

Submission

to the

Portfolio Committee on Finance

on the

Insurance Bill (B1 2016)

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A) INTRODUCTION

1. The Centre for Applied Legal Studies ('CALS') welcomes the opportunity to make submissions to the Portfolio Committee on Finance ('Finance Committee') on the Insurance Bill (B1 of 2016). In the event that oral submissions are sought and heard, CALS hereby seeks the opportunity to make such oral submissions to the Finance Committee.
2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand, South Africa. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.
3. CALS' vision is a country and continent where human rights are respected, promoted, protected and fulfilled by states, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils its mandate by:
 - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations,
 - providing professional legal representation to survivors of human rights abuses; and
 - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable.
4. CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law. The business and human rights programme was formed in 2013 and seeks to ensure that corporate entities acknowledge their power to influence the treatment of human rights, respect human rights and actively protect, promote and fulfil human rights.
5. Insurance providers are well placed to advance human rights' compliance by corporations and states because they provide insurance to projects that may facilitate or exacerbate human rights' abuse. Insurance providers also provide insurance products to impoverished and vulnerable members of society and must do so in a manner that serves the interest of those beneficiaries and does not exploit their vulnerabilities. Therefore, by attaching human rights' related conditions to the provision of insurance, insurance providers can ensure that human rights are respected, protected, promoted and fulfilled.
6. The Insurance Bill as it currently reads falls short of advancing and protecting human rights. CALS submits that it should be amended to include:

- 6.1. Principles of business and human; and
- 6.2. Environmental, social and good governance considerations.
7. The amendments suggested by CALS to the Insurance Bill appear as ***bold italics***.
8. CALS begins by making submissions to the Finance Committee concerning the non-implementation of ethical and professional standards and requests that the Finance Committee address these in future.
9. The rationale for and submissions in regard to each of the issues set out in paragraph 6 and 8 are dealt with in turn below.

B) ETHICS AND PROFESSIONAL STANDARDS

10. The work of the business and human rights programme at CALS substantially includes litigation on the provision of social grants. In 2016, CALS represented the Black Sash Trust ('Black Sash') in their intervention in the Lion of Africa case at the Constitutional Court.¹ The case concerned a moratorium that had been placed on the use of child support grants to meet life insurance policy obligations.
11. Black Sash intervened as amicus curiae in that case and presented evidence from an actuary concerning the value, to children (who are beneficiaries of the child support grant) of life insurance. The actuary found that, due to the low mortality rate of children, less than one percent of premiums that were paid to the insurance provider were used to pay the claims of children who had died. The actuary came to the conclusion that:

“[T]he policy does not offer value to the policyholders. Over the lifetime (17 years) of grant recipient, the total premium paid ... is far in excess of any benefit payment they could expect to receive.”²

12. Further, the actuary went on to state that:

“I do not consider the provision of these funeral cover policies by for-profit insurance companies to recipients of children’s grants to be in the interests of recipients of children’s grants. I further consider that there is a considerable market conduct risk associated with allowing such premiums to be deducted prior to the payment of grants

¹ *South African Social Security Agency and Another v Lion of Africa Life Assurance Company Ltd* (CCT 8/16).

² Black Sash Founding Affidavit Annexure LM8 p458, R Da Silva *Actuarial Report in Respect of the Deduction of Funeral Insurance Premiums from Children’s Social Security Grants*.

(intended for the cover of the basic needs of children) to the intended recipients.”

13. It should be noted that the Lion of Africa case did not proceed to hearing and judgement as it was settled between the parties. CALS also acknowledges that this is only one example of professional misconduct by insurance providers. However, in its work with Black Sash, CALS has come to know of a number of social grant beneficiaries who claim that they did not consent to obtaining insurance, or obtained such insurance through misrepresentation. The case explained above also demonstrates the risk of insurance providers providing insurance for financial profit as a result of very remote need for beneficiaries.
14. The objective of the Insurance Bill (and what may later become the Insurance Act) is, among others, to:

