



planning, monitoring & evaluation

Department:
Planning, Monitoring and Evaluation
REPUBLIC OF SOUTH AFRICA



civilian secretariat for police service

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SOCIO-ECONOMIC IMPACT ASSESSMENT SYSTEM (SEIAS)

REVISED (2018): FINAL IMPACT ASSESSMENT TEMPLATE –PHASE 2

NAME OF THE PROPOSAL: Proposed Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, 2020

1. Draft SEIAS report will have a watermark word DRAFT indicating the version and should be accompanied by the supporting documents (draft proposal, M&E plan and pieces of research work)
2. FINAL report will be in PDF format and will be inclusive of the sign-off
3. FINAL report will have the approval stamp of the DMPE on the front cover and will include the signoff
4. Sign off forms are valid for six months only

Overall comments by DPME:

1. The SEIAS report is acknowledged
2. Problem statement is general and not supported by empirical evidence. It shouldn't be about compliance to international treaties, there should be a reflection of SA perspective
3. Crosscutting comments by stakeholders are to be captured
4. It seems that the only costs to the bill relates to training and communication, given the emerging nature of new threats, not sure whether training will suffice, what about tools of trade and equipment to maximise security in new security threats areas –aviation and maritime
5. Clear SMART indicators are to be defined for M&E part. Think about types of indicators that SA has to report on around the implementation of the Bill to signatories / or among peers who signed the treaties

SMART is a mnemonic/acronym, giving criteria to guide in the setting of objectives, for example in project management, employee-performance management and personal development. The letters S and M generally mean specific and measurable. Possibly the most common version has the remaining letters referring to achievable, relevant and time-bound. However, the term's inventor had a slightly different version and the letters have meant different things to different authors, as described below. Additional letters have been added by some authors.

PART ONE: ANALYSIS FOR FINAL SEIAS REPORT

Please keep your answers as short as possible. Do not copy directly from any other document.

1. Conceptual Framework, Problem Statement, Aims and Theory of Change

1.1. What socio-economic problem does the proposal aim to resolve?

International law requires national legislation aligned to international instruments relating to counter-terrorism and binding Chapter 7 (of the United Nations Charter) Resolutions of the United Nations Security Council. There is a security threat posed by international terrorism. The proposal is aimed at updating existing national legislation with new developments in the international law, the changing nature of the security threat and best practises. The problem that the proposal aims to resolve is security related. Although no legislative gaps have been identified as a result of litigation, the constitutionality of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 had been challenged. The Constitutional Court found that the jurisdiction provisions are constitutional, but that it can be worded more clearly. (*State v Okah*). The legislative environment relating to terrorism, is contained in terms of crimes in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004. The Act also provides for civil and criminal asset forfeiture. The National Strategic Intelligence Act, 1994 sets out the intelligence mandates of the respective intelligence structures in relation to security treats, including terrorism. The Financial Intelligence Act, 2001, provides for the reporting of suspicious transactions relating to terrorism, whilst the South African Police Service Act, 1995, provides for the investigation of terrorism by the Directorate for Priority Crime Investigation. The Non-Proliferation of Weapons of Mass Destruction Act, 1993, the Civil Aviation Act, 1993, and the Criminal Procedure Act and related legislation provides for matters such as minimum sentences, and extradition. The Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act 33 of 2004) (POCDATARA), was regarded during the 2007 compliance visit by the United Nations Counter-Terrorism Executive Directorate (UNCTED) as being fit to serve as model legislation regarding counter-terrorism. During the compliance visit to the Republic in 2018, the need to provide in the POCDATARA in respect of Foreign Terrorist Fighters was expressed by the UNCTED. The UNCTED also pointed to-

- (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 (1) (a); 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 POCDATARA Act.

The Financial Action Task Force (FATF) of which South Africa is a member, also paid a compliance visit to South Africa during 2019 and recommended amendments to the POCDATARA Act, to be able to more effectively combat the financial of terrorism. 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 POCDATARA:

- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), adopted at Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005.
- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (SUA Protocol), adopted at Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005.
- 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.
- 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.
- Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation 2010, signed by the Republic on 26 September 2013;
- Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, done, at Beijing on 10 September 2010, signed by the Republic on 26 September 2013.
- Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft, done at Montreal on 4 April 2014.
- Amendments to the Convention on the Physical Protection of Nuclear Material 2005.
- Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005.
- Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf 2005.
- Protocol to the OAU Convention on the Prevention and Combating of Terrorism, adopted by the Assembly of the African Union at Addis Ababa on 8 July 2004;

As to empirical evidence, there had already been a number of prosecutions under the POCDATARA Act, as well as instances where South Africans left South Africa to join terrorist

groupings. South Africa is just as vulnerable to international terrorism as any other country. Terrorist movements are active also in Africa and the AU (now African Union) *Convention of the Prevention and Combating of Terrorism* followed bombings in Kenya and Tanzania. Furthermore, the compliance reports of the United Nations Counter-Terrorism Executive Directorate and the FATF are available as evidence that there is on international level persuasive reasons to review and amend the POCDATARA Act. Resolutions of the United Nations (UN) Security Council are binding upon Member States of the UN, as these are made under Chapter 7 of the UN Charter. South Africa has committed itself to the combating of international terrorism.

