ORGANISATION UNDOING TAX ABUSE

COMMENTS ON THE PROPOSED REGULATIONS TO THE ADMINISTRATIVE ADJUDICATION OF ROAD TRAFFIC OFFENCES AMENDMENT BILL

INTRODUCTION:

1. The Organisation Undoing Tax Abuse (OUTA) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation. OUTA was established to challenge the abuse of authority, in particular the abuse of taxpayers' money.

2. 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.

3. OUTA remains concerned about the high level of road fatalities in South Africa. We believe that these fatalities are largely due to the poor enforcement of traffic laws, a lack of traffic infringement management and a variety of problems in the management of vehicle- and driver licensing.

4. As a matter of principle, we do not oppose the introduction of new laws and regulations by Government, but we rather wish to ensure that these laws and regulations are capable of being effectively executed, are rational and are aligned with the basic principles envisaged in our Constitution.

5. The Administration of Road Traffic Offences Act is a troublesome and complex piece of legislation for most motorists and motor vehicle owners in South Africa. OUTA, with the support of our supporters, wishes to submit our comments on the proposed Regulations to Administrative Adjudication of Road Traffic Offences Amendment Bill [B 38B – 2015] ("regulations"). We identified and commented on two main issues in the proposed regulations namely (A) the content of some of regulations, and (B) the cross-referencing issues in the regulations. It is followed by (C) - comments in general.

A. CONTENT ISSUES

Service provision:

6. Regulations 2(1)(b), 2(1)(c), 2(3), 2(4)(a), 2(5)(a), regulations 3(1), 3(2), regulations 4(1)(a), 4(3)(b)(ii), regulations 5(3)(b)(iii), 5(3)(b)(iv), regulation 7(1), regulation 10(2), 10(3), regulation 11(8), 11(9), regulation 12(2), regulation 13(2), 13(4), regulation 20(1), regulation 21(9), 21 (10), regulation 23(2), 23(4), regulation 24(3)(b)(ii), 24(5), regulation 25(1)(b)(iii), regulation 26(4) and regulation 33(1), 33(2), 33(5) make reference to regulation 34(4)(b), which states the following:

"(4) An infringement notice or AARTO notice required to be served or issued to the infringer must be issued or served by –

(b) electronic service through electronic communications network the details of which have been provided by the infringer in terms of regulation 32;"

7. We belief that the service provision stated above does not provide for adequate service especially given the serious nature of the consequences that may follow an infringement.

8. These forms of service are inadequate because 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 this form of correspondence that emphasizes the importance of the document to the recipient.

9. The risks attached to these forms of service are unacceptable given the serious consequences resulting from an infringer's non adherence to the documents sent by electronic communication.

10. It is critical to ensure that an infringer is given an adequate opportunity to make representations or otherwise respond to an infringement notice (AARTO notice) before any penalties are visited upon him or her. Electronic communication does not give an adequate opportunity for the infringer to exercise this right accordingly.

Regulation 2

11. Regulation 2(6) stipulates that in addition to the required information as set out in section 17(1) of the AARTO Act, additional information (referred to in this regulation) **must** be contained in infringement notices.

12. Although we acknowledge that there is a necessity to obtain the correct information from an infringer, we submit that by introducing a regulation that imposes an obligation (the use of the word **must**) on the issuing officer to ensure that ALL the information is obtained, it increases the risk that in certain *bona fide* circumstances not all the information can be obtained and will ultimately affect the enforcement of the administrative process.

13. Furthermore, regulation 2(6)(g) stipulates that certain information of the officer who issued the notice must be provided. With specific reference to regulation

2(6)(g)(i), an officer who issued the infringement notice must provide his or her surname and initials on the issued notice.

14. We fail to understand why an officer who issues an infringement notice is only required to provide his or her initials and surname whereas regulation 2(6)(a)(ii) stipulates that the infringer must provide his or her first names and if such infringer has more than one name, must provide at least the first two full names and the initials of any further names.

15. We therefore submit that we belief that the officer who issues the infringement notice should also provide his or her first names and if such officer has more than one name at least provide the first two full names and the initials of any further names.

