COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA

ON THE

PROPOSED DRAFT RULES OF PROCEDURE FOR THE ENFORCEMENT COMMITTEE, ISSUED UNDER SECTION 92(2) OF THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013.

The Law Society of South Africa (LSSA) hereby submit our comments below which we trust will be favourably considered.

Right of Cross-examination: Hearings before the Enforcement Committee

The draft rules contemplate that the Enforcement Committee may consider complaints referred to it "on the papers only" (rule 4.1.4) or refer a matter to a hearing (rule 4.1.5). In this regard, the Enforcement Committee has powers similar to a court dealing with applications where applications may either be dealt with on the papers or be referred to oral evidence.

Rule 4.1.4 refers to "the complaint or a matter referred to it" whereas rule 4.1.5 refers only to "a matter". It is respectfully submitted that the power to refer a "matter" to a hearing should cover both "a complaint or a matter" and mirror the wording of rule 4.1.4 in this respect.

However, in the event that the Enforcement Committee refers complaints or matters to a hearing involving the presentation of testimony by a witness, then it is further submitted, as a matter of procedural fairness, that any person in respect of whom the Enforcement Committee may make a finding should be entitled to cross examine the aforesaid witness. Draft rules 4.2.2.4 ; 5.11.3; 5.11.4; 5.12.5; 5.13.1.2 do not give an affected person a right to cross examine a witness and it is not clear how the curtailment of such a person's right is promotive of a fair hearing.

In particular, rule 5.11.3 – 5.11.4 provide as follows:

5.11.3 The Chairperson of the Enforcement Committee may, in his/her discretion, direct the cross-examination of a witness by an affected person or his or her or its legal practitioner to take place after the Investigating Officer and the Enforcement Committee have exhausted their respective questions to the witness.

5.11.4 Subject to sub-rule 5.11.3, there is no right to cross-examine a witness before the Enforcement Committee, but the Chairperson of the Enforcement Committee may permit cross-examination should he or she deem it necessary and in the best interests of the work of the Enforcement Committee to do so.

In the current climate of so-called "Stalingrad" litigation tactics, rule 5.11.3 sets up the potential for unnecessary postponements and inter-locutory hearings to be held before the Chairperson to make a ruling on whether a witness may be cross-examined, which may entail the consumption of additional time and resources of the Committee and relevant parties appearing before the Committee that could be better spent on simply allowing for cross examination. The rules themselves may form the subject matter of Constitutional litigation to determine whether the rules unreasonably curtail a person's right to procedural fairness and access to justice given that cross-examination may be regarded as an essential element of due process and the right to a fair hearing in order to test the credibility of witness, expose bias or motive, present balanced and fair evidence and enhance the reliability of evidence on which the Enforcement Committee may make a determination.

Electronic Forms and Processes

The LSSA respectfully submits, as a general point, that the various forms attached to the draft rules are still looking back to justice processes of the last century. They do not seem to be intended to be digitized and should at least be made available as interactive PDFs which would allow rapid compiling of data for any matter and more efficient management of information as well as actual cases. We respectfully submit that the creation of the new procedural rules is the appropriate moment to ensure that the Enforcement Committee will benefit from a more efficient framework for dealing with matters than our courts presently labour under in terms of rules which originated in the pre-digital era.

Electronic forms can enhance the time-efficiency, cost-efficiency, and information security of administrative justice processes in several important ways:

1. Time-efficiency: Electronic forms can significantly reduce the time required for administrative justice processes. Electronic forms can be completed and submitted instantly and can be automatically routed to the appropriate staff member for processing. This eliminates the need for physical forms to be transported and processed, reducing processing times and speeding up the entire process.

2. Cost-efficiency: Electronic forms can also reduce the costs associated with administrative justice processes. Electronic forms eliminate the need for physical forms to be printed, shipped, and stored. This can result in cost savings in terms of printing, postage, and storage costs.
3. Information security: Electronic forms can also improve the security of administrative justice processes. Electronic forms can be encrypted and stored in secure databases, protecting sensitive information from unauthorized access or theft. Electronic forms also allow for secure and confidential communication between individuals and case workers.
4. Automation: Electronic forms can automate many routine tasks such as data entry, form processing, and document management. This reduces the workload of case workers, allowing them to focus on more complex tasks, and improving the quality of their decision-making.
5. Improved access to information: Electronic forms can also improve access to information by allowing individuals to track the progress of their case, receive notifications of updates, and access information about their case at any time. This improves transparency and can help to reduce the number of inquiries and requests for information from individuals.

If the POPIA enforcement process is intended to be paper based, it will become snowed under very quickly and it also does not allow for remote access to make a complaint or allow complaints to be more easily managed.

The whole basis of the draft rules seems to lack appreciation of the 21st century and to allow real access to justice for those who are physically not near the place the offices are or hearings might be held. As such, the draft rules appear to be a missed opportunity to start a true 21st Century process.

Indeed, we respectfully submit that there should be a portal to allow anyone to access the process from anywhere, to file complaints and evidence and even to attend virtual hearings. If one looks at how Brazilian courts and tribunals run their processes, it is almost entirely online and deals better with the challenges of distance and access to justice in general as well as allowing easier management of cases and judgments. It does still allow hard copy “wet ink “initiation of any matter if necessary but thereafter all is run online but if an actual hearing is required , the judges go to an area and have access to all case information wherever they are as do those participating , including lawyers or specialist advisers. They all have digital signatures and secured access which is now easily possible and much lower costs than even two or three years ago. Technology does not stand still and, in general, massively powerful platforms and processes are available at a fraction of the cost they were a few years ago.

The physical wet ink process should still be allowed for those not yet digitally trained, but the process should recognize the fact that online proceedings, case flow management and submission of evidence of many sorts are a reality and will increasingly be so.

It also allows hearings to be held anywhere at any time without physical restrictions and we submit that most complaints or submissions will be made by privacy specialists who are almost all digitally trained and capable.

The Electronic Communications and Transactions Act ("the ECT Act") after all is 21 years old and our Supreme Court of Appeal nowadays is largely online forum which has increased efficiency and improved access to justice.

We therefore submit that Chapters 1 and 3 should be comprehensively reviewed and revised to cater for digital evidence and to make it clear that such a process is available from the outset.

Chapter 5, similarly, should be adjusted to make it clear that digital submission and management are encouraged, especially rules 5.3 to 5.6 but, in general, explicit acceptance of the ECT Act definitions of processes, service, copies, documents and evidence should be expressly referenced or included.
