

MEMORANDUM ON THE OBJECTS OF THE PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES AMENDMENT BILL, 2021

1. BACKGROUND

1.1 International law requires national legislation to be aligned with international instruments relating to counter-terrorism and binding Chapter 7 (of the United Nations Charter) Resolutions of the United Nations Security Council.

1.2 The Republic has already enacted and implemented the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004) (“principal Act”). The principal Act was regarded as being fit to serve as model legislation regarding counter-terrorism during the 2007 compliance visit by the United Nations Counter-Terrorism Executive Directorate (“UNCTED”). During the compliance visit to the Republic in 2018, the need to make provision in respect of Foreign Terrorist Fighters in the principal Act was expressed by the UNCTED. The UNCTED further expressed—

- (a) the disparity between the sentencing regime in terms of which a more severe penalty may be imposed in respect of money laundering as opposed to terrorist financing;
- (b) the lack of any reference to administrative sanctions for violating asset-freezing orders issued pursuant to section 23; and
- (c) clarification of the applicability of the *aut dedere aut judicare* principle with respect to all terrorism-related offences, particularly those contained in the principal Act.

2. OBJECTS OF BILL

2.1 The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, 2021 (“Bill”), seeks to update the principal Act to developments in international law, to give effect to certain Constitutional Court judgments and to address challenges experienced with conducting investigations and prosecutions. Particular provisions have been inserted to cater for foreign terrorist fighters, to address the sentencing of the financing of terrorism, and the extension of the Extradition Act, 1962 (Act No. 67 of 1962), as required by the report of the UNCTED.

2.2 The proposals involve the amendment of certain definitions in the principal Act, the insertion of some new offences related to maritime and aviation security and addressing the problem of foreign terrorist fighters. It proposes to shift the responsibility for the publication of United Nations Security Council Resolutions in a notice in the *Gazette*, and other appropriate means, to the Minister of Finance in terms of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) (“Financial Intelligence Centre Act”) and the Director of the Financial Intelligence Centre; it simplifies the interpretation of the jurisdiction provision and expands the extradition provisions to all terrorism related offences in the principal Act.

2.3 There are presently 19 international instruments, and one regional (African Union) instrument on counter-terrorism of which the following were adopted after the commencement of the principal Act:

- (a) The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUA Convention”), adopted in Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005;
- (b) the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (“SUA Protocol”), adopted in Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005;
- (c) the International Convention for the Suppression of Acts of Nuclear Terrorism adopted by the United Nations General Assembly on 13 April 2005. The Republic became a Party thereto by ratification on 9 May 2007;
- (d) the Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 26 October 1979. The Republic became a Party thereto by ratification on 17 September 2007;
- (e) the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, adopted in Beijing on 10 September 2010 and signed on behalf of the Republic on 26 September 2013;
- (f) the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted in Beijing on 10 September 2010 and signed on behalf of the Republic on 26 September 2013;
- (g) the Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Montreal on 4 April 2014;
- (h) the Amendment to the Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 8 July 2005;

- (i) the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted in London on 14 October 2005;
- (j) the Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, adopted in London on 14 October 2005; and
- (k) the Protocol to the OAU Convention on the Prevention and Combating of Terrorism, adopted by the Assembly of the African Union in Addis Ababa on 8 July 2004.

2.4 In practice, the publication in terms of the Act of notifications that the UN Security Council has listed an entity as a terrorist entity or connected therewith by Proclamation in the *Gazette* by the President has proven to be a cumbersome process, also delaying the publication of such notices. It is proposed in the Bill that all Resolutions of the United Nations Security Council, which include financial sanctions, must be published by the Minister of Finance in accordance with section 26A(1) of the Financial Intelligence Centre Act.

3. SUMMARY OF BILL

3.1 *Ad clause 1*

This clause proposes the substitution, deletion and insertion of certain definitions in section 1 of the principal Act.

3.2 *Ad clause 2*

Clause 2 proposes to amend section 3 of the principal Act by providing for an offence in respect of entering, departing from, or transiting through or remaining in any country, for purposes of joining or supporting terrorist groups, in other words, to address “Foreign Terrorist Fighters”. The clause further seeks to provide that it is an offence to support an entity engaged in terrorist activities.

3.3 **Ad clause 3**

This clause proposes the insertion of section 3A in the principal Act, which provides for the prohibition of any publications with terrorist related content.

