



To: **Speaker of the National Assembly**  
Via email: [speaker@parliament.gov.za](mailto:speaker@parliament.gov.za)  
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14 October 2020

Dear Honourable Representatives

**RE: Comments on the draft Animals Protection Amendment Bill, 2020**

We, Animal Law Reform South Africa (“**ALRSA**”), refer to the “Notice of Intention to Introduce a Private Member’s Bill and Invitation for Comment on the Draft, namely the Animals Protection Amendment Bill, 2020” in terms of Notice 497 of 2020 published in Government Gazette No. 43702 of 11 September 2020 (the “**Notice**”).

We subsequently requested a copy of the proposed draft Animals Protection Amendment Bill (the “**Draft Bill**”) which was received via email on 21 September 2020. We note that as per the South African Government [Website](#), the Comment date is listed as October 14<sup>th</sup> 2020, and this is what we have based our Submission date on.

By way of background, ALRSA is a non-profit company and a registered NPO, composed of compassionate legal professionals. We envisage a society and legal system that adequately protects both humans and nonhuman animals. We work on connecting three core focus areas: Animal well-being, Social Justice and Law. We focus on a few key areas that we believe will bring about the most change. These focus areas include: Legislative and Policy Reform; Litigation and Legal Services and Education and Research.

At the outset we wish to thank you for your work to ban the testing of cosmetics of animals in the Republic of South Africa. We welcome the intention behind this Draft Bill and support your efforts.

For purposes of our Submission, we have included information that we believe may assist with the content of the Draft Bill, certain resources as well as some practical considerations as they pertain to the Draft Bill and the enforcement thereof.

As such, please consider these suggestions which we look forward to engaging with you further on. We are also happy to provide you with further information or resources.

Kindly confirm receipt of our comments (“**Submission**”) and address further correspondence to the email address: [amylwilson@animallawreform.org](mailto:amylwilson@animallawreform.org).



Yours sincerely,

A handwritten signature in black ink, appearing to read 'APW'.

**Amy P. Wilson**

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## 1. Introduction and Background

- 1.1. At the outset, we wish to record that we welcome this Draft Bill and the prohibition of the testing of cosmetics on animals as well as the sale and manufacturing of cosmetics that are tested on animals. Animal testing involves severe harm to animals and their welfare. There is also no necessity for humans to do so given the wide-ranging alternatives and methods which already exist. Animal testing is further more largely unsuitable to determine the safety nor suitability of products and other substances for humans.
- 1.2. Accordingly, we support the Draft Bill and thank you for this initiative. What follows below, are some proposals and considerations to assist with the process ahead.
- 1.3. As recognised in the Memorandum on the Objects of the Notice (the “**Memorandum**”), there are many jurisdictions around the world that have taken similar steps to ban the use of animal testing for cosmetics and household products and we are pleased that there is movement for South Africa to join them.
- 1.4. We wish to draw your attention to a huge number of other jurisdictions around the globe that have made legal efforts pertaining to vivisection, that have not been included in the Memorandum. In this regard, please see this [Timeline of Legislative Anti-Vivisection Reforms](#)<sup>1</sup>. We believe it would be helpful in the Parliamentary process to utilise this document to assist other MPs in recognising that this Draft Bill is not only possible and non-controversial, but that there is a global movement in this regard to move away from utilising animals for these and related purposes.
- 1.5. In addition to the Memorandum’s summary of the global movement to ban cosmetics testing, since the call for comment on the Draft Bill, new cosmetics regulations have been published in China, which is the largest importer of cosmetics - constituting 21.3% of the global market.<sup>2</sup>

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<sup>1</sup> Rise for Animals: [https://riseforanimals.org/wp-content/uploads/2020/09/Vivisection-Reforms-Timeline.2020.09.29\\_compressed.pdf](https://riseforanimals.org/wp-content/uploads/2020/09/Vivisection-Reforms-Timeline.2020.09.29_compressed.pdf)

<sup>2</sup> Workman, Daniel, 01 April 2020, “Beauty Cosmetics and Skincare Imports by Country.” *World’s Top Exports*, <http://www.worldstopexports.com/beauty-cosmetics-and-skincare-imports-by-country/> [Accessed 08/10/2020]



These regulations move to waive toxicology tests for imported cosmetics (where animal testing was previously mandated), if the product's quality and safety have been demonstrated by approved methods, which includes some non-animal methods. This is a significant development, as China is the last remaining major jurisdiction which requires animal testing for certain products.

