

24 July 2019

Our ref: AK/OUTA/AARTO

To: The President of the Republic of South Africa
Private Office of the President
President Cyril Ramaphosa

Email: presidentrsa@presidency.gov.za

C/O: Personal Assistant to the President
Malebo Sibiyá

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Dear Mr President

**ADMINISTRATIVE ADJUDICATION OF ROAD TRAFFIC OFFENCES AMENDMENT
BILL [B38D – 2015]**

1. We act on behalf of OUTA (the Organisation Undoing Tax Abuse), a South African non-profit civil action organisation.
2. OUTA has significant concerns about the constitutional validity of the Administrative Adjudication of Road Traffic Offences Amendment Bill (“the AARTO Amendment Bill”). This Bill was recently passed by Parliament and has been sent to you for signature.
3. We have been instructed to write to you and request that you exercise your discretion in terms of section 79(1) of the Constitution, by declining to sign the Bill and sending it back to Parliament for reconsideration.

4. Our client has a substantial interest in the Bill.
 - 4.1. OUTA is a strong promoter of road safety and effective traffic legislation. It believes that to achieve this outcome, South Africa needs effective and fair processes for the adjudication of road traffic infringements. Such processes must be consistent with the Constitution. In addition, it is critical that South Africa's traffic legislation is properly enforced to bring about behavioural changes in road users and to ensure safer driving and fewer fatalities on our roads.
 - 4.2. Our client remains concerned about the high level of road fatalities in South Africa. They believe that these fatalities are largely due to poor enforcement of traffic laws, a lack of traffic infringement management and a variety of problems in the management of vehicle and driver licensing.

THE AARTO AMENDMENT BILL

5. Our client was actively involved in the public participation processes in relation to the Bill. They wrote to you previously to highlight their reservations and concerns about various aspects of the AARTO Amendment Bill. This letter supplements those grounds of concern.
6. We wish to place on record that, as a matter of principle, our client does not oppose the introduction of new laws and regulations by Government, but rather wishes to ensure that these laws and regulations are capable of effective execution and are aligned with the basic principles envisaged in our Constitution.

7. OUTA has obtained legal advice regarding the constitutional validity of various provisions of the AARTO Amendment Bill. It has two main concerns with the Bill:
 - 7.1. The first relates to the service provisions in the Bill. Given the serious nature of the consequences that may follow an infringement, the Bill does not provide for adequate service to infringers;
 - 7.2. The second relates to the Appeals Tribunal that is established by section 29A of the Bill. The Bill only provides for one Tribunal staffed by a Chairperson and eight other members (appointed on a part-time basis) to service the whole of South Africa. This is vastly insufficient given the number of matters that it will be required to hear. This will result in a serious backlog in the system and will ultimately violate the constitutional rights of infringers (including their rights to just administrative action and a fair hearing).
8. We address each of these concerns in more detail below.
 - i) ***Inadequate service provisions***
 9. The Bill amends section 30 of the AARTO Act, which governs the manner and form of service of documents under the Act.
 10. Section 30(1) provided that any document required to be served on an infringer under the Act must be served on the infringer personally or sent by registered mail to his or her last known address. The definitions section of the AARTO Act provided that the date upon which service is affected is the date on which the infringer has signed for the document served.

11. The Bill amends section 30. It removes the requirement that service must be affected by personal service or registered mail. It replaces this with the requirement that all documents must be served on infringers by personal service *or* postage (i.e. non-registered mail) *or* electronic mail. The Bill defines 'electronic mail' to mean service by electronic communication as defined in the Electronic Communications Act 2005. The latter would include service by voice message, by SMS or by email.
12. These forms of service are inadequate. It is likely that the notice will be missed by infringers in many cases. The email, SMS or voice message could easily be treated as junk mail or spam or could simply go unopened. There is nothing in the form of correspondence that emphasizes the importance of the document to the recipient.
13. This risk is unacceptable given the serious consequences that will result if the infringer fails to respond to the notice in question.
 - 13.1. In terms of the Act, the first step that will be taken is that an infringer will be served with an infringement notice. The infringement notice describes the particulars of the infringement and the amount of the penalty and informs the infringer that they are entitled to make representations that contest their liability. If the infringer does not receive and respond to the infringement notice, they will be sent a courtesy letter. The courtesy letter informs them that they may make representations contesting their liability or pay the prescribed fee. If the infringer does not receive or respond to the courtesy letter, an enforcement order will be issued. If the infringer has incurred demerit points, these points will be recorded against the national register and the infringer will (only) then be informed of such by registered mail.

