⁹⁷ Option proposed by Ms Smuts.

⁹⁸ Option requested by Chairperson of Technical Committee.

- (c) the responsibilities of information officers as referred to in section 52(1);
- (d) the procedure in terms of which notifications must be submitted as referred to in section 55(5);
- (e) the categories of processing that are exempt from notification as referred to in section 56(2);
- (f) the form in terms of which an application for a code of conduct must be submitted to the Regulator as referred to in section 69;
- (g) the manner and form in terms of which a complaint must be submitted in terms of section 76;
- (h) the Regulator acting as conciliator in relation to any interference with the protection of personal information as referred to in section 78;
- (i) the notification of the parties concerned of an investigation to be conducted as referred to in section 81;
- (j) the settlement of complaints as referred to in section 82;
- (k) the manner in which an assessment of the processing of personal information will be made as referred to in section 91(1); and
- (l) the manner in terms of which the parties concerned must be informed of the developments during and result of an investigation as referred to in section 94.

(3) Regulations made in terms of subsection (2) may, in respect of any contravention thereof or failure to comply therewith, prescribe as a penalty a fine or imprisonment for a period not exceeding 12 months.

Procedure for making regulations

111. (1) The Minister, before making or amending any regulations referred to in section 110(1), must publish a notice in the *Gazette*—

- (a) setting out that draft regulations have been developed;
- (b) specifying where a copy of the draft regulations may be obtained; and
- (c) inviting written comments to be submitted on the proposed regulations within a specified period.

(2) After complying with subsection (1) and after consultation with the Regulator in respect of the draft regulations referred to in section 109, the Minister may—

- (a) amend the draft regulations; and
- (b) subject to subsection (5), publish the regulations in final form in the *Gazette*.

(3) The Regulator, before making or amending any regulations referred to in section 110(2), must publish a notice in the *Gazette*—

- (a) setting out that draft regulations have been developed;
- (b) specifying where a copy of the draft regulations may be obtained; and
- (c) inviting written comments to be submitted on the proposed regulations within a specified period.

(4) After complying with subsection (3), the Regulator may—

- (a) amend the draft regulations; and
- (b) subject to subsection (5), publish the regulations in final form in the *Gazette*.

(5) (a) The Minister or the Regulator, as the case may be, must, within 30 days before publication of the regulations in the *Gazette*, as referred to in subsection (2)(b) or (4)(b), table them in Parliament.

(b) Subsection (1) or (3) does not apply in respect of any amendment of the regulations as a result of the process referred to in paragraph (a).

Transitional arrangements

[103] 112. (1) Processing which is taking place on the date when this Act comes into force and does not conform to it must, within one year of such date, be made to conform and thereafter be notified to the Regulator in terms of section 17(1).

(2) The period of one year referred to in subsection (1) may be extended by the Minister by notice in the *Gazette* [to a maximum of three years] by an additional period which period may not exceed three years //Option: five years.

(3) Section ~~[56(2)] 60(2)~~ does not apply to processing referred to in section ~~[55] 59~~, which is taking place on the date of commencement of this Act, ~~[or as the case may be, [of] if the legislation, regulations or codes of conduct [applying] apply to such processing]~~ until the Regulator determines otherwise by notice in *Gazette*.⁹⁹

Short title and commencement

~~[104] 113.~~ (1) This Act is called the Protection of Personal Information Act, ~~[2009] 2011~~, and commences on a date determined by the President by proclamation in the *Gazette*.

(2) Different dates of commencement may be determined in respect of different provisions of this Act or in respect of different class or classes of information and bodies.

⁹⁹ Proposed redraft of subclause (3) aims to clarify meaning thereof.

SCHEDULE

LAWS ~~REPEALED OR~~ AMENDED BY SECTION 101

No. and year of law	Short title	Extent of repeal or amendment
Act 2 of 2000	Promotion of Access to Information Act, 2000	<p>1. The amendment of section 1 by the substitution for the definition of “personal information” of the following definition:</p> <p>" <u>'personal information'</u> means information relating to an identifiable natural person, including, but not limited to—</p> <p>(a) <u>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;</u></p> <p>(b) <u>information relating to the education or the medical, financial, criminal or employment history of the person;</u></p> <p>(c) <u>any identifying number, symbol, email address, physical address, telephone number or other particular assigned to the person;</u></p> <p>(d) <u>the blood type or any other biometric information of the person;</u></p> <p>(e) <u>the personal opinions, views or preferences of the person;</u></p> <p>(f) <u>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;</u></p> <p>(g) <u>the views or opinions of another individual about the person; and</u></p> <p>(h) <u>the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person,</u></p>

