

## Submission

to the

## National Treasury

on the

## DRAFT FINANCIAL SECTOR REGULATION BILL, 2014

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## A) INTRODUCTION

### *About the Centre for Applied Legal Studies and Its Work on Business and Human Rights*

1. The Centre for Applied Legal Studies ('CALS') welcomes the opportunity to submit comments on the Draft Financial Sector Regulation Bill, 2014 ('Draft Bill') in response to a call by the National Treasury to make these submissions. In the event that the National Treasury hosts public hearings on the Bill, CALS hereby requests that it be placed on the roll to make oral submissions.
2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. 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, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils this 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 them. CALS has submitted comments in the area of business and human rights on previous occasions. CALS' comments on the Promotion and Protection of Investment Bill are attached hereto marked as "**Annexure A**".
5. Recently, the international community and the South African government have demonstrated a commitment to ensuring that corporate entities comply with human rights standards. These attempts will be detailed in this submission. However, for the most part, financial institutions have been left out of the discussion on corporate accountability for human rights. This despite the fact that financial institutions are well placed to advance human rights' compliance by corporations

and states because they provide funding that may facilitate or exacerbate human rights' abuse. To this end, CALS, with the School of Law of the University of the Witwatersrand has been working on a set of proposed practices for human rights compliance by financial institutions in South Africa, called the Draft Johannesburg Principles.

### ***CALS' Submissions in Brief***

6. CALS submits that financial institutions, and the financial sector more generally, have human rights obligations and recommends that the Draft Bill be amended to reflect this fact in law.
7. In summation, CALS submits that the National Treasury amend the Draft Bill to:
  - 7.1. Align with international, regional and domestic regulations mandating human rights observations by business entities (including financial institutions);
  - 7.2. Align with the Constitution and the Bill of Rights, which imposes obligations on private actors, such as business entities, in accordance with section 8(2) of the Constitution;
  - 7.3. Recognise the importance of the protection, promotion, fulfilment of and respect for human rights in the financial sector;
  - 7.4. Expressly provide for the protection, promotion, fulfilment of and respect for human rights; and
  - 7.5. Expressly provide for the recourse in the event of non-compliance with the human rights protection afforded by the Draft Bill.

## **B) INTERNATIONAL AND REGIONAL FRAMEWORK**

### ***International Framework***

8. For the sake of brevity this submission does not detail the entire international, regional and domestic framework for corporate accountability. It details only the instruments most relevant to financial institutions and the financial sector and therefore begins in 2011 when the Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights ('UNGPs') prepared by Professor John Ruggie.
9. The UNGPs have three pillars: "Protect, Respect, Remedy". The first pillar, protect, speaks to the duty of the state to protect human rights. The second pillar, respect, speaks to corporations' responsibility to respect human rights. And the third pillar, remedy, demands that victims of human rights violations have access to a remedy.

10. Displeased with the manner in which corporations were avoiding liability for human rights violations, the African bloc (including South Africa), through a statement by Ecuador, proposed that the international community consider the formulation of a binding instrument that would attenuate the governance gaps arising as a result of globalisation. The following statement was presented at the Human Rights Council session of September 2013:

“Corporations reminds us of the necessity of moving forward towards a legally binding framework to regulate the work of transnational corporations and to provide appropriate protection, justice and remedy to the victims of human rights abuses directly resulting from or related to the activities of some transnational corporations and other businesses enterprises.

The endorsement by the UN Human Rights Council in June 2011 of the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect, and Remedy Framework’ was a first step, but without a legally binding instrument, it will remain only as such: a ‘first step’ without further consequence. A legally binding instrument would provide the framework for enhanced State action to protect rights and prevent the occurrence of violations.”

11. Nine months later, in June 2014, the South African government (along with the Ecuadorian government) submitted a resolution calling for elaboration on a binding treaty which would impose legal liability on corporations under international law *vis a vis* human rights.<sup>1</sup> South Africa then reconfirmed its commitment to corporate accountability in the African Union.

### ***Regional Framework***

12. Around the same time (July 2014) in the African Union, South Africa, along with a number of African countries, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“the African Court”).<sup>2</sup> The Protocol is ground-breaking in its reach with respect to corporate accountability, in that it does the following:

- 12.1. Defines a person as a natural or legal person, thereby extending the ambit of the African Court to include jurisdiction over the conduct of corporations;<sup>3</sup>

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<sup>1</sup> Human Rights Council, *Resolution on the Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, (24 June 2014), A/HRC/26/L.22/Rev.1.

