Inspection Of Financial Institutions Act: Matrix	
KEY TO CLASSIFICATION OF AMENDMENTS:	
	Regulatory gap: to enhance clarity & certainty
	Amendments of sections which do not currently form part of the Bill

Clause	Section in tabled bill	Commentator	Summary of concern/ comment	Proposed response
149	**Section 2** of the principal Act is hereby amended by the substitution for subsections (2) and (3) of the following subsections, respectively: "(2) **[The registrar must furnish every]** An inspector appointed under subsection (1) must, upon appointment, be issued with a certificate of appointment signed by the registrar. (3) **[An]** When an inspector **[must, before commencement of an inspection or the examination of any person,]** exercises any power or performs any duty in terms of this Act, the inspector must be in possession of a certificate of appointment issued under subsection (2), and must produce **[his or**	ASISA (18.02.2013) ASISA (19.04.2013)	The reason for an inspector no longer being required to produce the certificate of appointment before the commencement of the inspection is not understood and it is suggested that this practice be retained. Further the reference to —any person having a material interestll may cause difficulty with interpretation and it is suggested that such person be limited to a person who is the subject of the inspection or any person representing the financial institution. The reference to —any person having a material interestll may cause difficulty with interpretation and it is suggested that such person be limited to a person who is the subject of the inspection or any	This amendment in subsection (3) was proposed because of practical difficulties experienced by inspectors to produce the certificate at the commencement of an inspection. An inspector may commence the inspection by doing investigation work at his desk and cannot produce the certificate to any one in specific. It is considered to better to simply require inspectors to produce the certificate when they exercise their powers under the Act. It is agreed to limit the last part of the provision to a person in respect of whom a power is exercised. It is considered too limiting to only require production to the subject of the inspection or to the person who is representing the institution

	her] the certificate of appointment at the request of any person having a material interest in the matter concerned.".		person representing the financial institution.	concerned. **Proposed wording**  (3) **[An]** When an inspector **[must, before commencement of an inspection or the examination of any person,]** exercises any power in terms of this Act, the inspector must be in possession of a certificate of appointment issued under subsection (2), and must produce **[his or her]** the certificate of appointment at the request of any person in respect of whom such power is being exercised ".
151	**Section 4:Powers of inspectors relating to institutions**	13.03.2013 Mr Koornhof	Mr Koornhof said that he remembered that in 2012, there was a big debate in the Committee on search and seizure and there were amendments to the proposal by National Treasury. Were those arguments taken into account as the powers in the Bill were still wide?	The debate centered on search and seizure powers in relation to on-site powers. The Committee was satisfied that the Inspection Act contains sufficient checks and balances with regard to search and seizure powers.

151	**Section 4** of the principal Act is hereby amended— *(a)* by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words: "In carrying out an inspection of the affairs of an institution under section 3 or 3A an inspector may—";	ASISA (18.02.2013)	ASISA members suggest that the reference to the —affairs of the institution be replaced with a reference to the —business of the institution to ensure that the document relates to the business being inspected and not other affairs which may not be relevant to the inspection.	The NT does not agree with this. It is considered that the word "affairs" is more encompassing than "business"
151	*(d)* by the substitution in subsection (1) for paragraph *(e)* of the following paragraph: "*(e)* against the issue of a receipt, seize any document of the institution **[which in his or her opinion may afford evidence of an offence or irregularity]** if the inspector is of the opinion that the document contains information relevant to the inspection;"; and	ASISA (18.02.2013) (19.04.2013)	It is suggested that the wording be amended as proposed to align with section 4(1)(a) in that the inspector should reasonably believe that the document contains relevant information.	Disagreed. It is unnecessary to provide that the inspector must reasonably believe in this instance, as the inspector must act reasonable, fairly etc. in all circumstances. The reference in section 4(a)(i) to reasonably is unnecessary and must be removed. "*(a)* (i) summon any person who is or was a director, employee, partner, member, trustee or shareholder of the institution and whom the inspector **[reasonably]** believes is in possession of or has under his or her control, any document relating to the affairs of the institution, to

				lodge such document with the inspector or to appear at a time and place specified in the summons to be examined or to produce such document and to examine or, against the issue of a receipt, to retain any such document for as long as it may be required for purposes of the inspection or any legal or regulatory proceedings;
		BASA (17.04.2013)	In regards to institutions, the IFA does not require a warrant to search or seize items from an institution but does require a warrant in regards to individuals. It is recommended that the requirement of a warrant be extend to institutions as well.	The constitutionality of e warrantless searches with regard to regulated persons (under FSB legislation) has been considered in the High Court and found not be unconstitutional. In Constitutional judgments on searches and seizures in other areas (e.g. gambling) the Constitutional Court left open the question on the requirement for a warrant for a registered person