No. and year of law	Short title	Extent of repeal or amendment
		<p><u>but excludes information about an individual who has been dead for more than 20 years.</u>"</p> <p>2. The amendment of section 1 by—</p> <p>(a) the omission of the definition of “personal requester”; and</p> <p>(b) the insertion after the definition of “record” of the following definition: <u>" 'Regulator' means the Information Protection Regulator established in terms of section 35 of the Protection of Personal Information Act, 2009.</u>"</p> <p>3. The amendment of section 11 by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">"(2) A request contemplated in subsection (1) [includes] excludes a request for access to a record containing personal information about the requester."</p> <p>4. The amendment of section 22 by the substitution for—</p> <p>(a) subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">"(1) The information officer of a public body to whom a request for access is made, must by notice require the requester, other than a personal requester, to pay the prescribed request fee (if any), before further processing the request."; and</p> <p>(b) subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">"(2) If—</p> <p>(a) the search for a record of a public body in respect of which a request for access by a requester, other than a personal requester, has been made; and</p> <p>(b) the preparation of the record for disclosure (including any arrangements contemplated in section 29(2)(a) and (b)(i) and (ii)(aa)),</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>would, in the opinion of the information officer of the body, require more than the hours prescribed for this purpose for requesters, the information officer must by notice require the requester[, other than a personal requester,] to pay as a deposit the prescribed portion (being not more than one third) of the access fee which would be payable if the request is granted."</p> <p>5. The amendment of section 30 by the substitution for subsection (1) of the following subsection:</p> <p>"(1) If the information officer who grants, in terms of section 11, a request for access to a record provided by a health practitioner in his or her capacity as such about the physical or mental health, or well-being—</p> <p>[(a) of the requester; or] (b) if the request has been made on behalf of the person to whom the record relates, of that person, (in this section, the requester and person referred to [paragraphs (a) and] in paragraph (b), respectively, are referred to as the "relevant person"), is of the opinion that the disclosure of the records to the relevant person might cause serious harm to his or her physical or mental health, or well-being, the information officer may, before giving access in terms of section 29, consult with a health practitioner who, subject to subsection (2), has been nominated by the relevant person."</p> <p>6. The amendment of section 54 by the substitution for—</p> <p>(a) subsection (1) of the following subsection:</p> <p>"(1) The head of a private body to whom a request for access is made must by notice require the requester[, other than a personal requester,] to pay the prescribed request fee (if any), before further processing the request."; and</p> <p>(b) subsection (2) of the following subsection:</p> <p>"(2) If—</p> <p>(a) the search for a record of a</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>private body in respect of which a request for access by a requester [other than a personal requester,] has been made; and</p> <p>(b) the preparation of the record for disclosure (including any arrangements contemplated in section 29(2)(a) and (b)(i) and (ii)(aa)),</p> <p>would, in the opinion of the head of the private body concerned, require more than the hours prescribed for this purpose for requesters, the head must by notice require the requester[other than a personal requester,] to pay as a deposit the prescribed portion (being not more than one third) of the access fee which would be payable if the request is granted."</p> <p>[6.] 7. The amendment of the heading of Part 5 by substituting the words "Human Rights Commission" with the words "Information Protection Regulator".</p> <p>[7.] 8. The amendment of sections 1, 10, 32, 83, 84 and 85 by substituting the words "Human Rights Commission" wherever they occur, with the word "Regulator".</p> <p>[8.] 9. The repeal of section 88.</p> <p>Option:¹⁰⁰</p> <p>10. The amendment of section 90 by the substitution for subsections (2) and (3) of the following subsections:</p> <p>"(2) An information officer who wilfully or in a grossly negligent manner fails to comply with—</p> <p>(a) the provisions of section 14; or</p> <p>(b) <u>an enforcement notice referred to in section 77J,</u></p> <p>commits an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding two years.</p> <p>(3) A head of a private body who</p>