<sup>2</sup> African Union, *Decisions on Draft Legal Instruments*, Assembly/AU/Dec.529(XXIII).

<sup>3</sup> Article 1.

- 12.2. Criminalises the following acts as a principle, co-principle, agent or accomplice: inciting, organising, directing, facilitating, or financing an offence in terms of the Protocol;<sup>4</sup> and
- 12.3. Codifies the following crimes: Genocide, Crimes against Humanity, War Crimes, Corruption, Money Laundering, and the Illicit Exploitation of Natural Resources.<sup>5</sup>

13. Furthermore, at its 56<sup>th</sup> session in 2013, the African Commission passed a resolution on illicit capital flight.<sup>6</sup> In it, the African Commission noted that: (i) Illicit capital flight by multinational corporations leads to the loss of billions of US dollars every year; (ii) Africa is embroiled in a vicious circle of poverty, malnutrition, diseases and death because its revenue potential is being drained by multinational companies and individuals through exploitation of the loopholes and weaknesses of laws and of the monitoring system; (iii) without adequate resources the respect, protection and implementation of human rights will remain illusory; (iv) African Commission bodies are to study the impact of illicit capital flight on human rights; and (v) states should examine their national tax laws and policies towards preventing illicit capital flight in Africa. The linkage between the actions of corporate entities and human rights is evident from this resolution and the obligation of the state to ensure tax law compliance for human rights' purposes by corporate entities is equally evident.

14. It is clear from the foregoing that in the opinion of the South Africa, in international and regional spaces, corporate violation of human rights will no longer be tolerated. This move towards corporate accountability for human rights violations should be (and has in some ways been) reflected domestically in South African laws and policies.

15. The following section details the extent to which human rights compliance by corporate entities has been incorporated into domestic laws and policies and suggests that this should be extended towards the Bill.

## **C) DOMESTIC FRAMEWORK**

### ***The Truth and Reconciliation Commission***

16. In 1998 the Truth and Reconciliation Commission ('TRC') acknowledged the role played by business entities in the orchestration and success of the apartheid state. In its final report, the TRC noted in relation to banks:

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<sup>4</sup> Article 28N(i).

<sup>5</sup> Articles 28B, 28C, 28D, 28I, 28I *Bis*, and 28L *Bis*.

<sup>6</sup> African Commission on Human and Peoples' Rights, *Resolution on Illicit Capital Flight from Africa*, (23 April 2013), Resolution 236, 53<sup>rd</sup> Ordinary Session.

“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.”<sup>7</sup>

17. Speaking specifically of business the TRC said:

“[N]ot all businesses profited equally from apartheid. It is, however, difficult not to conclude that, between 1910 and 1994, government and business (despite periodic differences and conflicts between them) co-operated in the building of an economy that benefited whites. On the one hand, they promoted and maintained the structures of white power, privilege and wealth and, on the other, the structures of black (mainly African) deprivation, discrimination, exploitation and poverty. To this extent, business was part of the mind-set of white South Africa.”<sup>8</sup>

### ***The Constitution and Case Law***

18. It is in this context that the South African Constitution was drafted.<sup>9</sup> The Constitution embodies a departure from the manner in which government operated in Apartheid. It moved the South African state from one of parliamentary supremacy to one of constitutional supremacy. To this end, the Constitution itself provides that:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”<sup>10</sup>

19. The Constitutional Court confirmed the principle of constitutional supremacy in case of *Affordable Medicines Trust*.<sup>11</sup> Further, regarding the supremacy of the Constitution in light of the duty on the courts to declare invalid any law inconsistent with the Constitution, to the extent of its inconsistency; the Constitutional Court said:

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<sup>7</sup> Truth and Reconciliation Commission Report, volume 4, chapter 2, at paras 30 and 35, available at <http://www.justice.gov.za/trc/report/finalreport/Volume%204.pdf> (last accessed 4 March 2015).

<sup>8</sup> Ibid, at para 97.

<sup>9</sup> Constitution of the Republic of South Africa, 1996 (‘Constitution’).

<sup>10</sup> Section 2 of the Constitution.

<sup>11</sup> *Affordable Medicines Trust v Minister of Health and Others* 2006 (3) SA 247 (CC).

“This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.”<sup>12</sup>

20. Therefore, firstly law must not be inconsistent with the Constitution. Secondly, law must seek to realise the objectives of the Constitution, and in so doing promote the human rights ideals of the Constitution. It appears therefore, that there are two levels to constitutional supremacy. This is further evidenced by the provisions of the Constitution which call for legislative measures to realise human rights.<sup>13</sup> It is with this in mind that we suggest that the Draft Bill be amended to meet the standards of constitutional supremacy.