1.2. What are the main root causes of the problem identified above?

| What socio-economic problem does the proposal aim to resolve | What are the main roots or causes of the problem |
|---|--|
| <p>There is a general international security threat of international terrorism against any government and the public. A variety of security related threats are posed internationally and related to civil aviation, maritime traffic, fixed platforms, bombings, financing of terrorism, hostage-taking.</p> | <p>(a) Existing national legislation requires updating to International Law requirements and streamlining of publication of listings by United Nations Security Council. Non-domestication would result in the Republic not being compliant with huge international implications.</p> <p>(b) 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;</p> <p>(c) the lack of any reference to administrative sanctions for violating asset-freezing orders issued pursuant to section 23 (1) (a); and</p> <p>Particular provisions had to be inserted to cater for Foreign Terrorist Fighters, to address the sentencing of the financing of terrorism, and the extension of the extradition Act, as required by the report of the UNCTED.</p> |

1.3. Summarise the aims of the proposal and how it will address the problem in no more than five sentences.

The proposal aims to update the said Act to developments in international law, a Constitutional Court judgment and to address challenges experienced with conducting investigations and prosecutions.

1.4. Please describe how the problem identified could be addressed if this proposal is not adopted. At least one of the options should involve no legal or policy changes, but rather rely on changes in existing programmes or resource allocation.

| | |
|-------------------------|--|
| <p>Option 1.</p> | <p>None. The Republic is under legal obligation to update the legislation.</p> <p>The main objective of the amendments is to update the legislative framework with the international instruments on anti-terrorism. Such cannot be incorporated/ implemented/enforced without being domesticated into South African law. The only way of achieving this objective is within a legislative framework.</p> <p>Other amendments are in order to strengthen the legal framework on combating terrorism. These also can only be effected through a legislation.</p> |
| <p>Option 2.</p> | <p>Issues such as advanced passenger lists, protocols for search and seizure, are used in combating terrorism, but is not sufficient on its own, without amendments to legislation.</p> <p>The Department of Social Development is considering programmes to address persons who return from countries where they were trained as foreign terrorist fighters especially women and children which programmes does not include legislation, but that on its own is not adequate and just supplementary.</p> |

PART TWO: IMPACT ASSESSMENT

2. Policy/Legislative alignment with other departments, behaviours, consultations with stakeholders, social/economic groups affected, assessment of costs and benefits and monitoring and evaluation.

2.1. Are other government laws or regulations linked to this proposal? If so, who are the custodian departments? Add more rows if required.

General: The combating of terrorism is multi-disciplinary in nature and involves powers being administered by various government departments. The POCDATARA Act, therefore, is also multi-disciplinary in nature and amended a number of laws being administered by different departments and dealing with diverse issues such as extradition, refugees, nuclear materials, maritime safety, civil aviation, investigative and law enforcement powers, finances. The POCDATARA Amendment Bill, also proposes to amend the cross-cutting legislation as indicated in the table hereunder.

| Government legislative prescripts | Custodian Department | Areas of Linkages | Areas of conflict |
|--|--|--|--|
| Criminal Procedure Act 51 of 1977 | Department of Justice and Constitutional Development | Proposed amendment of procedure to apply for warrants (any magistrate or judge). The Act deals with investigations and prosecutions. This issue is cross-cutting with the powers of prosecutors as well as investigators (DPCI). | None. The Chief State Law Adviser advised on further consultations with the Department of Justice and Constitutional Development and this was done and the wording refined. |
| Extradition Act 67 of 1962 | Department of Justice and Constitutional Development | Proposed expansion of extradition to all terrorism offences in line with International Law. This power is of cross-cutting to investigators (DPCI), prosecution, and judiciary and the Department of Justice which administers the Extradition Act. | None |
| Civil Aviation Act 13 of 2009 | Department of Transport | Inclusion of additional provisions related to aviation security. This issue is cross-cutting with powers of investigators, prosecution and Department of Transport which administers the Civil Aviation Act. | Yes. Consultations were held with the Department of Transport (Civil Aviation) The Department indicated that it is busy with a draft Bill which is already being considered by Parliament and which will give effect to the relevant instrument. The provision is therefore deleted from the POCDATARA Amendment Bill. |
| Refugees Act 130 1998 | Department of Home Affairs | Defining "terrorism" reflected in the Refugees Act, in line with the POCDATARA Act. This issue is cross cutting with powers of investigators in ensuring that persons who are linked to terrorism are not allowed to enter South Africa as refugees. | None. |
| National Prosecuting Authority Act | Department of Justice and Constitutional Development | Enforcement of penalties and offences imposed in terms of the Act, including the amendments which in respect thereof, which are provide for in the Bill. | None |
| Nuclear Energy Act 46 of 1999 | Department of Energy | Minor alignment of an existing offence with the 2005 <i>International Convention for the Suppression of Acts of Nuclear</i> | None |

| Government legislative prescripts | Custodian Department | Areas of Linkages | Areas of conflict |
|---|--|--|--|
| | | <i>Terrorism</i> in section 34A of the said Act | |
| Critical Infrastructure Protection Act, 2019 (Act No. 8 of 2019). | Department of Police | The definitions of “ critical infrastructure ” and “ critical infrastructure complex ” in the Critical Infrastructure Act had been included in the POCDATARA Amendment Bill, to ensure that it will be included in the definition of terrorist activity and the offence of terrorism. | None |
| Cybercrimes Bill, 2019 | Department of Justice and Constitutional Development | The Portfolio Committee on Justice and Constitutional Development decided to split the issue of cybercrimes and cybersecurity in the original Bill and to only finalise continue with the cybercrimes part of the Bill. It also decided to remove the provisions related to cyberterrorism from the Cybercrimes Bill. The proposal was initially to amend the POCDATARA in respect of cyberterrorism, through the Cybercrimes Bill. The decision resulted into having to provide in respect of cyberterrorism in the POCDATARA Bill. This had been done by the insertion of a definition for “ critical information infrastructure ” in the POCDATARA and including the term in the definition of “ terrorist activity ”, thereby covering cyberterrorism in the offence of terrorism. | None. AS the Cyber Crime Bill is progressing definitions, etc. which are amended are aligned in the POCDATARA Amendment Bill, 2020 |
| Financial Intelligence Centre Act, 2001 (Act 38 of 2001) | Department of Finance | The Act provides for the publication of United Nations Security Council Resolutions pertaining to financial sanctions, except for terrorism related sanctions. The process in the Financial Intelligence Centre Act, 2004, is expeditious and provides for a two tier publication, namely by the Minister of Finance and any | None. Consultations with the Financial Intelligence Centre showed agreement with the transfer and that the transfer will have minimal financial implications for the Financial Intelligence Centre |