- 1.6. Further, two of the largest cosmetics companies in the world, Unilever (in the European Union or “EU”) and Proctor & Gamble (USA) will no longer test their products on animals unless they are required to do so by law. Both have also expressed support for a global ban on cosmetics testing.<sup>3</sup>
- 1.7. There are now numerous non-animal testing methods which can and are being utilised across the globe.<sup>4</sup> As recognised in the Memorandum, the cosmetics market of the largest cosmetic producing region, the EU, has thrived since instituting a ban on both the testing of cosmetics on animals and the sale of cosmetics that have been tested on animals, regardless of a particular cosmetic's origin.<sup>5</sup>
- 1.8. We hope that this is the first of many steps to improve the protection for animals in the law and to bring this area of regulation in line with *inter alia* constitutional values, public sentiment and others. We wish to note that a similar Draft Bill was introduced in 2017, which was far more extensive (hereinafter the “**2017 Draft Bill**”). For example, it included a formal recognition of animal sentience and extended the capability of enforcing aspects of the Animals Protection Act 71 of 1962 (“**APA**”) to court-registered animal welfare organisations. While we have commented specifically on the issues contained in the Draft Bill for this Submission, we believe that it is worth considering whether there is a possibility to introduce

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<sup>3</sup> Unilever: <https://www.livekindly.co/dove-now-certified-cruelty-free-as-unilever-demands-global-ban-on-animal-testing/>;

Proctor & Gamble: <https://www.businesswire.com/news/home/20190221005523/en/Procter-Gamble-Supports-Worldwide-Ban-on-Cosmetic-Animal-Testing-Joins-Humane-Society-International%E2%80%99s-BeCrueltyFree-Campaign>

<sup>4</sup> Bryce, Emma, 04 May 2020, “What Are the Alternatives to Animal Testing?” *Live Science*. Online: <https://www.livescience.com/65401-animal-testing-alternatives.html> [Accessed 07/10/2020]

<sup>5</sup> Workman, Daniel, 02 May 2020, “Beauty Cosmetics and Skincare Exports by Country”, *World's Top Exports*. Online: <http://www.worldstopexports.com/beauty-cosmetics-and-skincare-exports-by-country/> [Accessed 07/10/2020]



some further amendments as part of this parliamentary process.

1.9. Constitutional Court judgments (such as *NSPCA v Minister of Justice and Constitutional Development and Another*<sup>6</sup>) among others, require us to re-examine our relationship with and laws relating to animals. It is unclear why the amendments regarding sentience and the expansion of protection capabilities were removed from the Draft Bill. There were also various other issues that were in the 2017 Draft Bill that we believe would be useful to include as part of this process. We thus encourage you to explore potentially expanding on some of these for purposes of the Bill that is ultimately introduced. We had both provided direct input into the 2017 Draft Bill, as well as provided comments as part of the public process (together with other organisations), which can be found on our [Website](#).<sup>7</sup>

1.10. Despite our general support for the Draft Bill, we are of the view that it could potentially be improved in various ways. In summary, our submissions are as follows (non-exhaustive and can be expanded on if required):

1.10.1. There should be a prohibition on the manufacturing and sale of cosmetics which were in whole or part tested on animals beyond South Africa's borders, not only those which were tested within South Africa's borders. Absent this type of prohibition, the new legislation could easily be circumvented by companies importing products tested on animals from outside South Africa. As no animal testing takes place within South Africa, the only way to assist animals impugned by cosmetics testing is to institute a ban on importing and selling cosmetics tested on animals, regardless of the location of such testing.