21. Section 8(2) of the Constitution provides “that the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right”. During the Certification judgment, the Constitutional Court articulated a complaint on the provision and dismissed it:

“Objection was taken to this provision on the ground that it would impose obligations upon persons other than organs of state, that is, it permitted what has been referred to in South African jurisprudence and academic writing as the “horizontal application” of bills of rights. The objection was grounded, first on the basis that the horizontal application of fundamental rights is not universally accepted. That is so, but as stated above, the requirement of universal acceptance in [Constitutional Principle II<sup>14</sup>] does not preclude the [Constitutional Assembly] from including provisions in the [Constitution] which are not universally accepted.”<sup>15</sup>

22. In so saying, the court accepted the premise that corporate entities’ responsibilities *vis a vis* human rights can go further than “respect” and extend towards positive duties of protection, promotion and fulfilment. However, in *Juma Masjid*, the Constitutional Court said:

“It needs to be stressed however, that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party

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<sup>12</sup> Ibid, at para 48.

<sup>13</sup> The rights to equality, fair labour relations, property and lawful eviction, housing, healthcare, sufficient food and water, social security and access to information in terms of sections 9(4), 23(6), 25(5) and (6), 26(3), 27(2), and 32(2) respectively.

<sup>14</sup> Constitutional Principle II reads:

“Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.”

<sup>15</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC), at para 53.



the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the intensity of the constitutional right in question, coupled with the potential invasion of that right which could be occasioned by persons other than the state or organs of state'.<sup>16</sup>

23. In *All Pay*, importantly, the court extended the principle of positive obligations to private bodies exercising public function.<sup>17</sup>

24. It follows therefore that under South African Constitutional law, corporations have both positive and negative duties. At the very least, corporations have the negative duty to respect human rights and 'do no harm'. But, as appears from the *Juma Masjid* decision, they may have a positive duty depending on the constitutional right in question and, as appears from *All Pay*, corporations have positive duties to promote human rights where they perform state functions.

### **Legislative framework**

25. Human rights obligations have been extended to corporate entities in a number of different statutes. Section 7(a) and (d) of the Companies Act stipulates that the purpose of the former is to "promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law" and to "reaffirm the concept of the company as a means of achieving economic and social benefits".<sup>18</sup> It is clear therefore, that the legislature intends for corporate entities to comply with human rights.

26. To that end, the Companies Act demands that certain types of companies have social and ethics committees.<sup>19</sup> The social and ethics committee must monitor the companies' compliance with the 10 principles set out in the United Nations Global Compact Principles and environmental practices.<sup>20</sup>

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<sup>16</sup> *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others (Centre for Child Law and Another as Amici Curiae)* 2011 (8) BCLR 761 (CC), at para 58.

<sup>17</sup> *All Pay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)*; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC), at para 66.

<sup>18</sup> Act 71 of 2008.

<sup>19</sup> Section 72(5) of the Companies Act.

<sup>20</sup> Regulation 43(5)(a)(i)(aa) and (iii) of the Companies Act. The UN Global Compact Principles are quoted below and relate to human rights.

#### Human Rights

Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights; and • Principle 2: make sure that they are not complicit in human rights abuses.

#### Labour Standards

Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;

Principle 4: the elimination of all forms of forced and compulsory labour;

Principle 5: the effective abolition of child labour; and

Principle 6: the elimination of discrimination in respect of employment and occupation.

27. The National Treasury also promulgated the Regulation to the Pension Funds Act. Regulation 28 incorporates human rights principles in that it imposes on pension fund trustees an obligation to consider environmental, social and governance factors when making investment decisions. These factors should be considered especially where they may materially affect the long term sustainable performance of the asset.<sup>21</sup> In a memo released by the National Treasury it stated that the purpose of the regulation was to “align pension fund regulations with government policy objectives of socially responsible investment and transformation.”<sup>22</sup>
28. More recently, the Department of Trade and Industry released the Promotion and Protection of Investment Bill, 2013 (‘Investment Bill’). The Investment Bill seeks to ensure the protection, promotion and respect of human rights and the values of the Constitution through the express protection of human rights.<sup>23</sup> Clause 10 of the Investment Bill affords the Government or any Organ of State the sovereign right to take regulatory measures to (i) redress historical, social and economic inequalities; (ii) uphold the human rights guaranteed in the Constitution; and (iii) achieve the progressive realisation of socio-economic rights.
29. In its submissions to the International Centre for the Settlement of Investment Disputes during the *Foresti* dispute, South Africa argued that the mining legislation that preceded the Mineral and Petroleum Resources Development Act (“MPRDA”) enabled human rights violations in private relationships.<sup>24</sup> Thus the MPRDA was promulgated to redress those human rights violations and to protect human rights in private relationships such as in the relationship between the mining company and mine affected communities.

