ASSAf Update on the *Code of Conduct for Research* to Stakeholders - 21 February 2022

Dear Stakeholders,

We want to take this opportunity to thank you for your participation in the drafting process and for commenting on the ***ASSAf's Code of Conduct for Research (CoC)***. We also want to provide you with an update on the CoC's progress.

We have contracted Elizabeth de Stadler from Novation Consulting to assist in preparing the final draft of the CoC for a successful accreditation process. Novation Consulting specialises in data protection law and plain language document drafting. Novation Consulting also has prior experience in the academic and research spaces, having already worked with USAf and several higher education institutions on various POPIA-related initiatives.

In this document we will:

- outline what will change in the next draft of the CoC;
- provide a timeline for accreditation;
- highlight what institutions can do in the interim to raise POPIA compliance levels; and
- discuss the prior authorisation requirement and how it might affect your institutions.

1. Novation Consulting's brief (what will change in the next draft of the CoC)

We have briefed Novation Consulting to assist with the following:

- to create a more user-friendly CoC that complies with the plain language requirement stipulated in the official Guidelines to develop CoC; and
- to resolve outstanding issues in the CoC raised in the stakeholder submissions.

Important: Since the updates to the draft CoC will be substantial, we have decided

to allow for further submissions and suggestions on the revised draft CoC by all stakeholders. While this will delay the accreditation process, we believe that it is more important to ensure that the CoC has the support of the majority of the research community.

2. A timeline for accreditation

Below we have outlined the next steps in the accreditation process.

Novation submits revised draft CoC to ASSAf POPIA Code of Conduct Committee.	28 February 2022
ASSAf circulates CoC for further submissions by all stakeholders.	31 March 2022
Submissions by stakeholders are due.	30 April 2022
Submit the finalised CoC to the Information Regulator. The Information Regulator will publish a notice of intention to accredit a CoC and the CoC will be published again by the Information Regulator for public comment. The Information Regulator estimates that the decision must be made within 13 weeks from the notice of intention to accredit a CoC.	31 May 2022
The Information Regulator decides whether to accredit the CoC or not.	1 September 2022
CoC is accredited and published in *Government Gazette*.	30 September 2022

Commencement date of the CoC.	A date to be determined in the CoC which will be determined by the Information Regulator in consultation with ASSAf.

3. What institutions should be doing in the interim

It is important to note that while the CoC has not been accredited yet, POPIA is in full effect and applies to both existing and future research activities involving identifiable personal information.

We realise that this leaves institutions and researchers in a position of uncertainty while they wait for a CoC to be accredited. In this regard, it is important to remember that the CoC cannot change or detract from the protections provided by POPIA. In other words, the requirements of POPIA will apply even after a CoC is accredited. The CoC will provide certainty by clarifying what POPIA means in the research context and the steps institutions and researchers must take to comply.

There are many strategies that institutions can develop and steps they can take to raise POPIA compliance levels and prepare for the implementation of the CoC, even though the CoC has not been finalised.

We have attaced some examples of what these steps may be as **Annexure A**.

4. Prior authorisation

Some research activities are so high risk that the Information Regulator must be approached for prior authorisation before the activity commences or continues. The purpose of prior authorisation is to allow the Information Regulator to determine whether there are satisfactory safeguards in place to protect the personal information. For the most part, the process is aimed at assessing the security of the information.

The prior authorisation requirement has been in force since 1 July 2021, but until now, it was not necessary to suspend processing pending prior authorisation for research activities that started before 1 July 2021. This requirement will change on 1 February 2022. Research activities subject to prior authorisation will have to be suspended pending prior authorisation. The process takes a maximum of 17 weeks, and if the Information Regulator misses certain deadlines, prior authorisation is automatically

granted.

Important: Very few research activities will be subject to prior authorisation. However, those that are, may be disrupted by this requirement and there is always the risk that prior authorisation is withheld. The only way to be exempt from this requirement is to accredit a CoC in terms of POPIA. This is one of the reasons why ASSAf is developing the CoC. However, the CoC will not be accredited by 1 February 2022.

In **Annexure B** we:

- explain when prior authorisation is required;
- outline the timelines;
- explain the different strategies institutions and researchers can consider.

Here is the Information Regulator's guidance note on prior authorisation. **Here** is the application form.

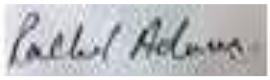
5. Questions and comments

Should you have any questions or have any comments on the information contained in this communication or the CoC itself, please contact Mrs Susan Veldsman at susan@assaf.org.za and Ms Mmaphuthi Mashiachidi at mmaphuthi@assaf.org.za.

We look forward to continuing this process with you.

Prof H Soodyall
Executive Officer

Prof M Ramsay
Committee Chair



Dr R Adams
Deputy Committee Chair

ANNEXURE A: WHAT INSTITUTIONS SHOULD BE DOING IN THE INTERIM

There are steps institutions can take while the CoC is finalised and accredited.