| Government legislative prescripts | Custodian Department | Areas of Linkages | Areas of conflict |
|-----------------------------------|----------------------|--|-------------------|
| | | <p>amendments to existing sanctions by the Director of the Financial Intelligence Centre. It will be more expedient to transfer the function from the President by Proclamation in the Gazette to the Minister of Finance and the said Director.</p> <p>Presently the publication of lists of suspected terrorist entities and persons and other UN Security Council sanctions is cross-cutting with the South African Police Service, but the POCDARA Amendment Bill proposes to centralise this function with the Minister of Finance and the FIC.</p> | |

Proposals inevitably seek to change behaviour in order to achieve a desired outcome. Describe (a) the behaviour that must be changed, and (b) the main mechanisms to bring about those changes. These mechanisms may include modifications in decision-making systems; changes in procedures; educational work; sanctions; and/or incentives.

- a) What and whose behaviour does the proposal seek to change? How does the behaviour contribute to the socio-economic problem addressed?

The crimes and other measures in the Bill which are aimed at combating terrorism should have the effect of deterring persons from committing these crimes. However, the threat is an international one and criminals plan and execute it in many instances from outside a country. Countries which have a weak legal system to combat terrorism are often targeted to recruit and arm terrorists and to finance and plan it. Therefore, the only mechanism to combat the threat is to deter through law enforcement.

The proposals involve the insertion of new crimes and amendments to existing crimes, as well as procedures to apply for warrants, which will require training for investigators, mainly of the Directorate for Priority Crime Investigations (DPCI) and prosecutors of the Priority Crime Litigation Unit of the National Prosecuting Authority. The National Prosecuting Authority has already indicated that there is ongoing periodic training between the Directorate for Priority Crime Investigation and the Priority Crime Litigation Unit, where this can be addressed. Information would also need to be shared with the Magistrates and Judges. Changes related to the asset seizure will involve

training for the Asset Forfeiture Units and investigators. The new proposed procedure for listing in terms of section 25 of POCDATARA will be easier, more expeditious, as the listing would now be made by means of a Notice in the *Gazette* to be issued by the Minister of Finance and subsequent amendments by the Director of the Financial Intelligence Centre. Transitional arrangements will cater for the continuity of law enforcement processes.

The proposals are aimed at criminal behaviour with a particular security threat to governments (not only the South African government) and the public in general. Most of these acts are already criminalised, in terms of the law, but in view of the particular serious nature thereof, are covered under terrorism with a more severe sentencing regime. All participants in the IDCTWG are involved in one way or the other in the combating of terrorism. The imperatives for updating the legislation is, however, not applicable to all, for example the Department of Transport (Civil Aviation) is dealing in their legislation with one of the international instruments.

The proposal further seeks to strengthen the legal country's legal framework for combating money laundering and terrorism financing through, amongst other things, the amendments to the offences and penalties Chapter of the Act. The intention is to bring within the ambit of the Act, all possible measures which are utilised to perform terrorist acts.

The criminalisation of different measures employed by terrorists to perform terrorist acts, should deter or impede the commission of terrorist acts. It is common knowledge that terrorism attacks have a negative impact on the economic development of any country, as it stifles investment opportunities and negatively impacts the tourism industry. This has disastrous socio-economic implications as it takes away from the economic resources which could have been used to uplift the marginalised and the poor.

b) How does the proposal aim to bring about the desired change?

Prevention, combating, detection and prosecution of the threat posed by the crime of terrorism and related activities, as well as deterrence through the sentencing regime, thus effective law enforcement.

2.2. Consultations

a) Who has been consulted inside of government and outside of it? Please identify major functional groups (e.g. business; labour; specific government departments or provinces; etc.); you can provide a list of individual entities and individuals as an annexure if you want.

The draft Bill and proposals had been 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; Department of Correctional Services; Department of Social Development; the Financial Intelligence Centre (Department of Finance); 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 also held with individual institutions such as the Priority Crime Litigation Unit, the Directorate for Priority Crime Investigations, Crime Intelligence and the South African Police Service: Legal Services. Departments which did not attend the last Workshop were individually consulted. The Chief State Law Advisers: International Law of the Department of International Relations and Cooperation had been consulted on whether the draft Bill addresses all the international obligations incurred by the Republic since the adoption of the Act, in 2004. It was conformed that the relevant obligations are all being addressed. The Chief State Law Advisers of the Department of Justice and Constitutional Development has already done their initial scrutiny of the Bill and the amendments proposed by them have been effected to the draft Bill. The draft Bill is now being considered for preliminary certification as required for submission to Cabinet.