153	The following section is hereby inserted in the principal Act after section 6: **‘‘Search and seizure** 6A. (1) Any entry upon or search of any premises in terms of section 4 or 5 must be conducted with strict regard to decency and good order, including— (a) a person’s right to, respect for and the protection of dignity; (b) the right of a person to freedom and security; and (c) the right of a person to personal privacy. (2) An inspector may be accompanied and assisted by a police officer during the entry and search of any premises under section 4 of 5. (3) Any entry and search under section 4 or 5 must be executed by day, unless the execution thereof by night is justifiable and necessary.**’’.**	BASA (17.04.2013)	Clause 153 of the Bill, inserts section 6A into IFA. Section 6A(3) provides that any entry and search must be executed by day, unless the execution thereof by night is justifiable and necessary. An entry and search, particularly of an institution should be done during business hours to ensure that the correct documents are seized and to ensure that representations of the institution are present. It is doubtful whether a search and entry on an institution at night would be justifiable. Any reference to night searches should be removed from the Bill. In regards to institutions, the IFA does not require a warrant to search or seize items from an institution but does require a warrant in regards to individuals. It is recommended that the requirement of a warrant be extend to institutions as well	The entry by night is only allowed if justified and necessary, for example where a search has started during the day and has not been finalised after hours, documents or evidence may be lost if the inspectors only return the following day. This provision is aligned with similar provisions in other legislation.

154	**Section 7** of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1): "(2) *(a)* Any person examined under section 4 or 5 may be required to answer any question put to him or her at the examination, notwithstanding that the answer might tend to incriminate him or her. *(b)* An incriminating answer directly obtained, or incriminating evidence directly derived, from an examination under paragraph *(a)* shall not be admissible as evidence in criminal proceedings in a court against the person concerned, or against the institution of which the person is or was a director, servant, employee, partner, member or shareholder, except in criminal proceedings where the person or institution is charged with an offence	ASISA (18.02.2013) (19.04.2013)	The right against self-incrimination is a basic human right which may potentially be infringed by this clause. The amendment as proposed does not absolve the person in question from all criminal prosecution. The fact that evidence directly obtained or derived from an answer during examination may not be admissible in criminal proceedings does not protect a person's right to self-incrimination if the information provided by the person is used to unearth or collate other information which would not have been uncovered but for the information provided by answers and used in subsequent criminal proceedings. The amendment is thus proposed to extend the protection to exclude information uncovered as a result of an answer given during examination without excluding derivative evidence that would in any event have been uncovered.	NT decided not to continue with the proposal as it may have constitutional implications, and there are risks that the evidence obtained pursuant to these provisions might not be properly ring-fenced. It was also considered to be more advantageous to be able to provide all information to the investigating authorities. Therefore, the current section 7 will therefore remain as is and section 12*(b)* remains applicable. Section 12*(b)* provides that a person, who without lawful excuse refuses to answer a question, commits an offence. This means that such person has a right to refuse to answer a question where his right against self-incrimination may be affected.

	relating to– (i) the administering of an oath or the making of an affirmation; (ii) the giving of false evidence; (iii) the making of a false statement; or (iv) a failure to answer questions fully or satisfactorily.".			

		BASA (17.04.2013)	Clause 154 of the Bill amends section 7 of IFA subsection (2) which allows for self-incrimination. The section requires any person who is 'examined' under section 4 or 5 of IFA to answer any question put to him even if the answer will incriminate the person. The incriminating answer is not admissible as evidence in criminal proceedings in court except where the criminal proceedings are for an offence relating to the administering of an oath or the making of an affirmation, the giving of false evidence, the making of a false statement or a failure to answer questions full or satisfactorily. The following section may be unconstitutional. The Constitution provides in section 35(3)(j) that every accused person has the right not to be compelled to give self-incriminating evidence. Section 35 of the Constitution further provides that an accused has the right to remain silent. Clause 150 should be removed from the Bill as it is potentially	See above

			unconstitutional and may not survive constitutional scrutiny.	

	Section 9	FSB	The amendment is necessitated by the proposed amendments to section 22 of the FSB Act as well as the Protection of Personal Information Act, 2013, and to avoid a conflict between section 9 and section 22 of the FSB Act.	 **152. Section 9 of the principal Act is hereby amended by the substitution of the following section:** If the registrar has reason to believe that— (*a*) an offence or irregularity has been committed relating to the affairs of an institution inspected under this Act; or (*b*) an institution so inspected is in an unsound financial condition, he or she may convey any information obtained during an inspection to— (i) any department or organ of State; (ii) any regulatory authority; (iii) any self-regulating association or organisation;

				(iv) any statutory board charged with supervisory or regulatory duties; (v) any shareholder, partner, member, director, auditor, accounting officer, liquidator, curator, executor or trustee of an institution inspected under this Act; (vi) any participating employer in a pension fund organisation inspected under this Act**[;]**.**.** **[(vii) an authority contemplated in section 22 (2) of the Financial Services Board Act,]** if the person or entity referred to in subparagraphs (i) to (vii) is affected by, or has an interest in, such information