Keep in mind that the CoC will provide guidance on some of the concepts mentioned in this annexure (e.g. when is personal information identifiable?). We have included these steps as examples.

Interim step	**More information**
Identify who will be responsible for implementing the CoC	Researchers will need support from the responsible research institution to discharge their responsibilities in terms of the CoC. It is also in the institution's interest to ensure that researchers comply, as it is the institution that is accountable to the Information Regulator. Who will: • make researchers aware of the CoC? • ensure that they have the skills and training to comply with the CoC? • provide technical support and legal advice to researchers? • review research-related contracts? • monitor high-risk research activities? • adjust the policies and procedures of the institution? This person or team may be led by the institution's deputy information officer(s), but they will need a team to assist them. You can identify and prepare this team now.
Document roles and responsibilities in respect of	The CoC will recommend that institutions document roles and responsibilities regarding research activities. This can be done in policies,

Interim step	More information
research activities	procedures, standards, templates, regulations, key performance indicators, contracts or a combination of governance documents. This is often done in a Research Data Management Policy, but the CoC will not be prescriptive about where roles and responsibilities are documented. It is important to record these roles and responsibilities in writing to demonstrate compliance. Typically, the following roles will include responsibilities relating to POPIA compliance: • the Institution's Information Officer; • the Institution's Deputy Information Officer(s); • legal advisors; • Directors or Heads in charge of research activities; • Information Technology departments; • Research Ethics Committees or other approval bodies; • Principal Investigators, Study Leaders, Supervisors or other leadership positions in research; and • Researchers. These roles can already be defined, and the responsibilities can already be communicated to the individuals involved even though the CoC is not finalised.
Identify and assess existing	POPIA (and the CoC) requires that institutions

Interim step	More information
research data repositories and research projects	keep a record of processing activities or ROPA as it is known in other jurisdictions. This means that institutions should compile a list of all research data repositories and research projects that involve identifiable research participants. The CoC will apply to all research data and research projects, even if the data was collected or the research commenced before the CoC is accredited. A record of processing activities usually includes the following information: • the name of the research activity; • the aim or purpose of the research activity; • the person responsible for compliance for this research activity (e.g. the study leader, principal investigator); • a list of the personal information that will be collected and used; • a list of other institutions, data repositories or researchers with who research data will be shared; • whether a research data management plan exists and where it can be accessed; and • whether any agreements have been concluded with other institutions who will have access to the personal information and where these agreements can be accessed. The CoC will advocate for a risk-based

Interim step	More information
	approach to compliance; the same level of compliance will not be expected of all research activities. The CoC will propose the following screening questions to identify research activities that are inherently high risk: • Is special personal information (as defined in section 26 of POPIA) used in the research activity? **What is 'special personal information'? Who is considered 'a child'?** Special personal information is personal information relating to: health, sex life, religious or philosophical beliefs, race, ethnic origin, trade union membership, political persuasion, biometrics or criminal behaviour. A child is anybody under the age of 18. • Is the personal information of children used in the research activity? • Does the activity involve further processing of personal information that was collected for another purpose? • Will the personal information be available for further processing in other research activities? • Will the personal information be collected from a source other than the data subject? • Will the personal information be linked with personal information collected by another institution?

Interim step	More information
	• Will the personal information be transferred to another country? The more affirmative answers, the higher the inherent risk. The CoC will require screening using these questions, but research institutions can add other questions to the list. A designation as a high risk research activity will mean that stricter controls will be required than in other cases. These controls may include a more in-depth assessment, mandatory research data management plans and more extensive monitoring. Some of these questions are aimed at identifying those research activities that may be subject to prior authorisation. This requirement is discussed in the next Annexure.

ANNEXURE B: APPLICATIONS FOR PRIOR AUTHORISATION

When does a research activity require prior authorisation

What questions institutions should ask	Why institutions should ask these questions
Does the institution use unique identifiers in a research activity to link research data held by other institutions? And, was this linking activity intended at the time when the research data was collected or not? **What is a 'unique identifier'?** A unique identifier is a code or a number that a responsible party uses to identify a data subject in its operations. For example, an ID number or other code or number that uniquely identifies a data subject in relation to a specific responsible party.	Under POPIA, institutions need prior authorisation from the Information Regulator when: • unique identifiers are used in a research activity; **and** • to link information held by multiple institutions; **and** • the linking activity constitutes further processing (secondary use). **Please note:** If the linking activity was intended at the time of collection, this does not constitute further processing, and an institution does not have to apply for prior authorisation.
Does the institution transfer special personal information or the personal information of children to institutions in a foreign country that is not subject to a law, binding corporate rules or a binding agreement that provides an 'adequate level of protection'? **What is 'special personal information'? Who is considered 'a child'?** Special personal information is personal	Under POPIA, institutions must obtain prior authorisation from the Information Regulator to transfer special personal information or children's personal information to a third party in a foreign country that does not provide adequate protection for the processing of personal information. If an institution has a data-sharing agreement in place with the third party