Appeals Tribunal

16. According to **Chapter 3** of the regulations, the functions of the Appeals Tribunal include the adjudication of matters brought to it by infringers aggrieved by a decision taken by the representation officer. Therefore, the hearing of appeals against or review of any decision made by the representation officer may be referred to the Appeals Tribunal.

17. The Appeals Tribunal will have jurisdiction over the entire country. The Tribunal will consist of a Chairperson and eight members who will be appointed on a part-time basis. We are of the view that it will not be possible for the Appeals Tribunal to deal with all the cases efficiently and within the prescribed time frames. The eight part-time members will not have the capacity or time to deal with thousands of challenges, appeals and reviews.

18. Furthermore, it is not clear if the Appeals Tribunal will be based in one location throughout the year with infringers having to travel across the country to the

Appeals Tribunal or if the Appeals Tribunal will go on circuit and hear matters at different locations. Traveling to different locations will mean that a significant amount of time will be lost to travel and will further reduce the Appeals Tribunal's ability to deal with its caseload.

19. According to **regulation 9** the Appeals Tribunal may develop its own rules governing the proceedings of the sittings, the conduct of its members as well as other related matters.

20. We submit that the creation of the Appeals Tribunal has already brought to life an administrative process that is cumbersome to say the least. In the event that the Appeals Tribunal can create their own rules, the process will become even more cumbersome.

21. The creators of this administrative process are of the opinion that this type of process will alleviate the congestion in the judicial system. We are however of the opinion that the Appeals Tribunal will be faced with more congestion than there ever was in the judicial system. Furthermore, the cost of establishing and sustaining this entity will be enormous and will ultimately be funded by normal taxpaying citizens of South Africa.

22. Regulation 11 sets out the Appeals Tribunal's procedure and we are of the opinion that the entire procedure is cumbersome, convoluted, highly technical, costly and not accessible to ordinary South Africans.

23. We believe that this procedure does not in the slightest promote road safety but is clearly a money-making procedure. Ordinary South Africans will most probable rather elect to pay (even if they are not guilty of an infringement) to avoid the administrative hassle than to participate in a process that is non sensical.

24. Regulation 11 also sets out specific timeframes applicable to the process. We firmly believe that the timeframes as identified, are not practical in the South African context and will be nearly impossible to adhere to. It therefore confirms our position that this administrative system will not be able to properly function as intended.

25. In terms of regulation 13(7), any administrative process in relation to the infringement notice shall be suspended pending the decision of the Appeals Tribunal. According to the process laid out in the regulations, an infringer has the right to appeal to the Appeals Tribunal if a representation that was made to an Issuing Authority or the Authority, was rejected. The representations may be made when an infringer receives an infringement notice or a courtesy letter. The intention of the Minister is unclear when he refers to the administrative process relating to infringement notices. Does this administrative process only bear reference to infringement notices or is it also applicable to courtesy letters?

26. Furthermore, regulation 13(7) does not mention the suspension of demerit points, if any, pending the decision of the Appeals Tribunal. It is thus unclear whether this regulation is applicable or not to demerit points and whether demerit points will be suspended or not pending the decision of the Appeals Tribunal. Clarity is needed.

27. Regulation 15(6) states that an infringer who makes representation to the Authority within the prescribed period and who's representation gets rejected, will not be entitled to a discount if he/ she subsequently approaches the Appeals Tribunal. An infringer will be liable for the full penalty amount and applicable fees.

28. We are of the opinion that regulation 15(6) is unfair and unreasonable because an infringer who chooses to exercise his right to follow the prescribed procedure and approaches the Appeals Tribunal, will be prejudiced when he/

she follows due process. We fail to understand why an infringer is deliberately prejudiced (by not qualifying for a discount) if he or she follows due process. The only reasonable explanation is that this administrative process does not in essence focus on road safety but on making money.