“promote the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, by establishing a legal framework for insurers and insurance groups that *enhances the protection of policyholders and potential policyholders*”.³ (Our emphasis.)
15. It should be noted that section 59 of the Long-Term Insurance Act (‘LTIA’) and section 53 of the Short-Term Insurance Act (‘STIA’) provide for the consequences of misrepresentation and the failure to disclose material information.⁴ Neither of these provisions prohibit insurance providers from intentionally misrepresenting or intentionally not disclosing material information to policyholders or potential policyholders. Section 62 of the LTIA and section 55 of the STIA each the Registrar to make rules for the protection of policyholders. Those rules have indeed been made and published.⁵ The rules read with the LTIA and STIA respectively provide for the consent of a potential policy holder and prohibit and punish misrepresentation.⁶
16. However, neither the rules nor the LTIA or STIA provide that insurance may not be sought where it is not in the interest of the policyholders, especially children, or where the the total premium paid far exceeds the benefit to the policyholders. The LTIA does, however, provide that policies should be actuarially sound and

³ Insurance Bill (B1 of 2016), clause 3(b).

⁴ Acts 52 of 1998 (‘LTIA’) and 53 of 1998 (‘STIA’) respectively.

⁵ Policyholder Protection Rules (Long-term Insurance), GN R1129 in *Government Gazette* 26854 of 30 September 2004; and Policyholder Protection Rules (Short-term Insurance), GN R1128 in *Government Gazette* 26853 of 30 September 2004.

⁶ Rule 4 of the Policyholder Protection Rules (Long-term Insurance) and rule 4 of the Policyholder Protection Rules (Short-term Insurance).

where they are not that insurers may be found guilty of an offence.⁷ It seems, therefore, that adequate law exists for the prevention of the situation such as that explained above, however, not adequate implementation and oversight is taking place to ensure compliance with this law.

17. Although this may not be the immediate concern of the Finance Committee in its deliberations on the Insurance Bill, CALS, considers it prudent to alert the Finance Committee of the abuses in the insurance system. This is done in the hopes that the Finance Committee will use forthcoming opportunities to address the non-compliance with legislative provisions by insurance providers.

C) BUSINESS AND HUMAN RIGHTS

18. Human rights have historically been considered the sole domain of the state. This is particularly at the international level where states are tasked with ensuring the realisation of human rights through administrative, legislative, policy and other means in various treaties.
19. Over the last few decades, however, the role of non-state actors in violating and protecting human rights has come to the fore. The Nuremberg Trials exposed the role of German companies in the construction and perpetration of anti-Semitic Nazi policies.⁸ Closer to home the Truth and Reconciliation Commission ('TRC') noted the role played by financial institutions in the success of the Apartheid programme. The TRC found that:

“By the very nature of their business, banks were involved in every aspect of commerce during the apartheid years. Without them, government and the economy would have come to a standstill.

. . . .

banks were ‘knowingly or unknowingly’ involved in providing banking services and lending to the apartheid government and its agencies. They were similarly involved in the movement of funds from overseas donors to organisations resisting apartheid.”

20. The end of Apartheid and the dawn of the constitutional democracy brought with it the clear indication that corporate activity may have an impact of human rights and that corporate entities cannot violate human rights. This was done by means of the language of the Constitution of the Republic of South Africa, 1996 which is

⁷ Section 46 read with section 67(2) of the LTIA.

⁸ Brief of the Amici Curiae Nuremberg Scholars, *Kiobel v Royal Dutch Petroleum Company*, available at http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/10-1491_petitioner_amcu_nuremberg_bartov_etal.authcheckdam.pdf.

the supreme law of the country.⁹ The Constitution places human rights obligations on private, juristic persons.¹⁰ The Constitutional Court upheld the principle that human rights must be protected even in private relationships.¹¹

21. The centrality of human right obligations has been extended into company legislation. The legislature has recognised the importance of human rights when it provided that the purpose of the Companies Act was to “promote compliance with the Bill of Rights as provided for in the Constitution” and “reaffirm the concept of the company as a means of achieving economic and social benefits”.¹² It has also provided for the establishment within certain types of companies of social and ethics committees.¹³ The purpose of the social and ethics committees is to implement social and ethical considerations which ultimately, are human rights considerations.¹⁴ Thus the legislature, through incorporation of the social and ethics committee, has incorporated a human rights framework into the Companies Act.