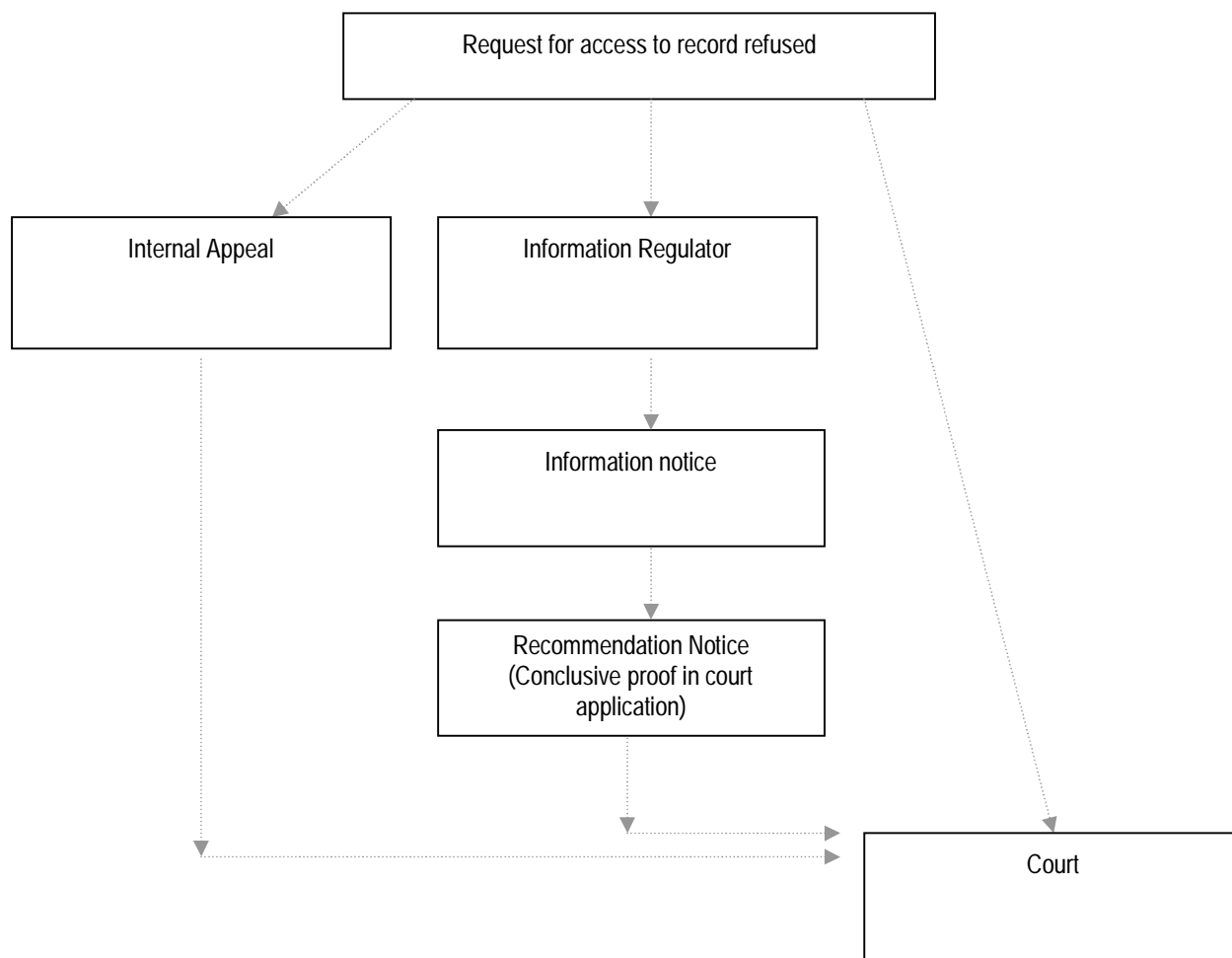
¹⁰⁰ Option proposed by Dr Oriani-Ambrosini (on 24/2/11). See also footnote hereunder dealing with proposed offence that has been included in the option proposed by Ms Smuts.