## D) SOUTH AFRICAN DEVELOPMENT AGENDA

30. South Africa has also indicated its commitment to pro-poor and inclusive development through its voting patterns in international and regional *fora* and its domestic laws and policies.

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### Environment

Principle 7: Businesses should support a precautionary approach to environmental challenges;

Principle 8: undertake initiatives to promote greater environmental responsibility; and

Principle 9: encourage the development and diffusion of environmentally friendly technologies

### Anti-Corruption.

Principle 10: Businesses should work against all forms of corruption, including extortion and bribery.

<sup>21</sup> Regulation 28(2)(c)(ix) of the Pension Fund Regulations, GN R98 in Government Gazette 162 of 26 January 1962.

<sup>22</sup> Explanatory Memorandum on the Final Regulation 28 that gives effect to section 36(1)(bB) of the Pension Funds Act, 1956, *Government Gazette* 34070 of 4 March 2011.

<sup>23</sup> Preamble of the Investment Bill, 2013.

<sup>24</sup> *Piero Foresti, Laura de Carli & Others v Republic of South Africa (ICSID) Case No ARB(AF)/07/1*, at para 66.

31. At the Human Rights Council session held in September 2014, South Africa voted in favour of the resolution on the right to development.<sup>25</sup> In the African Union, South Africa ratified treaties that speak to the right to social and economic development.<sup>26</sup> It is also a signatory to the New Partnership for African Development whose objective is to:

“To eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable growth and development and thus halt the marginalisation of Africa in the globalisation process”.<sup>27</sup>

32. The South African Constitution also makes reference to “promoting justifiable economic and social development.”<sup>28</sup> Further, the National Development Plan’s chapter on the economy and employment, which is aimed at reducing poverty, provides as follows:

“Economic transformation is about broadening opportunities for all South Africans, but particularly for the historically disadvantaged. It is about raising employment, *reducing poverty and inequality, and raising standards of living and education.* It includes broadening ownership and control of capital accumulation. In addition, it is about broadening access to services such as banking services, mortgage loans, telecoms and broadband services, and reasonably priced retail services. *It is also about equity in life chances and encompasses an ethos of inclusiveness that is presently missing.*”<sup>29</sup> (*Our emphasis.*)

33. South Africa has committed to an inclusive, equitable and poverty reducing economic policy. In light of this fact, its domestic policies, especially those that speak to the financial sector, should aspire to meet those objectives. It should also be demonstrated in South Africa’s growing powers in the global economic space, especially as the Brazil, Russia, India, China and South Africa (‘BRICS’) bloc.

## E) RECOMMENDATIONS

34. CALS recommends that the Draft Bill be amended to: (i) reflect Constitutional supremacy and the commitment to human rights in the Preamble and Purpose clause; (ii) demand compliance with human rights standards and the Constitution by financial institutions; and (iii) include provisions relating to the monitoring of

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<sup>25</sup> Human Rights Council, *Resolution on the Right to Development*, (19 September 2014) A/HRC/27/L.3.

<sup>26</sup> Article 3(j) of the African Union’s Constitutive Act; article 22 of the African Charter on Human and Peoples’ Rights; article 19 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; and article 10(1) of the African Youth Charter.

<sup>27</sup> African Union, *New Partnership for African Development*, available at [http://www.nepad.org/system/files/framework\\_0.pdf](http://www.nepad.org/system/files/framework_0.pdf), at p 13.

<sup>28</sup> Section 24(b)(iii) of the Constitution.

<sup>29</sup> National Planning Commission, *National Development Plan 2030*, p 138.

human rights compliance by financial institutions operating in the financial sector. We recommend that the language of the Draft Bill be amended as set out in the paragraphs that follow with language highlighted in ***bold italics***.