1.10.2. We support a strict liability offence for companies, organisations and other stakeholders involved in the cosmetic industry in this regard;

1.10.3. We submit that there should be a prohibition on utilising animal products in the formulation and production of cosmetics or alternatively a requirement to utilise

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<sup>6</sup> 2017 (4) BCLR 517 (CC)

<sup>7</sup> <https://www.animallawreform.org/wp-content/uploads/2019/01/3.-Comments-on-Animal-Protection-FINAL-CLEAN-1.pdf>



alternatives where these exist; and

1.10.4. We suggest that there should be a requirement for companies, organisations or stakeholders to obtain certification that they do not use animals for testing if they are to manufacture, import and/or sell such products in South Africa.

## 2. Section 1 – Definitions

2.1. ‘Cosmetic’ – it is important to recognise that some people distinguish between cosmetics which are usually inessential to daily life – such as make-up and perfumes – and toiletries which are essential to human hygiene – soap, toothpaste and shampoo. The current definition is wide enough to embrace both categories but, given the possible confusion in future by courts, it would be useful to clarify that the Act seeks to include both these categories and that “toiletries” are expressly included in the definition of “cosmetic.”

2.2. We welcome the inclusion of “any ingredient of any such article, preparation or substance” in section 1(c). The Draft Bill is silent on adequate oversight, regulation and enforcement in this regard. This would be an important element to consider in relation to the Draft Bill.

2.3. The Draft Bill as it is currently drafted fails to include a prohibition on the testing of household products on animals. This type of testing may be equally, if not more harmful to animals as compared with cosmetic testing.<sup>8</sup> It is also unnecessary given the current adequate number of alternative methods to test such products and the number of existing products that have already been tested and declared safe. Prohibiting testing of cosmetics on animals and not including household products thus has no rational basis; the same mischief (unnecessary animal testing) addressed and there are no rational reasons for distinguishing between household products and cosmetics testing. The phrase “and household products” along with a suitable definition should be added to every relevant reference to cosmetics in the Draft Bill.

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<sup>8</sup> L, Featherstone ‘Testing of household products in animals: Written statement - HCWS385’ 12 March 2015 *United Kingdom Parliament*. Online: <https://www.gov.uk/government/news/ban-will-end-testing-of-household-products-on-animals#:~:text=Testing%20of%20household%20products%20on%20animals%20will%20be%20banned%2C%20Crime,Minister%20Lynne%20Featherstone%20has%20announced>. [Accessed 07/10/2020]



2.4. A proposed definition for household products that could potentially be considered might be:

*“Household Products’ are products bought by the general public for use in the domestic home and garden. They include, but are not limited to, detergents, polishes and cleaning products, laundry products, household cleaners, disinfectants, air fresheners, toilet cleaners, descalants, deodorisers, adhesives, paints and varnishes, sealants, caulks and other decorating materials.”*

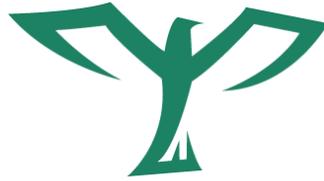
2.5. In addition to the above, while we note that there is no proposal with regard to the definition of “animal” in the APA, we wish for it to be made explicit that same includes fish as well as reptiles. There has been some debate as to certain animals being excluded from the scope of the APA, and we submit that the definition should be clear and there should not be exclusions from the definition. Fish are some of the most utilised animals in testing and should deserve protection from the APA as well as the Draft Bill.

### 3. Section 2 – Testing Offence

3.1. Section 2(a)(n4) states that any person who ‘tests a cosmetic on an animal’ shall be guilty of an offence. We welcome the inclusion of this provision. As the crime of acting in this manner applies only within South Africa, where (apparently) no cosmetic testing currently takes place, please see our submission on prohibiting the sale and manufacture of cosmetic products tested on animals, no matter their origin, by amending the Foodstuffs, Cosmetics and Disinfectants Act, 1972 (“**FDCA**”).