22. Similar language may be found in the Report on Corporate Governance, 2016 (‘King IV’) — a guideline for corporate governance across all juristic persons drafted by the Institute of Directors in Southern Africa (‘IODSA’).¹⁵ King IV recommends that the governing structure of corporate citizens:
 - 22.1. ensure compliance with the Constitution and the Bill of Rights;¹⁶ and
 - 22.2. oversee and monitor the societal consequences (public health and safety, consumer protection, community development, and protection of human rights) of the company’s activities and output.¹⁷

23. Internationally, South Africa has also demonstrated a desire to ensure that corporate compliance with human rights principles and to ensure that such language is contained in international instruments. The UN Guiding Principles on Business and Human Rights re-enforce the state’s duty to protect human rights in the business sphere.¹⁸ It outlines the implementation of law and policy as a

⁹ Section 1(c) of the Constitution of the Republic of South Africa, 1996 (hereinafter ‘Constitution’).

¹⁰ Section 8(2) of the Constitution.

¹¹ *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC).

¹² Section 7(a) and (d) of the Companies Act 71 of 2008.

¹³ Section 72 Companies Act.

¹⁴ Regulation 43(5)(a)(i)(aa) of the Companies Regulation GNR 351 in *Government Gazette* 34239 of 26 April 2011.

¹⁵ Institute of Directors South Africa, King IV Report on Corporate Governance (hereinafter ‘King IV’), available at http://www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf.

¹⁶ Principle 3(12) of King IV.

¹⁷ Principle 3(14)(c) of King IV.

¹⁸ UN Guiding Principles on Business and Human Rights, principles 1 and 2 accessible at <http://www.businessandhumanrights.org/en/un-guiding-principles> accessed 5 February 2015

means for states to achieve the protection of human rights.¹⁹ The South African Government has taken a stance in the international sphere for the legislative protection of human rights in business by calling for a binding treaty on business and human rights.²⁰

24. From the above it is clear that there is a trend towards explicitly providing for the protection of human rights in various instruments. Parliament (through the Constitution), the Department of Trade and Industry and the Portfolio Committee on Trade and Industry (through the Companies Act), the Department of International Relations and Cooperation (through the binding treaty on business and human rights process) and IODSA (through King IV) have aligned themselves with this trend.
25. CALS, therefore, calls on the Finance Committee to heed this trend and amend the Insurance Bill to explicitly provide that insurance providers should respect, protect, promote and fulfil human rights and comply with the Constitution. The Finance Committee can do so by replicating the language of the Companies Act. CALS, therefore, recommends the amendment of the objectives provision of Insurance Bill as follows:

- “3 The objective of this Act is to promote ***the adherence to human rights and the Constitution of the Republic of South Africa and to promote*** the maintenance of a fair, safe and stable insurance market for the benefit and protection of policyholders, by establishing a legal framework for insurers and insurance groups that—
- (a) facilitates the monitoring and the preservation of the safety and soundness of insurers;
 - (b) enhances the protection of policyholders and potential policyholders;
 - (c) increases access to insurance for all South Africans;
 - (d) ***promote compliance with the Bill of Rights as provided for in the Constitution, in the application of insurance law;*** and
 - (d) contributes to the stability of the financial system in general.”

D) ENVIRONMENTAL, SOCIAL AND GOOD GOVERNANCE PRINCIPLES

26. In order for insurance, as a principle, to work, it needs to be sustainable. This is especially the case in long-term insurance. Without being sustainable in the long

¹⁹ UN Guiding Principles on business and human Rights, principle 3

²⁰ Resolution on Elaboration of an international legal binding instrument on transnational and other business enterprises with respect to human rights <http://www.businessandhumanrights.org/en/binding-treaty> accessed 16 February 2015

term, long term insurance does not meet the needs of policyholders or insurers themselves. The same principle is true for pension funds.