Consulted Government Departments, Agencies and Other Organs of State

| Department's name | What do they see as main <u>benefits, Implementation/ Compliance costs and risks?</u> | Do they <u>support or oppose</u> the proposal? | What <u>amendments</u> do they propose? | Have these amendments been <u>incorporated</u> in your proposal? If yes, under which section? |
|---|--|--|---|---|
| National Prosecuting Authority (PCLU); Directorate for Priority Crime Investigation | Simplification of prosecution, legal certainty, plugging gaps in legislation and extradition, warrant procedures | Support | Amendment of –(a) definitions of “entity”, “ship”; “terrorist activity”, (b) warrant procedure, (c) jurisdiction, consent (d) offence related to Foreign Terrorist Fighters | <p>Yes, proposals were incorporated:</p> <p>(a) Proposed amendments to definition of “ship” in section 1; and amendment to definition of “terrorist activity” in section 1 deletion of paragraph (c) thereof and substitution of subsection (4) of section (1)</p> <p>(b) Warrant procedure: Proposed amendments to Criminal Procedure Act in Schedule 2.</p> <p>(c) Jurisdiction proposed amendments to section 15(1) and 15(2A); consent: Proposed amendment to section 16.</p> <p>(d) FTF: proposed insertion of new subsection (2)(aA).</p> |
| Department of Justice and Constitutional Development | Proposal to insert “cybercrime” in the definition of “terrorist activity” in section 1. | Support | It was first suggested that cyberterrorism will be dealt with in the Cybercrimes Bill already before Parliament. | Department of Justice and CD indicated that cyber terrorism must be dealt with in the POCDATARA Bill as it was removed from the |

| Department's name | What do they see as main <u>benefits, Implementation/ Compliance costs and risks?</u> | Do they <u>support</u> or <u>oppose</u> the proposal? | What <u>amendments</u> do they propose? | Have these amendments been <u>incorporated</u> in your proposal? If yes, under which section? |
|--|---|---|---|---|
| Department of Justice | Proposed notice of disclosure of encryption keys | Support | They proposed insertion of this amendment and support the proposal that the discretion must be exercised by the designated Judge under the Regulation of Interception and Provision of Communication-related Information, 2002. | Cybercrimes and Cybersecurity Bill by the Portfolio Committee on Justice. Yes. Inserted as new section 24A and 24B in the Bill (Clause 20). |
| Department of Transport (Civil Aviation) | Proposed amendment of the Civil Aviation Act | Do not support | They are dealing with the same amendment in the Civil Aviation Amendment Bill already before Parliament. Retained in main body of the Bill | No. Provision deleted from Schedule 2 of the draft Bill. |
| Department of Transport (Maritime) | Proposed insertions of amendments to sections 6 and 10 | Support | | Yes Clauses 6 and 10 of the draft Bill. |
| Department of Finance: Financial Intelligence Centre | Transfer of the function related to the publication of the adoption of Resolutions by the United Nations Security Council in respect of | Support | Amendment in Schedule 2 to the Bill, to the Financial Intelligence Centre Act, 2001, | Yes. See proposed amendment of the Financial Intelligence Centre Act, 2001, in Schedule 2 to the draft Bill. |

| | | | | |
|--|--|---------|---|---|
| | financial sanctions pertaining to terrorism. Redrafting of section 23 of the Act. | Support | which already addresses all other financial sanctions. Redrafting of section 23 to provide more extensively for freezing orders, ancillary orders and publication of court orders by the National Prosecuting Authority. | Yes. See clause 18 of the redrafted Bill. |
|--|--|---------|---|---|

Consulted stakeholders outside government

The Bill had been extensively consulted within Government. The aim is to now submit the draft Bill to the Development Committee, the Justice, Crime Prevention and Security Directors General Cluster and the Ministers Cluster and Cabinet to obtain approval for the publication of the Bill in the *Gazette* to invite public comments.

| Name of Stakeholder | What do they see as main <u>benefits, Implementation/ Compliance costs and risks?</u> | Do they <u>support</u> or <u>oppose</u> the proposal? | What <u>amendments</u> do they propose? | Have these amendments been <u>incorporated</u> in your proposal? |
|--|---|---|---|--|
| Not applicable now. The Bill will after approval by Cabinet be published soon to invite public comments, which comments will be considered and addressed in the final draft. | | | | |

- b) Summarise and evaluate the main disagreements about the proposal arising out of discussions with stakeholders and experts inside and outside of government. Do not give details on each input, but rather group them into key points, indicating the main areas of contestation and the strength of support or opposition for each position.

There had been consensus in the IDCTWG on the Draft Bill and the Bill was intensively interrogated and concerns addressed. The Bill received general support of stakeholders within government. Stakeholders outside government will get a chance to critic the Bill once it has been published for public comments

- 2.3. Assessment of costs and benefits to stakeholders inside and outside of government

- 2.4. Describe the groups that will benefit from the proposal, and the groups that will face a cost. These groups could be described by their role in the economy or in society. Note: NO law or regulation will benefit everyone equally so do not claim that it will. Rather indicate which groups will be expected to bear some cost as well as which will benefit. Please be as precise as possible in identifying who will win and who will lose from your proposal. Think of the vulnerable groups (disabled, youth women, SMME), but not limited to other groups.