Regulation 20

29. Regulation 20(1) read together with section 26 (1) of the AARTO Act regulates the disqualification and cancelation of documents and the way an infringer must be informed when he/ she incurred more than the number of demerit points stipulated in these regulations. Regulation 20(1) stipulates that an infringer, who incurred more than the number of demerit points stipulated in these regulations, can be informed by way of registered post (in terms of regulation 34(4)(a)) or by way of electronic service (in terms of regulation 34(4)(b)). Section 26(1) of the AARTO Act however, specifically states that an infringer should be informed by way of registered post. Regulation 20(1) is therefor in direct violation of the AARTO Act and *ab initio* void.

Regulation 21

30. Regulation 21(4) refers to rehabilitation programs and the different types thereof. Regulation 21(4)(c) specifically refers to "…any other appropriate rehabilitation measures as approved by the Authority." We are of the opinion that the regulation is vague because it does not provide the qualification criteria for possible service providers nor does it give clarity on what these "other appropriate rehabilitation measures" constitute.

Regulation 24

31. Regulation 24 regulates the manner and the process to be followed when an infringer wants to pay (if he or she so elects) a penalty and fee (if applicable) in instalments. Regulation 24(4) stipulates that where payments in instalments are made such payment may not exceed ten (10) monthly payments. We are

of the opinion that the number of instalments should not be limited and we suggest that the quantum of the instalments should rather be capped at a certain minimum amount. This will enable South Africans who are not financially sound to elect to pay in instalments.

32. Furthermore, the prescribed form AARTO 4 that is used in an application to pay in instalments, states that the maximum period allowed for the payment in instalments are six (6) months. We submit that the regulation and the form attached to the regulation are contradictory and warrant further amendment.

Refunds

33. Regulation 26 refers to the process in terms of which an infringer may apply for a refund of penalties and fees paid. Regulation 26(4) stipulates that the Authority must consider the application and either refund the excess amount or refuse the refund. The regulation does not clarify if an infringer who has applied for the refund that was subsequently refused, has the right to appeal or review the decision of the Authority to the Appeals Tribunal. It is not expressly stated and we believe it warrants clarity from the Minister.

Electronic equipment

34. In terms of regulation 38(3), AARTO 2 (Infringement Notices) must be obtained from the Authority and installed on electronic equipment for the electronic generation and printing of notices at the roadside. Creating regulations that places a duty on government (ultimately South African taxpaying citizens) to fund electronic equipment in order to enforce this system, is absolutely irrational. We reiterate our opinion that the whole AARTO administrative system is going to be costly and ultimately unmanageable because of the financial position South Africa is in (and historic financial challenges).

35. Currently AARTO Notice Books are used. It is therefore inconceivable that additional money must be spent to buy electronic equipment that is most probably not even going to be used.

South African Police Services ("SAPS")

36. Section 1 of the AARTO Act does not include members of the SAPS as authorised officers. Schedule 4 aims to include and to regulate members of the SAPS as authorised officers. We are of the opinion that the Minister is trying to amend the AARTO Act with this regulation which makes Schedule 4 *ab initio* void.

37. Furthermore, we are of the opinion that Schedule 4 will not withstand constitutional scrutiny. Schedule 4 places a restriction and/ or limitation on the powers given to the SAPS in terms of the Constitution of South Africa and other legislation. Schedule 4 prescribes how the SAPS must perform certain functions. The constitution expressly states in section 207 that the National Police Commissioner **must** exercise control over and manage the police services in accordance with the national policing policy and the directions of the Cabinet member responsible for policing. If Schedule 4 is promulgated, it will directly interfere with the powers of the National Police Commissioner in terms of Section 207 of the Constitution.

38. We are also of the opinion that the enforcement of AARTO by an already under staffed police (and metro police) force will not be possible and, unless other alternative arrangements are made, AARTO will not be properly implemented.

B. CROSS - REFERENCING ISSUES

39. From the first page of the proposed regulations, it was apparent that the drafting of the regulations was done in a hastily manner. The reasons for our

averment will become clear and is highlighted hereunder.