What questions institutions should ask	Why institutions should ask these questions
information relating to: health, sex life, religious or philosophical beliefs, race, ethnic origin, trade union membership, political persuasion, biometrics or criminal behaviour. A child is anybody under the age of 18. **How do you know if a foreign country has 'adequate protection' or not?** In terms of section 72(1)(a) of POPIA, you can transfer personal information to a 'third party who is in a foreign country' as long as the third party is subject to a law, binding corporate rules or binding agreement which provides protection that is substantially similar to the protection provided in POPIA, and that requires similar protection for the further sharing of the personal information with third parties. Establishing whether a law, binding corporate rules or binding agreement provides for 'an adequate level of protection' is not easy. When compared to POPIA, other data protection laws will have some provisions that are stricter and others that provide weaker protections. In the EU, this exercise is referred to as 'adequacy decisions'. The CoC will provide guidance on how to determine whether a country or agreement provides adequate protection. In the interim here is a list of countries that the EU has deemed to have 'adequate levels of	in a foreign country that: • requires the third party to uphold the principles for reasonable processing of personal information that are 'substantially similar' to the principles in POPIA, and • includes provisions about the further transfer to another third party in a foreign country that are 'substantially similar' to section 72 of POPIA, then this is 'adequate protection' under POPIA. Therefore, the institution will not have to apply for prior authorisation.

What questions institutions should ask	Why institutions should ask these questions
protection' equal to the GDPR.	
Must institutions apply for prior authorisation for research projects which started before POPIA commenced?	With POPIA already in effect, the prior authorisation requirement applies to new research projects and research projects that commenced prior to POPIA's commencement date of 1 July 2021, if the linking or transfer continues to take place after 1 July 2021. Therefore, institutions should identify which of their existing and new research projects require prior authorisation from the Information Regulator.

Prior authorisation timelines

For new research projects, prior authorisation must be obtained for new projects before the research data is linked or transferred. Once the application is lodged, the Information Regulator has 4 weeks to indicate whether they will do a full investigation. If they do not provide this notice, the linking or transfer can continue or start.

If the Information Regulator indicates that there will be an investigation, the Information Regulator has 13 weeks to conclude it. Once concluded, the Information Regulator will either grant prior authorisation or issue an enforcement notice containing steps that must be taken before the linking or transfer can proceed. Non-compliance with that notice is an offence and can lead to a fine of a maximum of R10 million for the institution. The notice can be challenged in court. If the 13-week period has lapsed and the Regulator has not sent an enforcement notice, the linking or transfer can proceed or continue.

To be clear, existing research projects will also have to apply for prior authorisation if there is linking or transfer. From 1 February 2022, the linking or transfer will have to be suspended for a 4-week period and for the further 13-week period if the Information Regulator indicates that a full investigation is necessary.

Consequences of not applying for prior authorisation

The first risk that is most important for existing research projects is the disruption to the project. All linking or transferring activities will have to be suspended while institutions wait for the Information Regulator to consider their prior authorisation applications.

The second risk is that it is a criminal offence if institutions do not apply for prior authorisation when they are required to. The consequences of this being a criminal offence are that the Information Regulator can immediately hand the case over to the NPA for prosecution or issue an administrative fine.

Please note:

Once the CoC is accredited, you will not have to apply for prior authorisation at all.

Interim strategies concerning prior authorisation

If institutions have any research projects that require prior authorisation, the options are as follows:

- **Apply for an exemption from section 57(1) of POPIA on public interest grounds.** There is no mechanism to apply for an exemption on behalf of the whole industry (apart from Codes of Conduct). Novation Consulting does not think that an exemption will be granted in time (by February 2022).
- **Comply**. That would mean that institutions need to (a) identify which projects are affected, (b) apply for prior authorisation and (c) suspend processing until they receive authorisation or the statutory periods of 4 weeks and 17 weeks expire. It is unlikely that prior authorisation will be withheld. Novation Consulting has been told that the Information Regulator is swamped.
- **Comply partially.** Apply for prior authorisation but carry-on processing.
- **Don't comply**. It is important to note that a failure to comply is automatically an offence. In other words, there is no enforcement notice first. The Information Regulator can immediately hand the case over to the NPA or issue an administrative fine. Of course, an institution would be able to challenge the case. One would have to argue that the project in question does not fall within section 57(1)(a) or (d) of POPIA. There is some potential leeway there, but the institution would have to show that they considered it. Does Novation Consulting think any of this is likely? No.