No. and year of law	Short title	Extent of repeal or amendment
		<p>wilfully or in a grossly negligent manner fails to comply with—</p> <p><u>(a) the provisions of section 51; or</u></p> <p><u>(b) an enforcement notice referred to in section 77J.</u></p> <p>commits an offence and is liable on conviction to a fine, or to imprisonment for a period not exceeding two years.”.</p> <p><i>Refer to options at end of Table.</i></p>
Act 25 of 2002	Electronic Communications and Transactions Act	<p>1. The amendment of section 1 by the substitution for the definition of “personal information” of the following definition:</p> <p><u>“ 'personal information' means information relating to an identifiable natural person, including, but not limited to—</u></p> <p><u>(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;</u></p> <p><u>(b) information relating to the education or the medical, financial, criminal or employment history of the person;</u></p> <p><u>(c) any identifying number, symbol, email address, physical address, telephone number or other particular assigned to the person;</u></p> <p><u>(d) the blood type or any other biometric information of the person;</u></p> <p><u>(e) the personal opinions, views or preferences of the person;</u></p> <p><u>(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;</u></p> <p><u>(g) the views or opinions of another individual about the</u></p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>person; and <i>(h)</i> <u>the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person, but excludes information about an individual who has been dead for more than 20 years.</u>"</p> <p>2. The repeal of sections 45, 50 and 51.</p>
Act 34 of 2005	National Credit Act	<p>1. The amendment of section 55 by the substitution for subsection (2) of the following subsection:</p> <p style="padding-left: 40px;">"(2) <i>(a)</i> Before issuing a notice in terms of subsection (1)<i>(a)</i> to a regulated financial institution, the National Credit Regulator must consult with the regulatory authority that issued a licence to that regulated financial institution.</p> <p style="padding-left: 40px;"><i>(b)</i> <u>[The information protection provisions as set out in sections] Sections 68, 70(1), (2)<i>(b)</i> to <i>(g)</i> and <i>(i)</i>, (3) and (4) and 72(1), (3) and (5) will be subject to the compliance procedures set out in Chapters 10 and 11 of the Protection of Personal Information Act, 2009.</u>"</p> <p>2. The amendment of section 68 by the deletion of subsection (2).</p> <p>3. The amendment of section 136 by the substitution for subsection (1) of the following subsection:</p> <p style="padding-left: 40px;">“(1) Any person may, <u>subject to section 55(2)<i>(b)</i></u>, submit a complaint concerning an alleged contravention of this Act to the National Credit Regulator in the prescribed manner and form.”</p> <p>4. The amendment of section 137 by the deletion of subparagraph (a) of subsection (1).</p>

No. and year of law	Short title	Extent of repeal or amendment
		<p>5. The amendment of section 1 by the substitution of the definition of “prohibited conduct” with the following definition:</p> <p>“prohibited conduct’ means any act or omission in contravention of the Act, other than an act or omission <u>that constitutes an interference with the protection of the personal information of any person as specified in section 55(2)(b) or that constitutes an offence under this Act, by –</u></p> <p>(a) an unregistered person who is required to be registered to engage in such an act; or</p> <p>(b) a credit provider, credit bureau or debt counselor;” .</p>

Option 1: Variation 3¹⁰¹
(Recommendation model – Mr Jeffery)



“PART 4
APPEALS AGAINST DECISIONS AND COMPLAINTS TO REGULATOR(SS74-82)

“CHAPTER 1A
COMPLAINTS TO REGULATOR

Complaints

- 77A.** (1) A requester–
- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);
- (c) aggrieved by a decision of the information officer of a public body–
- (i) to refuse a request for access; or
- (ii) taken in terms of section 22, 26(1) or 29(3);or
- (d) aggrieved by a decision of the head of a private body–
- (i) to refuse a request for access; or

¹⁰¹

Option 1 (The Regulator’s PPI powers are mirrored in respect of complaints handling in terms of PAIA).

Variation 3 (Recommendation model – Mr Jeffery) (Complainant may choose to use internal appeal, complain to Regulator or approach court for appropriate relief).

Technical Committee requested that Regulator should not be provided with adjudicatory powers in terms of this Variation. Proposed option may require consequential amendments to, among others, sections 1, 21, 22(3), 25(2) and (3), 26(3), 29(9), 32, 49(3) and (4), 54(3), 56(2) and (3), 57(3), 73(3) and (4) and 84.

(ii) taken in terms of section 54, 57(1) or 60, may, within 60/180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Regulator in the prescribed manner and form for appropriate relief.

(2) A third party—

- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the information officer of a public body to grant a request for access; or
- (c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body.

may within 60/180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Regulator in the prescribed manner and form for appropriate relief.

Modes of complaints to Regulator

77B. (1) A complaint to the Regulator must be made in writing.

(2) The Regulator must give such reasonable assistance as is necessary in the circumstances to enable a person, who wishes to make a complaint to the Regulator, to put the complaint in writing.

Investigation by Regulator

77C. (1) The Regulator, after receipt of a complaint made in terms of section 77A, must —

- (a) investigate the complaint in the prescribed manner;
- (b) act, where appropriate, as conciliator in relation to such complaint; and
- (c) take such further action as is contemplated by this Chapter.

(2) The Regulator must as soon as is reasonably practicable after receipt of a complaint, advise the complainant and the information officer or relevant authority of a public body or head of a private body, as the case may be, to whom the complaint relates of the course of action that the Regulator proposes to adopt under subsection (1).