| List of beneficiaries (groups that will benefit) | How will they benefit? |
|--|---|
| State | Benefit by ensuring the safety of citizens and protection of infrastructure and complying with international obligations, thereby promoting tourism and industry. |
| General public and inhabitants of the Republic | Safety and security. |

| List of cost bearers (groups that will bear the cost) | How will they incur / bear the cost |
|---|---|
| Judges and Magistrates | Normal training interventions. |
| South African Police Service, inclusive of Crime Intelligence and the Directorate for Priority Crime Investigation (DPCI) | Feedback from these Departments indicate that no additional costs are expected as the issue of terrorism is being engaged with comprehensively in day-to-day activities of the South African Police Service. The publication of Proclamations will simply be substituted with publication of notices in the Gazette with no additional costs. |
| Asset Forfeiture Unit | No indication of any additional costs. |
| Financial Intelligence Centre | No indication of any significant additional costs. |

| | |
|--------------------------------|---|
| South African Secret Service | No indication of any additional costs. The issue of terrorism is also in the SSA being addressed comprehensively at present. |
| National Prosecuting Authority | The NPA also indicated that no additional costs are expected with implementation of the proposals. The proposals will not necessarily result in a heavier case-load. The amendments to the legislation will be covered in existing periodic training sessions which include both the NPA and the DPCI |
| Defence Intelligence | No additional costs are foreseen. |

2.6 Describe the costs and benefits of implementing the proposal to each of the groups identified above, using the following chart. Please do not leave out any of the groups mentioned, but you may add more groups if desirable. Quantify the costs and benefits as far as possible and appropriate. Add more lines to the chart if required.

Note: "Implementation costs" refer to the burden of setting up new systems or other actions to comply with new legal requirements, for instance new registration or reporting requirements or by initiating changed behaviour. "Compliance costs" refers to on-going costs that may arise thereafter, for instance providing annual reports or other administrative actions. The costs and benefits from achieving the desired outcomes relate to whether the particular group is expected to gain or lose from the solution of the problem.

For instance, when the UIF was extended to domestic workers:

- *The implementation costs were that employers and the UIF had to set up new systems to register domestic workers.*
- *The compliance costs were that employers had to pay regularly through the defined systems, and the UIF had to register the payments.*
- *To understand the inherent costs requires understanding the problem being resolved. In the case of UIF for domestic workers, the main problem is that retrenchment by employers imposes costs on domestic workers and their families and on the state. The costs and benefits from the desired outcome are therefore: (a) domestic workers benefit from payments if they are retrenched, but pay part of the cost through levies; (b) employers pay for levies but benefit from greater social cohesion and reduced resistance to retrenchment since workers have a cushion; and (c) the state benefits because it does not have to pay itself for a safety net for retrenched workers and their families.*

| Group | Implementation costs | Compliance costs | Costs/benefits from achieving desired outcome | Comments |
|------------------------|--|---|--|--|
| Judges and Magistrates | Training and distribution of information on the new provisions, as line- function activity | Judges and magistrates must be acquainted with new offences and sentencing regime in order to apply it. . | Legal certainty should benefit the cost structure. | Legal certainty and simply communication with judiciary required. The new offences would not necessarily equate into additional case load. |

| Group | Implementation costs | Compliance costs | Costs/benefits from achieving desired outcome | Comments |
|-------------|---|------------------|---|--|
| Prosecutors | Training and distribution of information on the new provisions as line- function activity | | <p>The proposals will rather reduce and benefit the costs involved in prosecution: PCLU</p> <p>Comments:</p> <p>The strengthening of definitions will result less contracted legal challenges. The NPA already provides counter terrorism training on an annual basis to which the DPCI and CI are invited so again there will be no additional expenses there.</p> | <p>The amendments do not require an immediate training intervention and can be addressed within the existing framework for training.</p> <p>The amendments will in fact in the long term translate into savings. The NPA indicated that the deletion of the motive requirement from the definition of “terrorist activity” will exclude the need for expert evidence in that regard. The NPA would be required to publish court notices relating to the proposed amendments to section 23 of the Act. These are not regarded as unnecessarily burdensome as it is not being utilised to a huge extent.</p> |
| | | | | |

| Group | Implementation costs | Compliance costs | Costs/benefits from achieving desired outcome | Comments |
|-----------------------|--|------------------|--|----------|
| Investigators (DPCI) | Training and distribution of information on the new provisions as line- function activity | . | The NPA already provides counter- terrorism training on an annual basis to which the DPCI and CI are invited so again there will be no additional expenses there. The amendments will in fact make investigations easier | None |
| Asset Forfeiture Unit | Training and distribution of information on the new provisions, as line- function activity | | | None |

| Group | Implementation costs | Compliance costs | Costs/benefits from achieving desired outcome | Comments |
|-------------------------------|--|--|--|---|
| Financial Intelligence Centre | Training and distribution of information on the new provisions, as line- function activity | | | The only additional costs for the FIC would be the publication of notices containing details of entities and persons linked to terrorism, by the UN Security Council. These lists are presently published by the SA Police Service, but the FIC in any event publishes the lists of entities and persons to which all other UN Security Council financial sanctions apply. The FIC indicated that the additional publications would not be unduly burdensome. |
| SAPS (Crime Intelligence) | Training and distribution of information on the new provisions, as line- function activity | The amendments will in fact make investigations easier, in terms of obtaining warrants for search and seizure... | The NPA already provides counter terrorism training on an annual basis to which the DPCI and CI are invited so again there will be no additional expenses there. | None |

| Group | Implementation costs | Compliance costs | Costs/benefits from achieving desired outcome | Comments |
|------------------------------|--|--|--|----------|
| South African Secret Service | Training and distribution of information on the new provisions, as line- function activity | | | |
| Defence Intelligence | Training and distribution of information on the new provisions, as line- function activity | No extra costs – falls within the normal pre-deployment budget for deploying troops. | Terrorism is already part of pre-deployment briefings to troops. | None. |

FINANCIAL IMPLICATIONS: GENERAL

The POCDATARA Amendment Bill, 2020, does not require particular “tools of trade” and equipment to be implemented. It must be kept in mind that the function international terrorism is not a new function. Furthermore, more advanced technology and “tools of the trade” might be developed in respect of civil and maritime aviation, but the POCDATARA Amendment Bill does not create a particular burden in that regard. On the other hand, the Bill will ensure access to encryption provided by service providers used in computers which are seized and also make the application of warrants less burdensome. The implementation of the original Act at the time was also effected in a very short time in view thereof that it did not require a huge financial lay-out.