35. The preamble should be amended to reflect a commitment to Constitutional supremacy. The amended preamble should read as follows:

“To establish regulatory authorities for the purposes of strengthening financial stability and the fair treatment of financial customers in the interest of a safer financial sector; to establish and provide for the Financial Stability Oversight Committee, the Prudential Authority, and the Market Conduct Authority; to provide for co-operation between the regulatory authorities, including co-operation in rule making; to provide for co-operation between regulatory authorities and other financial regulators; to promote the maintenance of financial stability; to provide for the management and mitigation of financial crisis; to provide for administrative penalties; ***to provide for the protection and promotion of human rights as set out in the Constitution in the financial sector***; to provide for the establishment of the Financial Services Tribunal to hear appeals; to provide for regulations and codes of good practice; to provide for transitional provisions; and to provide for matters connected therewith.”

36. The purpose of the Draft Bill should be amended to reflect the desire to align the South African financial sector with the Constitution and human rights principles. It should be amended as follows:

- (1) The purpose of this Act is to promote a financial system that works in the interests of financial customers, ***is aligned to the spirit and purport of the Constitution***, and supports balanced and sustainable economic growth in the Republic, by establishing, in conjunction with the regulatory laws, a supervisory and regulatory framework that promotes—
- (a) ***compliance with the Bill of Rights as provided for in the Constitution, in the financial sector***;
  - (b) financial stability;
  - (c) the safety and soundness of financial institutions;
  - (d) the fair treatment and protection of financial customers;
  - (e) confidence in the financial system;
  - (f) financial inclusion; and
  - (g) the integrity of the financial system and the prevention of financial crime.
- (2) The supervisory and regulatory framework established in terms of this Act and the regulatory laws must ensure that—

- (a) **financial institutions operate in a manner that furthers the rights in the Bill of Rights;**
- (b) an institution can only operate as a financial institution with an appropriate valid license, permission or authorisation;
- (c) persons in positions of significant responsibility in a financial institution, or interacting with financial customers, must be fit and proper persons; and
- (d) all financial institutions are subject to regulation and supervision.

37. Chapter 7 of the Draft Bill should be amended to include a section on human rights which may read as follows:

***“Financial Institutions must comply with the Constitution and the rights set out in the Bill of Rights in all regulated activities.”***

38. Further, the Draft Bill should contain an acknowledgment that the South African Reserve Bank is a body established in terms of the Constitution and bound to it. Therefore, section 5 should be amended to read as follows:

- “(1) The Financial Stability Oversight Committee is established to assist the Reserve Bank to maintain, protect and enhance financial stability **and ensure compliance with the Constitution and the Bill of Rights.**
- (2) In pursuing the objective referred to in subsection (1), the Financial Stability Oversight Committee must, consistent with the provisions of Chapter 5 of this Act—
  - (a) continuously monitor the financial system for risks, weaknesses, disruptions, or developments that threaten to harm or are harming financial stability, whether those risks, weaknesses or disruptions arise from structural imbalances, cyclical occurrences, failing financial institutions, contagion or any other factor;
  - (b) **continuously monitor the financial system for compliance with the Constitution and the Bill of Rights;**
  - (b) determine—
    - (i) the extent and seriousness of any risk, weakness, disruption **or Constitutional non-compliance** detected;
    - (ii) whether that risk, weakness, disruption **or Constitutional non-compliance** is of a localised or systemic nature; and
    - (iii) whether it is causing a potential, impending or actual financial crisis in the financial system **or adverse human rights impacts by an individual or community;**
  - (c) initiate, in accordance with this Act, any action necessary to mitigate or remedy a risk, weakness, disruption **or Constitutional non-compliance** detected, having due regard to the need to pursue its objective in a manner that does not unduly adversely impact the ability of the financial system to provide favourable conditions for balanced and sustainable economic growth in the Republic;
  - (d) promptly advise the Minister of any developments or trends that may contribute to the instability of the financial system, **including human rights violations;** and

- (e) promptly submit a recommendation to the Minister when the Financial Stability Oversight Committee identifies that a financial institution should be designated as a systemically important financial institution.
- (3) ***In pursuing the objective referred to in subsection (1), the Financial Stability Oversight Committee shall have the right to receive complaints of human rights violations directly from members of the public or affected communities.***

## **F) CONCLUSION**

39. It is clear from the foregoing, therefore, that there has been a clear message from government with regards to corporate accountability in respect of human rights: corporate entities have the responsibility to, at the very least, respect human rights and, at most, take steps actively to protect, promote and fulfil human rights. The National Treasury, as an arm of government, has aligned itself to this commitment in the regulations that it has published. The protection of human rights is a constitutional duty on the state, but it extends towards private entities. The Bill should be amended to reflect this fact.