3.2. The 2017 Draft Bill increased the maximum sentence for committing an offence under the APA. The 2020 Draft Bill does not seek to do so. Given that the current sentencing limits are outdated and that parliament needs to send a strong message to South Africans that cruelty to animals should not be tolerated, we submit that the 2017 proposed amendment should be maintained in the 2020 Draft Bill, namely: the words following paragraph (s) of sub-section 1 should be substituted by the following words: ‘

*“shall, subject to the provisions of sub-section (1A) in respect of a company and subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding [**twelve months**] 10 years or to such imprisonment without the option of a fine.”*



3.3. The 2017 Draft Bill expressly extended liability for testing cosmetics on animals to companies, directors and prescribed officers. It is not clear why this aspect was taken out in the 2020 Draft Bill. We propose that such liability be maintained in the 2020 Draft Bill and, thus, that the following section be added, after section 2, subsection (1):

*“(1A) For the purposes of sub-section (1), where the person is a company, every director or prescribed officer of the company, shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years or to such imprisonment without the option of a fine.”*

3.4. Section 2(b) of the Draft Bill states that, “the testing on an animal of an ingredient that may be included in a cosmetic, shall not constitute an offence where that testing is for a purpose unrelated to the use of that ingredient in a cosmetic.”

3.5. We are of the view that this exception creates a loophole in the legislation, is vaguely worded, open to abuse, and should be removed from the Draft Bill. It creates an open-ended exception which suggests that any purpose other than cosmetic testing is allowable which is not acceptable. If there is to be such an exception (something we do not support), we suggest it includes a closed list of reasons (for example an exception for specific medical research).

3.6. In 2013, the European Federation for Cosmetic Ingredients (EFCE) tried to create a similar in the EU Ban. In 2013, the EFCE was referred to the European Court of Justice (ECJ) in 2014 after approaching the London High Court for a judicial opinion as to whether the cosmetics industry is legally allowed to use data from tests that use animals for purposes other than testing the safety of cosmetics (e.g. for medical or household product testing).<sup>9</sup> The ECJ found that such data cannot be relied upon to support the safety of cosmetics products inside the EU because doing so would be contrary to the objective of reducing the prevalence of animal testing in the cosmetics sector.<sup>10</sup> Thus, the EU ban prohibits cosmetics containing ingredients which were tested using animals from being marketed, even where

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<sup>9</sup> *European Federation for Cosmetic Ingredients v Secretary of State for Business, Innovation and Skills and Others* Case C-592/14

<sup>10</sup> *Id.*, pp8-9



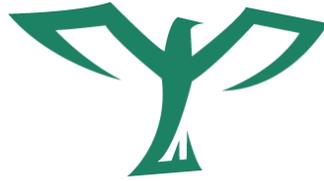
such ingredients were not tested for reasons other than ensuring the safety of a cosmetics product. There is no reason why the South African ban should be any different. Thus, we propose that section 2(b) of the Draft Bill should be removed.

- 3.7. In the alternative, we propose that section 2(b) of the Draft Bill be amended to require that persons who wish to test such chemicals on animals and who wish to use the exception must be certified, before testing begins, that such chemicals will be used by them in non-cosmetic products. In order to be certified, they should be required to show conclusive proof of marketing and selling the non-cosmetic product in question, and that the particular chemical is used therein.
- 3.8. It may be necessary for the Minister to make regulations regarding the proposed ban on testing cosmetics on animals. We submit that the original, non-controversial insertion to the 2017 Draft Bill should be maintained, in this regard. Namely, section 10 should be amended by the insertion, after paragraph (c), of the following words:

*“(cA) the testing of, subject to section 2(1)(pA), any compound, chemical, foodstuff, disinfectant or other matter on an animal and minimum standards related thereto; and”*

#### **4. Amendment of Foodstuffs, Cosmetics and Disinfectants Act**

- 4.1. The Schedule to the Draft Bill proposes amending FCDA to render it consistent with the APA.
- 4.2. In our view, these provisions do not go far enough. The intention of the Draft Bill involves recognising the need to eliminate the testing of cosmetics on animals and that this is unjustifiable. Given the global nature of the cosmetics industry, such a goal would not be achieved by a prohibition on animal testing within South Africa only. It is necessary to prohibit the importing and selling of products in South Africa, from wherever they originate, that contain any ingredient that has been tested on animals within a specified period of time, and/or that contains any animal product. This is because most of the products sold in South Africa today originate from corporations with global production systems.
- 4.3. As such, the Draft Bill would be ineffective if it prohibits a practice that can simply be



circumvented by allowing it to continue in a jurisdiction where the practice is allowed. Consequently, it is necessary to prohibit the manufacture, importing or sale of products tested on animals, or which contain ingredients tested on animals within a specified time, whether that occurs in South Africa or elsewhere. This will also send a strong message that South Africa does not support harm against animals, globally.