2.7 Cost to government: Describe the changes that the proposal will require and identify where the affected agencies will need additional resources

a) Budgets, has it been included in the relevant Medium Term Expenditure Framework (MTEF) and

National Prosecuting Authority No additional budgetary provision required.

Directorate for Priority Crime Investigation No additional budgetary provision required.

Judiciary No additional budgetary provision required.

Financial Intelligence Centre: No additional budgetary provision required.

Asset Forfeiture Unit No additional budgetary provision required.

b) Staffing and organisation in the government agencies that have to implement it (including the courts and police, where relevant). Has it been included in the relevant Human Resource Plan (HRP)

Note: You MUST provide some estimate of the immediate fiscal and personnel implications of the proposal, although you can note where it might be offset by reduced costs in other areas or absorbed by existing budgets. It is assumed that existing staff are fully employed and cannot simply absorb extra work without relinquishing other tasks.

2.8 Describe how the proposal minimises implementation and compliance costs for the affected groups both inside and outside of government.

For groups outside of government (add more lines if required)

To be determined from submissions made subsequent to publication in the Gazette for public comments.

| Group | Nature of cost (from question 2.6) | What has been done to minimise the cost? |
|-------|------------------------------------|--|
| | | |
| | | |
| | | |

For government agencies and institutions:

| Agency/institution | Nature of cost (from question 2.6) | What has been done to minimise the cost? |
|---------------------------------------|--|---|
| National Prosecuting Authority (PCLU) | Initial training and sensitising in respect of the Act Personnel requirements | Existing training interventions which are ongoing and effective communication will be utilised to the maximum. Prosecution functions in |

| Agency/institution | Nature of cost (from question 2.6) | What has been done to minimise the cost? |
|---|--|--|
| | | respect of terrorism related cases is limited to a single entity within the National Prosecuting Authority, namely the Priority Crime Litigation Unit. |
| Directorate for Priority Crime Investigation (DPCI) | Initial training and sensitising in respect of the Act Personnel requirements | Existing training interventions which are ongoing and effective communication will be utilised to the maximum. Investigative Prosecution functions in respect of terrorism related cases is limited to a single entity within the South African Police Service, namely the Crimes against the State (CATS) Unit. |
| Judiciary | Initial training and sensitising in respect of the Act Personnel requirements | The additional crimes established as required by the international instruments would not translate necessarily in additional cases that will go to court. For instance the number of prosecutions in respect of terrorism offences since 2004, had been very small. |
| Intelligence | Initial training and sensitising in respect of the Act Personnel requirements | No additional budgetary implications indicated. |

2.9 Managing Risk and Potential Dispute

- a) Describe the main risks to the achievement of the desired outcomes of the proposal and/or to national aims that could arise from implementation of the proposal. Add more lines if required.

Note: It is inevitable that change will always come with risks. Risks may arise from (a) unanticipated costs; (b) opposition from stakeholders; and/or (c) ineffective implementation co-ordination between state agencies. Please consider each area of risk to identify potential challenges.

See the last Table hereunder in terms of nature of possible disputes setting out the particular provisions that are expected to be opposed.

Opposition had been experienced in the past against the type of legislation where it is perceived as being directed at a particular group. It might happen that orchestrated opposition against the proposed legislation be experienced. The changes to the legislation need to be explained in terms of the Republic's particular international law obligations and the fact that no country is excluded from the threat of international

terrorism as it might be directed at another country or government, but executed in the Republic against a target that might be linked to another country or government. In this regard there might be costs related to communicating this message. This can, however, be managed within existing line-function costs, within existing budgets.

- b) Describe the measures taken to manage the identified risks. Add more rows if necessary.

Mitigation measures means interventions designed to reduce the likelihood that the risk actually takes place.

| Identified risk | Mitigation measures |
|--|---|
| Addressing incorrect perceptions and orchestrated actions against the legislation and implementation thereof | <p>To alert communication services and the GCIS in advance in order to ensure that a proper and executable Media Plan is in place to address misperceptions from the period when the draft Bill is announced and published for public comments.</p> <p>The process to draft a media plan in liaison with the GCIS has been initiated already.</p> |
| Interdepartmental Cooperation required as the Act is of a multi-disciplinary nature | <p>Maximize the use of the Interdepartmental Counter-Terrorism Working Group convened by DIRCO, intelligence cooperation through NICOC and close cooperation between prosecution (Priority Crime Litigation Unit) and investigation (Directorate for Priority Crime Investigation)</p> |

- c) What kinds of dispute might arise in the course of implementing the proposal, whether (a) between government departments and government agencies/parastatals, (b) between government agencies/parastatals and non-state actors, or (c) between non-state actors? Please provide as complete a list as possible. What dispute-resolution mechanisms are expected to resolve the disputes? Please include all of the possible areas of dispute identified above. Add more lines if required.

The proposed legislation is an amendment of existing legislation and the principal Act had been implemented in 2004. No problems had been experienced on government level or civil society with the implementation of the principal Act, and as a result of the intensive interdepartmental consultations no disputes are expected. The risk of opposition against the Bill had been explained and can be mitigated.