- 13.2. Once an enforcement order has been issued, no driving license, professional driving permit or license disc may be issued in respect of a motor vehicle registered in the name of the infringer, until such enforcement order has been complied with or has been revoked. If the infringer wishes to have the enforcement order revoked, he or she must apply to the agency in the prescribed manner and submit reasons to the satisfaction of the registrar. In reality, this means that an infringer who has not received notice of their infringement (and who would otherwise have made representations) may be barred from obtaining a driver's license, professional driving permit or license disc until they have successfully applied for the revocation of the order.
- 13.3. If the infringer already has demerit points, the additional demerit points that are recorded may result in him being disqualified from operating his motor vehicle. In addition, he may not apply for a driving license, professional driving permit or operator card during the disqualification period.
- 13.4. This would have severe consequences for the driver's ability to move freely and to practice their profession or work (particularly in the case of taxi drivers and fleet operators).
14. Given these severe consequences, the requirement of personal service or service by registered mail should not be removed. It is critical to ensuring that an infringer is given an adequate opportunity to make representations or otherwise respond to an infringement notice before the penalties are visited upon him or her.
- ii) *The Appeals Tribunal***
15. The AARTO Amendment Bill creates the Appeals Tribunal.

16. The functions of the Tribunal include the adjudication of matters brought to it by infringers aggrieved by a decision taken by the representation officer and the hearing of appeals against, or review of, any decision of the representation officer that may be referred to the Tribunal. This is a vast workload. In this regard, the following bears emphasis:

16.1. In the 2017/2018 period, the total number of representations made and adjudicated (after the infringer received an infringement notice) was 133,790. This was in respect of Johannesburg and Tshwane alone.¹

16.2. In 2017/2018, a total of 286,390 persons (in Johannesburg and Tshwane) elected to have their traffic infringement tried in court. In the same year, a total of 25 143 court hearings took place.² In the preceding year (2016/2017), a total of 79 122 court hearings took place.³

16.3. The AARTO Amendment Bill removes the distinction between major and minor infringements and no longer allows for infringers to elect to be tried directly in a court. Under the Bill, all infringers must first go to the Appeals Tribunal before they may challenge the infringement charge in court.

¹ RTIA annual report 2017/2018 – Reporting period 1 April 2017 to 31 March 2018.

² Ibid. In terms of sections 17(1)(f)(iv) or 18(7) of the AARTO Act, an infringer may elect to be tried in court on the charge of having committed the infringement(s) as stated on the Infringement Notice.

³ Ibid.

17. The AARTO Amendment Bill makes provision for only one Appeals Tribunal with jurisdiction over the entire country. The Tribunal consists of a Chairperson and only eight members, who are appointed on a part-time basis. It will not be possible for the Appeals Tribunal to deal with the case load described above. The eight part-time members will not have the capacity or time to deal with tens of thousands of challenges, appeals and reviews. Furthermore, it is not clear whether the Tribunal will be based in one location throughout the year (with infringers having to travel across the country to the Tribunal) or whether the Tribunal will go on circuit and hear matters at different locations (which means a significant amount of time will be lost to travel, further reducing the Tribunal's ability to deal with its caseload).

18. The result will be years of backlogs in hearing grievances with the decisions of representation officers, appeals and reviews. This, in turn, means that there will be no effective redress for persons who have been accused of a traffic infringement or offence, but who have a valid defence. Such persons are not permitted to circumvent the Appeals Tribunal and go directly to a court (which is an independent tribunal).

iii) Implications of flawed provision

19. The problems identified above implicate a number of the alleged infringers' rights. These include the following:
 - 19.1. First (and foremost), the alleged infringer's right to just administrative action (section 33 of the Constitution). This right is limited by the lack of proper service provided for in the Bill as well as the delays in having the matter heard before the Appeals Tribunal. The lack of service and delays will result in a process that is not fair.

- 19.2. Second, the lack of service and delays in having the matter heard may also implicate the alleged infringer's right to freedom of economic activity, freedom of movement and substantive just administrative action. As is explained above, there are severe consequences that may flow from an alleged infringer's failure to respond to or successfully challenge a charge in an infringement notice. This includes that person's licence being suspended or their being unable to obtain a vehicle licence. This prevents them generally from driving to and from work engagements. In the instances where a person is employed or operates in the transport industry (e.g. a taxi driver or fleet owner), they will be prevented from pursuing their livelihood.
- 19.3. Third, the delays in having the matter heard by the Appeals Tribunal may negatively affect the alleged infringer's right to a fair hearing before an independent tribunal. The Appeals Tribunal is an administrative body whose members are appointed by the President. It does not constitute an independent tribunal. The Court is an independent tribunal. In order to have a hearing before a court, the alleged infringer must first go through the Appeals Tribunal. This will result in lengthy delays. By the time that the alleged infringer is able to bring their matter before a court, it is likely that years will have passed. There is a great chance, with the passing of time, that evidence will be lost and memories will fade. This will make it harder for the alleged infringer to prove their case.
20. We therefore submit that the AARTO Amendment Bill does not withstand constitutional scrutiny. In the circumstances, Mr President, we respectfully urge you not to sign the AARTO Amendment Bill and to refer the Bill back to the Parliament for reconsideration.



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We kindly await your response at your earliest convenience.

Yours faithfully,



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