- 4.4. The European Union (EU) has imposed a ban on the marketing of cosmetics tested on animals, no matter their origin. We include below a portion of the European Council's regulations that pertain to testing on animals for your reference:

*“Article 18*

***Animal testing***

*Without prejudice to the general obligations deriving from Article 3, the following shall be prohibited:*

*the placing on the market of cosmetic products where the final formulation, in order to meet the requirements of this Regulation, has been the subject of animal testing using a method other than an alternative method after such alternative method has been validated and adopted at Community level with due regard to the development of validation within the OECD;*

*(b) the placing on the market of cosmetic products containing ingredients or combinations of ingredients which, in order to meet the requirements of this Regulation, have been the subject of animal testing using a method other than an alternative method after such alternative method has been validated and adopted at Community level with due regard to the development of validation within the OECD;*

*the performance within the Community of animal testing of finished cosmetic products in order to meet the requirements of this Regulation;*

*the performance within the Community of animal testing of ingredients or combinations of ingredients in order to meet the requirements of this Regulation, after the date on which such tests are required to be replaced by one or more validated alternative methods listed in Commission Regulation (EC) No 440/2008 of 30 May 2008 laying down test methods*



*pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) or in Annex VIII to this Regulation.”*

- 4.5. From our research the EU has experienced no major problems with implementing the ban (the EU cosmetics market has, in fact, thrived) and there has been no challenge to the ban at the World Trade Organisation (WTO). There was initial concern that the ban would be challenged by countries worried that their exports into the EU would be blocked by means of the ban.<sup>11</sup>
- 4.6. Art. III:4 of the General Agreement on Tariffs and Trade (GATT) holds that like domestic and foreign products must be treated alike. Only the end product is considered when determining ‘likeness’; the process by which a product is brought to market (manufactured and/or tested) is not relevant to the GATT’s conception of ‘likeness’. Thus, there was a concern that differentiating between two products on the basis of the method of testing could contravene Art III:4. Possibly encouraged by lobbying from the US and the European cosmetics industry,<sup>12</sup> the EU Commission wanted to avoid such contravention by redacting the marketing ban, only instituting the testing ban (which only applies to EU member states).<sup>13</sup> But then the EU Parliament reinstated its intent for a ban (pursuant to sufficient availability of alternative methods of testing).<sup>14</sup> The most likely reason for the EU Parliament ignoring WTO concerns is because of Art XX of the GATT. Art. XX includes measures necessary to protect public morals<sup>15</sup> and animal health.<sup>16</sup>
- 4.7. France raised similar concerns to the Commission in a case it brought before the European

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<sup>11</sup> Ziegler, Oliver. 2012. *EU regulatory decision making and the role of the United States: transatlantic regulatory cooperation as a gateway for U.S. economic interests?* Springer., p179