Regulator may decide to take no action on complaint

77D. (1) The Regulator, after investigating a complaint received in terms of section 77A, may decide to take no action or, as the case may be, require no further action in respect of the complaint if, in the Regulator's opinion—

- (a) the complaint has not been submitted within the period referred to in section 77A(2) and there are no reasonable grounds to condone the late submission;
- (b) the complaint is frivolous or vexatious or is not made in good faith; or
- (c) it appears to the Regulator that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

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

Pre-investigation proceedings of Regulator

77E. Before proceeding to investigate any matter in terms of this Chapter, the Regulator must, in the prescribed manner, inform—

- (a) the complainant of the Regulator's intention to conduct the investigation; and
- (b) the information officer or relevant authority of a public body or the head of the private body, as the case may be, to whom the complaint relates of the—
 - (i) details of the complaint; and
 - (ii) right of the relevant authority, the information officer or the head of the private body to submit to the Regulator, within a reasonable period, a written response in relation to the complaint.

Settlement of complaints

77F. If it appears from a complaint, or any written response made in relation to a complaint under section 77E(b)(ii), that it may be possible to secure a settlement between the parties concerned, the Regulator may, without investigating the complaint or, as the case may be, investigating the complaint further, in the prescribed manner, use its best endeavours to secure such a settlement.

Investigation proceedings of Regulator

77G. (1) For the purposes of the investigation of a complaint the Regulator has powers similar to those of the High Court in terms of section 80 relating to the disclosure of records to it and non-disclosure of records by it.

(2) Section 83(a), (b) and (c) of the Protection of Personal Information Act apply to the investigation of complaints in terms of this Chapter.

Assessment¹⁰²

77H. (1) The Regulator, on its own initiative, or at the request by or on behalf of an information officer or head of a private body or any other person must make an assessment in the manner prescribed of whether a public or private body generally complies with the provisions of this Act.

(2) The Regulator must make the assessment if it appears to be appropriate, unless, where the assessment is made on request, the Regulator 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 Regulator may have regard in determining whether it is appropriate to make an assessment include—

- (a) the extent to which the request appears to it to raise a matter of substance, and if the assessment is made on request—
- (b) any undue delay in making the request; and
- (c) whether or not the person making the request is entitled to make an application in terms of section 22 or 23 of the Protection of Personal Information Act, 2011, in respect of the personal information in question.¹⁰³

(4) If the Regulator has received a request under this section it must notify the person referred to in subsection (1)—

- (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 authorisation from section 22 or 23 of the Protection of Personal Information Act, 2011, applying in relation to the personal information concerned, of any view formed or action taken as a result of the request.

Information Notice

77I. (1) For the purposes of the investigation of a complaint the Regulator may serve the information officer, relevant authority or head of a private body with an information notice requiring said party to furnish the Regulator, within a specified period, in a form specified in the notice, with the information specified in the notice.

(2) An information notice in terms of sub-section (1) must be accompanied by –

- (a) reasons for the issuing of the notice; and
- (b) particulars of the right to appeal conferred by section 78.
- (3) Section 92(3) to (9) of the Protection of Personal Information Act, 2011, applies to the serving of an information notice in terms of this Chapter.

Recommendation Notice

77J. (1) The Regulator, after investigating a complaint, may serve the information officer or the relevant authority of a public body or the head of a private body with a recommendation notice—

¹⁰² Assessments, if approved as a function to be exercised by the Regulator in terms of PAIA, could be introduced on a voluntary basis.

¹⁰³ Proposed amendment aims to clarify meaning of clause and to harmonise with clause 50(1)(b)(v).

- (a) confirming, amending or setting aside the decision which is the subject of the complaint; or
- (b) requiring the said officer, authority or head to take such action or to refrain from taking such action as the Regulator has specified in the notice.

(2) A notice in terms of subsection (1) must be accompanied by –

- (a) reasons for the notice;
- (b) particulars of the right to make an application to court conferred by Chapter 2 of this Part.

(3) Section 95(3) to (5) of the Protection of Personal Information Act, 2011, applies to the serving of a recommendation notice in terms of this Chapter.

(4) A copy of the notice referred to in subsection (1) that has been certified by the Regulator is, for purposes of the application referred to in section 78, conclusive proof of the contents of the recommendation notice that has been served by the Regulator.

CHAPTER 2 APPLICATIONS TO COURT (ss 78-82)

Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies or Regulator

78. (1) [A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.

(2) A requester—

- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);
- (c) aggrieved by a decision of the information officer of a public body [referred to in paragraph (b) of the definition of 'public body' in section 1]—
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 22, 26(1) or 29(3); [or]
- (d) aggrieved by a decision of the head of a private body—
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 54, 57(1) or 60[.];
- (e) aggrieved by a decision of the Regulator in terms of section 77D; or
- (f) aggrieved by a decision of the information officer or relevant authority of a public body or head of a private body not to comply with an recommendation notice that has been issued in terms of section 77J,

may, by way of an application, within [30] 180 days apply to a court for appropriate relief in terms of section 82.