Note: Disputes arising from regulations and legislation represent a risk to both government and non-state actors in terms of delays, capacity requirements and expenses. It is therefore important to anticipate the nature of disputes and, where possible, identify fast and low-cost mechanisms to address them.

| Nature of possible dispute (from sub-section above) | Stakeholders involved | Dispute-resolution mechanism |
|--|---|---|
| The deletion of the motive requirement (paragraph (c) of the definition of “terrorist activity” in section 1 of the Act, might be portrayed as an unnecessary extension of the definition of “terrorist activity” which may lead to abuse of the legislation | Human Rights Groups Academics | The proposal can be motivated along legal developments and judgments in Canada; practical implications for law enforcement and the fact that elsewhere in law the State is not obliged to prove the motive of an offence |
| The proposed streamlining of the exclusion of a “legitimate struggle” from the definition of a “terrorist activity” might be experienced as a “watering down” of the exclusion. | Civil Society on political level Academics | The Constitutional Court made observations on, but no finding in respect of the section. The section is difficult to interpret as presently worded. The Canadian model had been followed The proposal need to be fully motivated in the legislative process |
| The proposed criminalisation of the establishing and becoming a member of a terrorist organisation. | Civil society and academics | Provisions in line with similar legislation in other jurisdictions. |
| The proposed offence relating to the publication of documents and statements with unlawful terrorism content and power to requires the modification or removal of such publication from electronic social media sites. | Media and electronic service providers. | Within the European Union there had been extensive investigations of the options in this regard. In the United Kingdom similar legislation is in force: Terrorism Act, 2006. Significant successes have been obtained through this in a number of countries. To curb cost a dedicated monitoring mechanism will not be considered now. |

Would it be possible to establish or use more efficient and lower-cost dispute-resolution mechanisms than those now foreseen? These mechanisms could include, for instance, internal appeals (e.g. to the Minister or a dedicated tribunal) or mediation of some kind.

No.

| Nature of possible dispute | Proposed improvement in dispute-resolution mechanism |
|----------------------------|--|
| | |
| | |
| | |

2.10 Monitoring and Evaluation

- a) When is implementation expected to commence after the approval of the proposal?

The Bill has been provisionally certified by the Chief State Law Adviser. It has been submitted on 25 June 2020 to the Development Committee, which advises the Justice, Crime Prevention and Security (JCPS) Cluster on submissions regarding draft legislation. The JCPS Directors General Cluster was briefed on 13 July 2020 and the Bill was recommended for submission to the JCPS Ministers Cluster, which will probably consider the Bill during August 2020, when the Bill could in the best scenario be considered by the JCPS Cabinet Committee and Cabinet in September 2020. The Bill will then be published in September with a period of four weeks for public comments and four weeks to process. The Bill will then be submitted for approval by Cabinet to be introduced, before the end of the P2020 Parliamentary year. Once the Bill has been assented to and signed by the President, the run-up time to implementation should not be more than four months, including the time to distribute information on the legislation, and to effect the commencement of the Act through a proclamation in the *Gazette* by the President.

- b) Describe the mechanisms that you will apply to monitor the implementation of the proposal after being approved.

In respect of compliance with the UN Security Council Resolutions, International Instruments and the FATF, very clear criteria are available: South Africa has during 2018 received a compliance visit by the UN Counter-Terrorism Executive Directorate and during 2019 a compliance visit from the FATF. Many of the proposals in the POCDATARA Amendment Bill are as a result of clear shortcomings identified by these two institutions, and the finalisation of the legislation should ensure compliance.

Monthly reporting from the date of adoption of the Bill by Parliament, to the Interdepartmental Counter-Terrorism Working Group by all participants thereof, in terms of the-

- Development of training material and the distribution thereof as well as *ad hoc* training and training incorporated in normal training programmes for Judges, Magistrates prosecutors, and investigators.
- Reporting of assent to and signing of the Act and distribution of a copy thereof to all role-players.
- The readiness to implement the Act, determination of date of commencement and submission of President's Minute and Proclamation to President.
- Communication to all role-players (governmental and public) of commencement of Act.
- Monitoring of the period taken to publish United Nations Security Council listings from the time of listing until publication in the *Gazette*. This period should be as soon as possible, but preferably not more than a few days.

- Monitoring of investigations under the Act for contraventions thereof.
- Monitoring the successes in terms of prosecution under the Act.

A clear criterium here would be the number of successful prosecutions in relation to investigations and the success rate of applications for warrants under the amended provisions

- Monitoring of prosecutions under the Act and the reporting thereof to the Secretary General of the United Nations as required by the Act.
- Monitoring the success of combating the financing of terrorism in terms of asset freeze, orders applied for versus orders denied.

c) Who will be responsible for monitoring the implementation of this proposal?