<sup>12</sup> Ibid., p178

<sup>13</sup> Ibid., p190

<sup>14</sup> Ibid., p196

<sup>15</sup> Art. XX(a) of the GATT

<sup>16</sup> Art. XX(b) of the GATT



Court of Justice (ECJ) in order to get a partial annulment of the marketing ban.<sup>17</sup> France argued that Art XX of GATT did not save the possible contravention of Art. III:4 because of countervailing human health concerns.<sup>18</sup> However, Art XX had previously been used by the US to justify a ban on the “importation and sale of dog and cat fur products” and, thus, the US’s argument was weakened.<sup>19</sup> France also raised a variety of other allegations such as a lack of clarity in the text of the amendment to the Cosmetics Directive and an infringement of the freedom to pursue a professional activity that was excessive, intolerable, and contrary to the principle of proportionality. The ECJ rejected France’s challenge on the basis that, under EU law, a partial annulment of an Act of EU Parliament, “is only possible if the part for which annulment is sought can be severed from the remainder of the Act. The ECJ concluded that when partial annulment of the EC Act would result in an alteration of the substance of the Act, the requirement of severability is not satisfied.” Since the marketing ban constituted “one of the principal axes of the amendment,” it could not be annulled.<sup>20</sup> The failure to overrule the EU’s marketing ban in international law, the lack of a challenge at the WTO, and the implementation of similar bans, globally, mean that a prohibition on the importing and sale of cosmetics tested on animals will likely be successful and not subject to challenge.

- 4.8. Further, the current ban, which only affects local producers of cosmetics, may mean that such producers could challenge the legislation for irrationally discriminating between local and foreign producers of cosmetics. Thus, we propose that the prohibition on selling cosmetics should not depend on the geographical origin of such products. The prohibition could be made simpler than the EU ban, in light of proposed amendments to the FCDA. Instead of simply prohibiting manufacturing and selling products tested on animals “in the Republic”, the proposed amendment,<sup>21</sup> should be changed to read “in the Republic or in any other

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<sup>17</sup> Case C-244/03, *French Republic v. European Parliament and the Council of the European Union*, 2003 O.J. (C 171) 20

<sup>18</sup> Donnellan, L., 2006. Animal testing in cosmetics: recent developments in the European Union and the United States.

13 *Animal L.* 251., pp.261-62

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*, p266

<sup>21</sup> Point 1(b) of the schedule to the draft Bill and proposed section 2(1)(d) of the Foodstuffs, Cosmetics and Disinfectants Act.

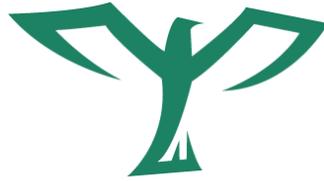


country or jurisdiction”. We note that this provision could incur a delayed commencement date of no more than one year so that importers and other affected and impacted stakeholders can prepare and adjust their businesses accordingly.

- 4.9. Such a prohibition on the import and sale of cosmetics tested on animals will not have a negligible impact on importers. Because of the sizeable EU market, which exports 45.6% of the world’s cosmetics,<sup>22</sup> importers have plenty of options of cruelty-free cosmetics from which they can source their products. Such a ban on importing cosmetics tested on animals will also stimulate demand for South African cosmetics, which are not tested on animals (and will be banned from doing so in the future). Locally produced and tested cosmetics will have an advantage over imports, energising the local economy.
- 4.10. The FCDA should also be modified to include a prohibition on manufacturing and selling products that include products derived from animals. Cosmetics have often been created by using products from animals which have been maltreated. Placing such a prohibition in the Act would prevent such practices. There is no need to create cosmetics with animal products and doing so would hence improve animal welfare. The same arguments supporting the proposed ban on testing cosmetics on animals, in turn, support a ban on using products derived from animals in cosmetic products: the processes inherently involve large-scale animal suffering, which is unnecessary (there are many alternative non-animal-derived products that we can use instead) and unjustified (we should not make animals suffer for the triviality of beauty).
- 4.11. Para 1(c) of the schedule to the Draft Bill contains the same exception for the testing of chemicals not solely intended for use in cosmetics, as found in section 2(b) of the Draft Bill. The same proposals apply, as set out in further detail above.
- 4.12. The Draft Bill is not sufficiently clear on how it will be enforced. One way we propose that could be included as part of the enforcement mechanisms, is that the Draft Bill should require companies operating in the cosmetics industry in South Africa to apply for accredited

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<sup>22</sup>Workman, *supra* n4



certificates of compliance. Upon application, they would be required to show that, for each product, their testing procedure did not involve animals at any point during the research, development or production stages, after the commencement date of the relevant amendments. Such a declaration could be administered by customs and excise officers, already tasked with administering aspects of the Foodstuffs, Cosmetics and Disinfectants Act to ensure compliance with the proposed amendments.