[3] (2) A third party—

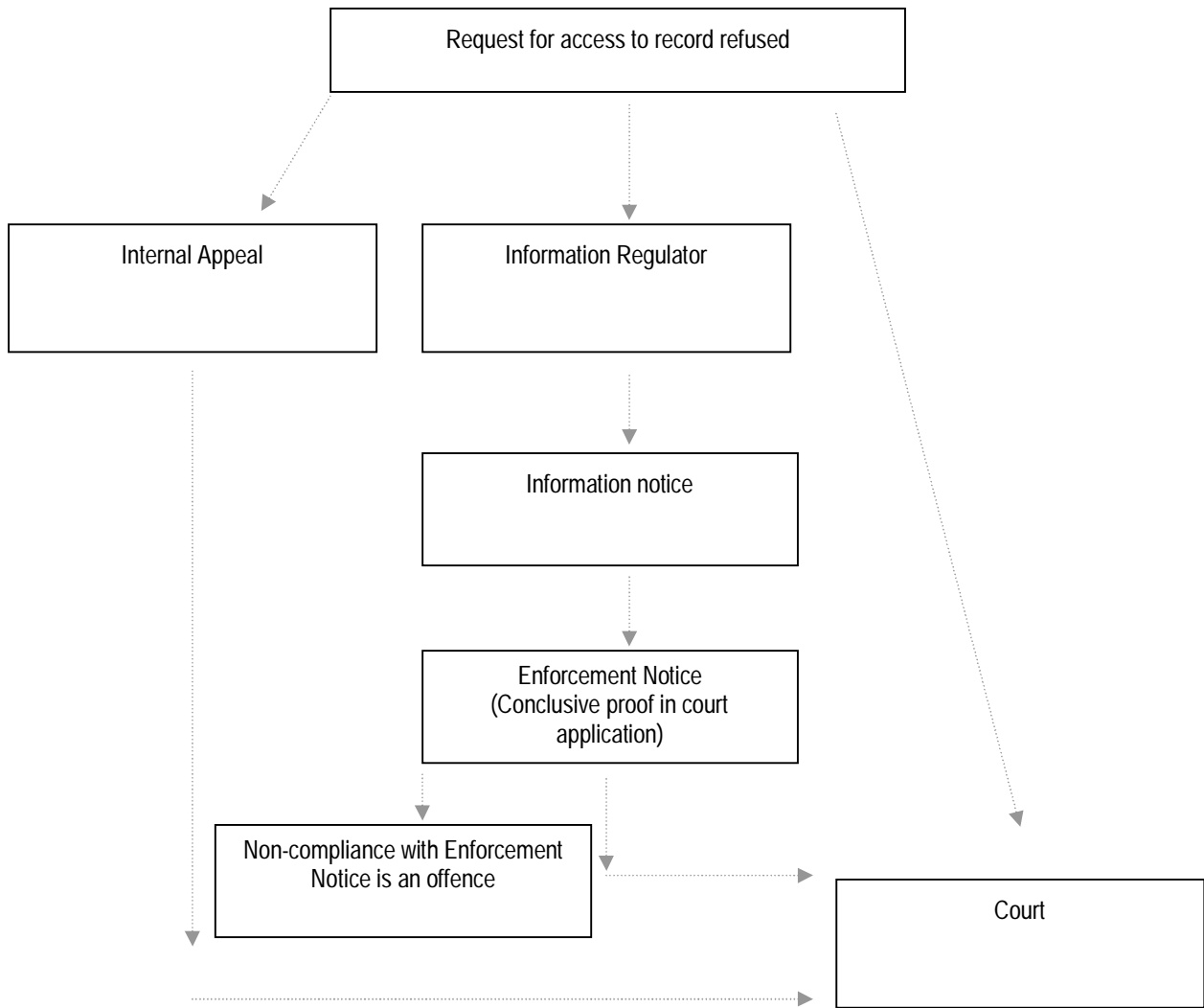
- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access; or
- (c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,
- (d) aggrieved by a decision of the Regulator in terms of section 77D; or
- (e) aggrieved by a decision of the information officer or relevant authority of a public body or head of a private body not to comply with an recommendation notice that has been issued in terms of section 77J,

may, by way of an application, within [30] 180 days apply to a court for appropriate relief in terms of section 82.