156	**Section 11** of the principal Act is hereby amended by the substitution for paragraph *(b)* of the following paragraph: "*(b)* the institution being inspected, or a director, employee, partner, member or shareholder of such institution, if the registrar so decides, after having considered the results of the inspection.".	ASISA (18.02.2013) (19.04.2013)	The Explanatory Memorandum contains no substantive motivation for the liability to be extended to directors, employees, partners, members or shareholders. It is assumed that the Registrar wishes to broaden the base from which the costs of an inspection can be recovered but it is submitted that an increase in potential liability must be proportionately balanced with an appropriate basis on which the Registrar may make a cost recovery decision, not merely if the Registrar so decides. The basis on which the Registrar should be able to recover costs from individuals (which may not be directly involved in the business for example a shareholder in a public company or a junior employee who have no decision making powers) should be included in this section failing which the liability should not be extended to a director, employee, partner, or member or shareholder.	The extension was considered necessary where for instance serious irregularities where found during an inspection and the institution is placed under curatorship. It is unfair in those circumstances to recover the costs from the institution as it could in fact be the investors that fund the recovery. After considering the comments, it was agreed to specify the basis on which the Registrar should be able to recover costs from other persons. It was agreed to leave subsection (b) unchanged and to insert a subsection (c) with the following wording:  *"(c)* Any person, when it appears after considering the outcome of an inspection, that such person was knowingly a party to the carrying on of the affairs of the institution in a manner that constituted an irregularity, non-compliance or contravention."

		BASA (17.04.2013)	Clause 156 amends section 11 of the IFA which deals with the costs of inspections. The amendment provides that the costs of an inspection may now be recovered not only from the institution but from 'a director, servant, employee, partner, member or shareholder of such institution'. The section seems overly broad and it is not clear what circumstances would result in a 'servant' or employee' being imposed with the costs. Section 11 of the IFA should not be amended and left as is.	See above

	General Comments	BASA (17.04.2013)	**Inspections of Financial Institutions Act 80 of 1998** There are extensive amendments made to this Act, which makes room for the argument that only inspectors in terms of the IFA should conduct on-site visits and inspections. Inspectors are confined to act within the powers given to them in terms of the IFA and only certain individuals may qualify to be inspectors. E.g. Inspectors are required to carry certificates which state they are inspectors and must produce the certificate on request.	

SUMMARY OF REGULATORY GAPS

OVERARCHING AMENDMENT PROPOSED IN RESPECT OF SECTOR SPECIFIC ACTS

Section 10

1. To repeal the provision as section 22 of the Financial Services Board Act (as amended in 2008) contains a similar, but more comprehensive, provision.

ALIGNMENT WITH OTHER LEGISLATION

Section 1

1. To amend the definition of “registrar” to rectify the references to the Medical Schemes Act, 1998.

REGULATORY GAP

Section 2

1. To clarify the issuing and use of certificates of appointment of inspectors so as to address possible uncertainty of when an inspection commences.

Section 3A

2. To enable the registrar to respond to a request from another regulator under a memorandum of understanding without the person identified by the requesting authority being present or resident in the Republic, as it is possible for the required information to be available in the Republic but the inspected person has left the Republic or has not been here.

Section 4

3. To rectify the omission of a reference to section 3A; to align these sections with the Securities Services Act, 2004 so as to allow for the summonsing of documents; and to

4. To authorise the seizure of documents if they appear to be relevant to an inspection, and not only if they provide evidence of an offence or irregularity.

Section 5

5. To rectify the omission of a reference to section 3A; to align these sections with the Securities Services Act, 2004 so as to allow for the summonsing of documents; and
6. To authorise the seizure of documents if they appear to be relevant to an inspection and not only if they provide evidence of an offence or irregularity.

7. Section 5(3) - To align with above amendments.

Insertion new Section after Section 6

8. To ensure compliance with constitutional requirements. A new section is inserted that prescribes the manner and time of searches, arranges for inspectors to be accompanied by police officers and provides for inspected parties' rights and dealing with privileged information.

Insertion new Section under Section 7

9. To require interviewees to answer all questions relating to the affairs of an institution even if the answer to such a question might incriminate the person. The obligation is qualified in that evidence so obtained may not be used in criminal proceedings against such persons other than proceedings where such persons stand trial on charges relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers or a failure to answer lawful questions fully and satisfactorily. This will ensure that the registrar obtains information necessary for regulatory purposes to protect investors' interests and establish the true state of affairs of financial institutions but without infringing on a person's constitutional right against self-incrimination with regard to a criminal prosecution**.**

Section 11

10. To allow for the recovery of inspection costs from private individuals (currently costs may only be recovered from financial institutions). This is to prevent investors from indirectly be liable for inspection costs where irregularities were committed by the individuals managing the institution.

Section 12

11. Consequential amendment because of the proposed amendment of sections 4 and 5.