40. Regulation 3(2), regulation 4(3)(a), 4(4), 4(5), regulation 5(3), regulation 6(4)(a), regulation 13(3), regulation 20(2)(a), regulation 21(7), regulation 24(3)(a), regulation 26(3)(a), regulation 27(1), regulation 29(1)(c) and regulation 33(2), make specific reference to regulation 34(6) but regulation 34(6) does not exist. Regulation 34 is only numbered up to regulation 34(5).

41. Regulation 14(1) makes specific reference to column 5 of Schedule 3 and the calculation of penalties. However, column 5 of Schedule 3 (which was not amended) refers to the "Classification of Offences". We belief that the correct reference should have been column 6 of Schedule 3.

42. Regulation 14(2) makes specific reference to column 7 of Schedule 3 and the rand value payable in respect of a penalty. However, column 7 of Schedule 3 (which was not amended) refers to "Demerit points". We belief that the correct reference should have been column 8 of Schedule 3.

43. Regulation 15(2) makes specific reference to column 8 of Schedule 3 and the discounted penalty amount. However, column 8 of Schedule 3 (which was not amended) refers to the rand value payable in respect of a penalty. We belief that the correct reference should have been to column 9 of Schedule 3.

44. Regulation 18(1) makes specific reference to section 24(3)(a) of the AARTO Act and the instances where demerit points will be incurred by an infringer. We submit that the reference to section 24(3)(a) is wrong because section 24(3)(a) speaks to an infringer committing two different infringements on the same set of facts and not to the circumstances when demerit points will be incurred by an infringer.

45. Regulation 18(2) makes specific reference to column 6 of Schedule 3 and the

demerit points to be incurred by an infringer. However, column 6 of Schedule 3 (which was not amended) refers to penalties. We belief that the correct reference should have been column 7 of Schedule 3.

46. Regulation 18(3) makes specific reference to column 9 of Schedule 3 and the infringements or offences committed by an operator in terms of section 49 of the National Road Traffic Act. However, column 9 of Schedule 3 (which was not amended) refers to discounts in rand value. We belief that the correct reference should have been column 11 of Schedule 3.

47. Regulation 18(3)(a) refers to column 10 and column 6 of Schedule 3 and the charge code upon which an operator will be charged and the amount of demerit points that would be incurred for those charges, respectively. However, column 10 of Schedule 3 (which was not amended) refers to the penalty minus discount in rand value and column 6 of Schedule 3 refers to the penalty. We belief that the correct reference should have been column 11 and column 7 of Schedule 3 respectively.

48. Regulation 18(8) refers to regulation 15(2). We submit that the reference to regulation 15(2) is wrong because regulation 15(2) refers to the discounted penalty amount if payment is made within 32 days and does not refer (at all) to the holders of foreign driving licenses. We belief that the correct reference should have been regulation 15(3) that does refer to holders of foreign driving licenses.

49. Regulation 19(1)(a) makes specific reference to section 34(1) of the AARTO Act and the access to the demerit point information of a person. We submit that the reference to section 34(1) is wrong because section 34(1) speaks to the Minister's duty to make regulations. We belief that the correct reference should have been section 33(1) which stipulates that any person may ascertain his or her demerit points position in a prescribed manner.

50. Regulation 19(1)(b) makes specific reference to section 34(2) of the AARTO Act and the access to demerit point information requested from an employer with regards to an employee. We submit that the reference to section 34(2) is wrong because section 34(2) doesn't exist. We belief that the correct reference should have been section 33(2) which states that any person who employs a person for the purposes of driving a motor vehicle may in the prescribed manner ascertain the demerit points position of the employee.

51. Regulation 20(2)(c) makes specific reference to regulation 33(1)(a) but regulation 33(1)(a) doesn't exist.

52. Regulations 20(4) makes specific reference to AARTO 21a that will be used to inform an infringer that he/ she has been disqualified for the third time. However, AARTO 21a does not exist and only AARTO 21 was published for comment.

53. Regulation 20(5)(a) refers to regulation 33(2) and the capturing and processing of infringers' details on the National Traffic Information System. However, the reference to regulation 33(2) is wrong because regulation 33(2) does not refer to the capturing and processing on infringers details on the National Traffic Information System but refers to the re-service of documents.