(4) An information officer or relevant authority of a public body or the head of a private body, as the case may be, aggrieved by a decision of the Regulator in terms of section 77I or 77J may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.

Option 1: Variation 3¹⁰⁴

(Adjudication model – Ms Smuts)



**“PART 4
APPEALS AGAINST DECISIONS AND COMPLAINTS TO REGULATOR(SS74-82)**

**“CHAPTER 1A
COMPLAINTS TO REGULATOR**

Complaints

- 77A.** (1) A requester–
- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
 - (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);
 - (c) aggrieved by a decision of the information officer of a public body–
 - (i) to refuse a request for access; or

¹⁰⁴ **Option 1** (The Regulator’s PPI powers are mirrored in respect of complaints handling in terms of PAIA).
Variation 3 (Adjudication model – Ms Smuts) (Complainant may choose to use internal appeal, complain to Regulator or approach court for appropriate relief).
 Proposed amendment may require consequential amendments to, among others, sections 1, 21, 22(3), 25(2) and (3), 26(3), 29(9), 32, 49(3) and (4), 54(3), 56(2) and (3), 57(3), 73(3) and (4) and 84.

- (ii) taken in terms of section 22, 26(1) or 29(3); or
- (d) aggrieved by a decision of the head of a private body—
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 54, 57(1) or 60,

may, within 60/180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Regulator in the prescribed manner and form for appropriate relief.

(2) A third party—

- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the information officer of a public body to grant a request for access; or
- (c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body,

may within 60/180 days of the decision, submit a complaint, alleging that the decision was not in compliance with this Act, to the Regulator in the prescribed manner and form for appropriate relief.

Modes of complaints to Regulator

77B. (1) A complaint to the Regulator must be made in writing.

(2) The Regulator must give such reasonable assistance as is necessary in the circumstances to enable a person, who wishes to make a complaint to the Regulator, to put the complaint in writing.

Investigation by Regulator

77C. (1) The Regulator, after receipt of a complaint made in terms of section 77A, must —

- (a) investigate the complaint in the prescribed manner;
- (b) act, where appropriate, as conciliator in relation to such complaint; and
- (c) take such further action as is contemplated by this Chapter.

(2) The Regulator must as soon as is reasonably practicable after receipt of a complaint, advise the complainant and the information officer of a public body or head of a private body, as the case may be, to whom the complaint relates of the course of action that the Regulator proposes to adopt under subsection (1).

Regulator may decide to take no action on complaint

77D. (1) The Regulator, after investigating a complaint received in terms of section 77A, may decide to take no action or, as the case may be, require no further action in respect of the complaint if, in the Regulator's opinion—

- (a) the complaint has not been submitted within the period referred to in section 77A(2) and there are no reasonable grounds to condone the late submission;
- (b) the complaint is frivolous or vexatious or is not made in good faith; or
- (c) it appears to the Regulator that, having regard to all the circumstances of the case, any further action is unnecessary or inappropriate.

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

Pre-investigation proceedings of Regulator

77E. Before proceeding to investigate any matter in terms of this Chapter, the Regulator must, in the prescribed manner, inform—

- (a) the complainant of the Regulator's intention to conduct the investigation; and
- (b) the information officer of a public body or the head of the private body, as the case may be, to whom the complaint relates of the—
 - (i) details of the complaint; and
 - (ii) right of the information officer or the head of the private body to submit to the Regulator, within a reasonable period, a written response in relation to the complaint.

Settlement of complaints

77F. If it appears from a complaint, or any written response made in relation to a complaint under section 77E(b)(ii), that it may be possible to secure a settlement between the parties concerned, the Regulator may, without investigating the complaint or, as the case may be, investigating the complaint further, in the prescribed manner, use its best endeavours to secure such a settlement.

Investigation proceedings of Regulator

77G. (1) For the purposes of the investigation of a complaint the Regulator has powers similar to those of the High Court in terms of section 80 relating to the disclosure of records to it and non-disclosure of records by it.

(2) Section 83(a), (b) and (c) of the Protection of Personal Information Act, 2011, apply to the investigation of complaints in terms of this Chapter.

Assessment¹⁰⁵

77H. (1) The Regulator, on its own initiative, or at the request by or on behalf of an information officer of a public body or head of a private body or any other person must make an assessment in the manner prescribed of whether a public or private body generally complies with the provisions of this Act.