3.4 **Ad clause 4**

This clause proposes the amendment of section 4 of the principal Act by providing that it is an offence to facilitate the retention or control of property on behalf of, or for the benefit of, a specific entity identified by a Resolution of the United Nations Security Council and which is announced by the Minister of Finance in terms of section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by the Director of the Financial Intelligence Centre in terms of section 26A(3) of the Financial Intelligence Centre Act.

3.5 **Ad clause 5**

This clause seeks to insert section 4A in the principal Act, in order to provide for offences related to foreign travel.

3.6 **Ad clause 6**

Clause 6 seeks to amend section 5 of the principal Act by extending the offence related to terrorist bombings to private places.

3.7 **Ad clause 7**

Clause 7 proposes to amend section 6 of the principal Act, by inserting additional offences in accordance with international law.

3.8 **Ad clause 8**

Clause 8 proposes to amend the heading to section 8 in accordance with legislative drafting practices.

3.9 **Ad clause 9**

This clause proposes the amendment of section 9 of the principal Act to provide that it will be an offence to, by any other means, seize or exercise control of an aircraft for the purposes listed in section 9.

3.10 **Ad clause 10**

Clause 10 proposes to amend section 10 of the principal Act by providing for additional offences in accordance with Article 3*bis* of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, as amended by the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005.

3.11 **Ad clause 11**

Clause 11 proposes to amend section 11 of the principal Act by substituting the reference to a specified offence with the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, any Convention offence, or an offence referred to in section 13 or 14. The proposed amendment is consistent with the amendment proposed in section 13 to section 15 of the principal Act.

3.12 *Ad clause 12*

Clause 12 proposes to amend section 12 of the principal Act by providing that no duty of secrecy or confidentiality, or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution as defined in the Financial Intelligence Centre Act, 1998 or any other person.

3.13 *Ad clause 13*

Clause 13 seeks to amend section 13 of the principal Act by providing that the use of false threats to intimidate the public or to divert police resources in order to enable the commission of a crime is an offence.

3.14 *Ad clause 14*

Clause 14 seeks to simplify the language of section 15 of the principal Act following the Constitutional Court judgment of **S v Okah** [2018] ZACC 3. It further amplifies the jurisdictional issues of the principal Act, as well as where a warrant in respect of

offences in terms of the principal Act may be obtained under the Criminal Procedure Act, 1977 (Act No. 51 of 1977). The clause further provides that persons who are not citizens of the Republic, who are not ordinarily resident in the Republic or persons who are stateless must be advised of their rights to consular assistance from the State, where they are ordinarily resident or of which they are citizens. The clause, in terms of international obligations, provides that the relevant governments must be informed of the arrest of such a person for a Convention offence.

3.15 *Ad clause 15*

Clause 16 seeks to amend section 16 of the principal Act and provides that the prosecution for an offence under section 13 may be instituted without the written authority of the National Director and may be authorised by the relevant Director of Public Prosecutions.

3.16 *Ad clause 16*

Clause 16 proposes the substitution in section 17 for the reference to the Department of Foreign Affairs with the Department responsible for International Relations and Cooperation.

3.17 *Ad clause 17*

Clause 17 seeks to align the sentencing, as laid down in section 18 of the principal Act, with the severity of the offence, especially in relation to the financing of terrorism. It also provides for sentences in respect of the offences listed in sections 3A(3) and (4), 4A and 24B(13).

3.18 Ad clause 18

Clause 18 proposes to substitute section 23 of the principal Act as a consequence of the proposed repeal of section 25 and expands on the ambit of, and what may be contained in, a freezing order, the making of ancillary orders, the publication of orders, the appointment of a *curator ad litem* and interim orders.

3.19 Ad clause 19

Clause 19 proposes to amend section 24 of the principal Act by providing for the inclusion of premises which may be cordoned off and searched in accordance with a warrant which may be issued by a judge.

3.20 Ad clause 20

Clause 20 proposes the insertion of section 24A in the principal Act, which provides for the application for a decryption direction by an officer of the Directorate in terms of section 21 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002). The clause further proposes the insertion of section 24B in the principal Act, which provides that a member of the Directorate may apply to a competent court for an order to disable access to an internet or social media site with unlawful terrorism related content.

3.21 Ad clause 21

Clause 21 proposes the repeal of sections 25 and 26 of the principal Act. In the amended Schedule to the Act, it is proposed that the publication of Resolutions of

the United Nations Security Council relating to sanctions imposed on entities linked to terrorism and announced by notice in the *Gazette* should be performed by the Minister of Finance in terms of the Financial Intelligence Centre Act. Amendments to such announcement may be made by the Director of the Financial Intelligence Centre. The proposal will ensure that all United Nations Security Council sanctions are being dealt with by the Financial Intelligence Center and through the same processes.