54. Regulation 21(2) makes specific reference to paragraph 9 in Schedule 2. However, the reference to paragraph 9 in Schedule 2 is wrong because paragraph 9 in Schedule 2 refers to interest earned on any credit balance in the AARTO Bank account and not to payment with regards to compulsory rehabilitation programs.

55. Regulation 21(3) also makes specific reference to paragraph 9 in Schedule 2. However, the reference to paragraph 9 in Schedule 2 is wrong because paragraph 9 in Schedule 2 refers to interest earned on any credit balance in

the AARTO Bank account and not to payment with regards to voluntary rehabilitation programs.

56. Regulation 21(10)(b) refers to regulation 20(5). However, regulation 20(5) appears twice and the two regulations numbered 20(5) provide different information. It is therefore unclear which regulation 20(5) is specifically referred to in regulation 21(10)(b).

57. Regulation 27(1) makes specific reference to regulation 21(1). However, the reference to regulation 21(1) is wrong because regulation 21(1) refers to rehabilitation programs and not to the payments of penalties.

58. Regulation 28(2) and regulation 28(5) make specific reference to regulation 29(4) but regulation 29(4) does not exist. Regulation 29 is only numbered up to regulation 29(3).

59. Regulation 34(4)(a) refers to regulation 30. However, the reference to regulation 30 is wrong because regulation 30 deals with personal service and not with service by postage.

60. Regulation 34(4)(c) refers to regulation 29. However, the reference to regulation 29 is wrong because regulation 29 deals with the National Road Traffic Offences Register and not with personal service. We believe the reference should be regulation 30 which deals with personal service.

61. Regulation 37 makes specific reference to Schedule 5. However, Schedule 5 doesn't exist. We are of the opinion that it should probably refer to Schedule 4 that deals with the South African Police Service.

62. The errors mentioned in paragraphs 39 to 61 *supra* create legal uncertainty and make the interpretation of the published regulations difficult and the intention of the Minister unclear. These types of errors do not instil confidence

in the proposed new process.

63. It is abundantly clear that the regulations were drafted in haste and without due regard to the legal soundness thereof. The way these regulations were drafted makes it very difficult to read and to interpret the Minister's express intention.

64. We humbly submit that the Minister should correct the highlighted errors and only then publish the regulations for comment.

C. GENERAL COMMENTS:

65. We have noted that there is no mention of a regulation 22 anywhere in the regulation. It is not clear: is this a numbering issue or was regulation 22 not printed?

66. Schedule 3 was not amended and therefore not published for comment. However, most of the regulations currently published for comments rely heavily on Schedule 3 and no proper comment on the regulations can be made unless the regulations and Schedules are evaluated as a whole. We are of the opinion that the regulations should not be promulgated yet. Schedule 1,2,3 and 4 should be published together for comment because Schedule 3 has a direct impact on the other already published Schedules and regulations. If the regulations are promulgated and Schedule 3 is later amended and published for comment, the regulations and Schedule 2 will have to be amended and published for comment again because the regulations and Schedules are so intertwined that the one cannot be read without the other. Therefore, the process will start afresh and will make the process that we are now undergoing moot.

67. The current AARTO pilot project has been in force and in affect in the Johannesburg and Tshwane metros for the past 10 years but has not yielded positive results if the AARTO system was indeed aimed at road safety as is claimed. After the Amendment of the AARTO Act and subsequent publicity of the regulations, it is abundantly clear that the intention of the legislation and the regulations is to make money and not to promote road safety.

68. What was created was a system that is complicated, expensive and cumbersome and in doing so citizens are being forced to pay the infringements (whether guilty or not) in order to avoid a cumbersome process.

CONCLUSION

69. In conclusion, we reiterate that OUTA 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 rational and aligned with the basic principles envisaged in our Constitution.

70. We trust that you find the above in order and thank you in advance for considering our comments.

71. In the event that you have any further questions or queries, kindly contact our Chief Legal Officer, Stefanie Fick on stefanie.fick@outa.co.za.

Kind regards,

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