27. Mindful of the need for long term sustainability for pension funds, the National Treasury published amendment to the Pension Fund Regulations²¹ in 2011 ('Regulation 28').²² The preamble to regulation 28 aptly states the latter's purpose:

"A fund has a fiduciary duty to act in the best interest of its members whose benefits depend on the responsible management of fund assets. This duty supports the adoption of a responsible investment approach to deploying capital into markets that will earn adequate risk adjusted returns suitable for the fund's specific member profile, liquidity needs and liabilities. Prudent investing should give appropriate consideration to any factor which may materially affect the sustainable long-term performance of a fund's assets, including factors of an environmental, social and governance character. This concept applies across all assets and categories of assets and should promote the interests of a fund in a stable and transparent environment."

28. Following on from that objective, regulation 28 lists a number of principles that pension funds and their boards should be guided by. Among those principles is that set out in regulation 28(2)(c)(ix) which reads as follows:

"A fund and its board must at all times apply the following [principle]: before making an investment in and while invested in an asset consider any factor which may materially affect the sustainable long term performance of the asset including, but not limited to, those of an environmental, social and governance character."

29. In its explanatory memorandum, the National Treasury explained the rationale for this provision in the following way:

"Read together with the principles, the preamble represents a new approach to [r]egulation 28, and better guides trustees to consider what investment strategy would be appropriate for the specific nature and obligations of the fund".

30. CALS acknowledges that regulation 28 applies exclusively to pension funds. We call on the Finance Committee however, to be mindful of the fact that this principle aligns with the human rights principles set out above and with the

²¹ GNR98 in *Government Gazette* 162 of 26 January 1962.

²² GNR183 in *Government Gazette* 34070 of 4 March 2011

direction of corporate governance generally. An example of this may be found in King IV. In King IV the authors accept that corporate entities operate in a triple context (of the economy, society and the environment) and that they (corporate entities) have an impact on these elements but also that these elements have an impact on corporate entities. In addition, the authors advise governance structures of corporate entities to conduct their business in a sustainable manner.²³

31. Three things can be drawn from the examples of regulation 28 and King IV above. The first is that long term sustainability is an important principle for all corporations but especially those that have long term output objectives. It cannot be doubted that insurance providers, particularly long term insurance providers whose key business is to manage risk should be mindful of all the factors that influence risk such as environmental, social and good governance principles.
32. The second is that insurance providers, incorporated as corporate entities are already guided by King IV to abide by ESG principles. ESG is a concept incorporated into the notion of ethical and good corporate governance, as such, these are considerations that should be borne in mind by insurance providers already. Therefore, requiring the same, through legislation, would certainly be more binding but not new or exceptional.
33. The last, and perhaps most important for the purposes of the Finance Committee is drawn from the language of regulation 28. It is that legislation can explicitly provide for ESG considerations within its contents. CALS recommends that the precedent set by the Pension Fund Regulations be followed in the Insurance Bill by amending section 4 as follows:

- “4 An insurer and a controlling company must, at all times—
- (a) conduct its business with integrity; 10
 - (b) conduct its business with due skill, care and diligence;
 - (c) act in a prudent manner;
 - (d) organise and control its affairs responsibly and effectively;
 - (e) **conduct its business in compliance with the principle of long term sustainability bearing in mind environmental, social and governance factors;** and
 - (f) deal with the Prudential Authority in an open and cooperative way.”

E) CONCLUSION

²³ King IV, p 4.

34. In conclusion, CALS views the Insurance Bill is the prime opportunity for the Finance Committee to follow the trend that is emerging domestically and internationally to ensure that human rights and the Constitution, the supreme law of the country, are complied with. The emerging trend of ESG should also be followed. CALS calls upon the Finance Committee to include provisions to this effect in the Insurance Bill.

35. Despite the fact that the issue before the Finance Committee is the Insurance Bill, we view this as an opportunity to alert and address the Finance Committee on the abuse of the insurance system, particularly on the most vulnerable and impoverished members of our society. We request that the Finance Committee hear us on this issue and seek to find ways to address it.