3.22 Ad clause 22

Clause 22 proposes amendments to section 27 of the principal Act by providing that any proclamations issued under section 25(1), before the commencement of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, 2021, remains valid and has the same force and effect as a notice announced by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given under section 26A(3) by the Director of the Financial Intelligence Centre. Clause 22 also seeks to amend the principal Act to provide that any action taken in pursuance of a Proclamation issued under section 25(1), before the commencement of the Protection of Constitutional Democracy against Terrorist and related Activities Amendment Act, 2021, remains valid.

3.23 Ad clause 23

Clause 23 proposes amendments to the Preamble of the principal Act to reflect South Africa's changed status in respect of having become a Party to certain

counter-terrorism international instruments, including international instruments concluded after the adoption of the principal Act, but not yet in force.

3.24 **Ad clause 24**

Clause 24 proposes amendments to the arrangement of sections of the principal Act.

3.25 **Ad clause 25**

Clause 25 proposes to substitute the Schedule to the principal Act. The proposed amendment to the Intimidation Act, 1982 (Act No. 72 of 1982) (“Intimidation Act”), gives effect to the Constitutional Court Judgment delivered on 22 October 2019 in the matters of ***General Alfred Moyo and Another v Minister of Police and Others*** and ***Nokulunga Primrose Sonti and Another v Minister of Police and Others*** [2019] ZACC 40, where sections 1(1)(b) and 1(2) of the Intimidation Act were ruled as unconstitutional. See also the recommendation of the SA Law Reform Commission in its Report on the Review of Security Legislation: Project 105, at page 1046.

3.26 **Ad clause 26**

Clause 26 provides the short title and commencement of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, 2021.

4. DEPARTMENTS / BODIES / PERSONS CONSULTED

The Bill and proposals were extensively consulted within the Inter-Departmental Counter-Terrorism Working Group (“IDCTWG”), convened by the Department for International Relations and Cooperation, which is also part of the IDCTWG. The IDCTWG also consists of the Department of Home Affairs, the Department of Justice and Constitutional Development, the Department of Defence (Defence Intelligence), the State Security Agency, the National Intelligence Coordinating Committee (“NICOC”), the South African Police Service (Legal Services), Crime Intelligence Division and the Directorate for Priority Crime Investigation, the Department of Correctional Services, the Department of Social Development, the Financial Intelligence Centre (Department of Finance), National Treasury and the Department for Evaluation and Monitoring and the Civilian Secretariat for the Police Service. Consultations took the form of briefings, submission of draft documents for comments, reworking of documents and two Workshops of which the last was during September 2018. One-on-one discussions were, where required, held with individual institutions and Departments, such as the Priority Crime Litigation Unit, the Directorate for Priority Crime Investigations, the South African Police Service: Legal Services. Departments which did not attend the last Workshop were also individually consulted. Discussions were held with the Financial Intelligence Centre on the transfer of the function to announce United Nations Security Council Resolutions pertaining to sanctions relating to terrorism to the Minister of Finance and the Financial Intelligence Centre. There is general consensus by all the role-players on the contents of the Bill. Comments on the Bill were provided by the South African Revenue Service, which were taken into account.

5. FINANCIAL IMPLICATIONS FOR STATE

Financial implications are linked to line-function responsibilities of Departments and would not include new functionalities or actions. The Financial Intelligence Centre has indicated that the transfer of the function relating to the announcement and notification of United Nations Security Council Resolutions will have a minimal effect on the finances of the Financial Intelligence Centre.

6. PARLIAMENTARY PROCEDURE

6.1 The Constitution regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.

6.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.

6.3 A Bill falling within a functional area listed in Schedule 4 of the Constitution must be dealt with in accordance with the procedure set out in section 76. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 of the Constitution lists the functional areas of exclusive

provincial legislative competence. Therefore, those areas not falling within Schedule 4 and Schedule 5 fall within the exclusive national legislative competence.

6.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of *Tongaone and Others v National Minister for Agriculture and Land Affairs and Others*¹ ("Tongaone judgment"), is that any Bill with provisions which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule.² The Tongaone judgment therefore laid down the substantial measures test for the tagging of a Bill which requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4 of the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.

6.5 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 of the Constitution, we submit that section 44(1)(a)(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on "any matter".

6.6 It is therefore the opinion of the State Law Advisers and the Department: Civilian Secretariat for Police Service, that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

¹ CCT 100/09 [2010] ZACC 10.

² *Ibid* paragraph 72.

6.7 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.