(2) The Regulator must make the assessment if it appears to be appropriate, unless, where the assessment is made on request, the Regulator 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 Regulator may have regard in determining whether it is appropriate to make an assessment include—

- (a) the extent to which the request appears to it to raise a matter of substance, and if the assessment is made on request—
- (b) any undue delay in making the request; and
- (c) whether or not the person making the request is entitled to make an application in terms of section 22 or 23 of the Protection of Personal Information Act, 2011, in respect of the personal information in question.

(4) If the Regulator has received a request under this section it must notify the person referred to in subsection (1)—

- (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 authorisation from section 22 or 23 of the Protection of Personal Information Act, 2011, applying in relation to the personal information concerned, of any view formed or action taken as a result of the request.

Information Notice

77I. (1) For the purposes of the investigation of a complaint the Regulator may serve the information officer of a public body or head of a private body with an information notice requiring said party to furnish the Regulator, within a specified period, in a form specified in the notice, with the information specified in the notice.

(2) An information notice in terms of sub-section (1) must be accompanied by –

- (a) reasons for the issuing of the notice; and
- (b) particulars of the right to appeal conferred by section 78.

(3) Section 92(3) to (9) of the Protection of Personal Information Act, 2011, applies to the serving of an information notice in terms of this Chapter.

Enforcement Notice

77J. (1) The Regulator, after investigating a complaint, may serve the information officer of a public body or the head of a private body with an enforcement notice –

¹⁰⁵ Assessments, if approved as a function to be exercised by the Regulator in terms of PAIA, could be introduced on a voluntary basis.

- (a) confirming, amending or setting aside the decision which is the subject of the complaint; or
- (b) requiring the said officer or head to take such action or to refrain from taking such action as the Regulator has specified in the notice.

(2) A notice in terms of subsection (1) must be accompanied by –

- (a) reasons for the notice;
- (b) particulars of the right to make an application to court conferred by Chapter 2 of this Part.

(3) Section 95(3) to (5) of the Protection of Personal Information Act, 2011, applies to the serving of an enforcement notice in terms of this Chapter.

(4) A copy of the notice referred to in subsection (1) that has been certified by the Regulator is, for purposes of the application referred to in section 78, conclusive proof of the contents of the enforcement notice that has been served by the Regulator.

Non-compliance with Enforcement Notice¹⁰⁶

77K. An information officer or relevant authority of a public body or head of a private body who refuses to comply with an enforcement notice referred to in section 77J, is guilty of an offence and liable upon conviction to fine or to imprisonment for a period not exceeding three years or to both such a fine and such imprisonment.

CHAPTER 2 APPLICATIONS TO COURT (ss 78-82)

Applications regarding decisions of information officers or relevant authorities of public bodies or heads of private bodies or Regulator

78. [(1) A requester or third party referred to in section 74 may only apply to a court for appropriate relief in terms of section 82 after that requester or third party has exhausted the internal appeal procedure against a decision of the information officer of a public body provided for in section 74.

(2)] (1) A requester—

- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the relevant authority of a public body to disallow the late lodging of an internal appeal in terms of section 75(2);
- (c) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1—
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 22, 26(1) or 29(3); [or]
- (d) aggrieved by a decision of the head of a private body—
 - (i) to refuse a request for access; or
 - (ii) taken in terms of section 54, 57(1) or 60[.] ;
- (e) aggrieved by a decision of the Regulator in terms of section 77D; or
- (f) aggrieved by a decision of the information officer or relevant authority of a public body or head of a private body not to comply with an enforcement notice that has been issued in terms of section 77J,

may, by way of an application, within [30] 180 days apply to a court for appropriate relief in terms of section 82.

(3) A third party—

- (a) that has been unsuccessful in an internal appeal to the relevant authority of a public body;
- (b) aggrieved by a decision of the information officer of a public body referred to in paragraph (b) of the definition of 'public body' in section 1 to grant a request for access; [or]
- (c) aggrieved by a decision of the head of a private body in relation to a request for access to a record of that body[.] ;
- (d) aggrieved by a decision of the Regulator in terms of section 77D; or
- (e) aggrieved by a decision of the information officer or relevant authority of a public body or head of a private body not to comply with an enforcement notice that has been issued in terms of section 77J,

¹⁰⁶

This provision should, if this option is approved, be included in section 90 of PAIA which section deals with offences. See also option proposed by Dr Oriani-Ambrosini in table above.

may, by way of an application, within ~~[30]~~ 180 days apply to a court for appropriate relief in terms of section 82.

(4) An information officer or relevant authority of a public body or the head of a private body, as the case may be, aggrieved by a decision of the Regulator in terms of section 77I or 77J may, by way of an application, within 180 days apply to a court for appropriate relief in terms of section 82.