The prosecution and law enforcement, including the Directorate for Priority Crime Investigation, the National Prosecuting Authority, the Asset Forfeiture Unit, the Financial Intelligence Centre, the National Intelligence Coordinating Committee and the Department for International Relations and Cooperation. The monitoring can be coordinated through the Interdepartmental Counter Terrorism Working Group and reported to the Civilian Secretariat for Police Service.

d) What are the results and key indicators to be used to for monitoring? Complete the table below:

| Results | Indicators | Baseline | Target | Responsibility |
|--|--|----------|------------|---|
| Impact: long term result (change emanating from the implementation of the proposal in the whole of society of parts of it) Stringent anti-terrorism legislative framework to combat the scourge of terrorist attacks. | The Bill will ensure full compliance with the requirements of international instruments and the international law regarding the combating of terrorism. Such full compliance by the Republic will be reported to the structures of the United Nations Security Council. South Africa is a member of the Security Council from early 2019. The compliance itself will be in favour of the country's image and position in the Security Council South Africa is being monitored by the United Nations Counter-Terrorism Executive Directorate for such compliance. Positive reporting by international standard setting and monitoring bodies such as the Financial Action Task Team | One year | Six months | South African Police Service National Prosecuting Authority Financial Intelligence Centre |

| | | | | |
|--|--|------------|-----------|---|
| | and the United Nations Counter –Terrorism Executive Directorate will be the outcome of compliance. | | | |
| Outcome: medium term result (what beneficiaries achieve as a result of the implementation of the proposal) | | | | |
| Improvement of time period for publication of the sanctions imposed by the UNSC in the <i>Gazette</i> . | <p>The Bill provides that the National Commissioner may publish a notice in the <i>Gazette</i>, instead of the President publishing a Proclamation in the <i>Gazette</i>. The present situation causes delays and criticism especially within the FATF</p> <p>Timeous implementation of the sanctions imposed by UNSC in the UNSC.</p> | Four weeks | Two weeks | South African Police Service; Legal Services South African Police Service National Prosecuting Authority Financial Intelligence Centre |
| Ensuring the safety of citizens and protection of infrastructure and complying with international obligations, thereby promoting tourism industry as well as direct and indirect foreign investment opportunities. | The reduction in the number of reported terrorism attacks or incidents. | Two years | | |

- e) When will this proposal be evaluated on its outcomes and what key evaluation questions will be asked? Below please find evaluation questions for your consideration:

Continuous evaluation is required, from the time of adoption of the legislation, the operationalisation and implementation thereof and enforcing it. This apply also in respect of new obligations and international requirements, as is taking place at present through the Interdepartmental Counter- Terrorism Working Group.

- i. What was the quality of proposal design/content? (Assess relevance, equity, equality, human rights)
 - ii. How well was the proposal implemented and adapted as needed? (Utilise the Monitoring and Evaluation plan to assess effectiveness and efficiency)
 - iii. Did the proposal achieve its intended results (activities, outputs and outcome) as per the Monitoring and Evaluation plan?
 - iv. What unintended results (positive and/or negative) did the implementation of the proposal produce?
 - v. What were the barriers and enablers that made the difference between successful and failed proposal implementation and results
 - vi. How valuable were the results of your proposal to the intended beneficiaries?
- f) Provide a comprehensive implementation plan (see Annexure A) aligned to 2.10 (b) **Attached.**
- g) Please identify areas where additional research would improve understanding of the costs, benefit and/or of the legislation.
None.

For the purpose of building a SEIAS body of knowledge please complete the following:

| | |
|---------------------------|---|
| Name of Official/s | Dr PC Jacobs |
| Designation | Director: Legislation Specialist |
| Unit | Legislation Unit of the Civilian Secretariat for Police Service |
| Contact Details | Mobile: 082 7789215 |
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PART THREE: SUMMARY AND CONCLUSIONS

1. Briefly summarise the proposal in terms of (a) the problem being addressed and its main causes and (b) the measures proposed to resolve the problem.

Problem:

Existing counter-terrorism legislation needs to be updated to comply with International Law. The international instruments in this regard has increased from 12 to 19 and numerous new binding Chapter 7 of the United Nations Charter Resolutions have been adopted since the Act had implemented in 2004). Following a Constitutional Court judgment in favour of the State, some wording in the Act needs to be simplified. The process of publication of listings by the United Nations Security Council needs to be simplified.

Proposals:

The proposals involve amendment of certain definitions in the Act, the insertion of some new offences related to maritime and aviation security and addressing the problem of foreign terrorist fighters. It amends the requirement of publication of United Nations Security Council Resolutions in a Proclamation to a Notice in the Gazette, by the Minister; it simplifies the interpretation of the jurisdiction provision and provides that any magistrate or judge may issue a warrant in respect of the Act, and expands the extradition provisions to all terrorism related offences in the Act.

2. Identify the social groups that would benefit and those that would bear a cost, and describe how they would be affected. Add rows if required.

| Groups | How they would be affected |
|---------------------------|---|
| Beneficiaries | |
| 1. Financial Institutions | The proposals will enable financial institutions like banks to react swifter in response to the United Nations Security Council listings. |
| 2. Law enforcement | The issue about obtaining warrants will facilitate investigations. Gaps in terms of foreign terrorist fighters will be addressed. |
| 3. Prosecution | The crimes provided for will be prosecutable as terrorist related actions. Interpretation is simplified. |
| Cost bearers | |
| 1. Law enforcement | Only in respect of initial training to implement the legislation. |
| 2. Prosecution | Only in respect of initial training to implement the legislation |
| 3. Judiciary | Only in respect of initial training to implement the legislation |

3. What are the main risks from the proposal in terms of (a) undesired costs, (b) opposition by specified social groups, and (b) inadequate coordination between state agencies?

- Summarise the cost to government in terms of (a) budgetary outlays and (b) institutional capacity.

Summary: Based on figures provided by the line-function Departments

The costs fall mostly within the line-function budgets already budgeted for by Departments and will involve the minimal additional costs

- Given the assessment of the costs, benefits and risks in the proposal, why should it be adopted?

The amendments are mostly required to align existing legislation to the requirements of International Law. They also seek to strengthen the legislative framework for combating terrorism, through inter alia, effecting amendments to the penalty and offences chapter of the Act (Chapter 2) and creation of new penalties and offences. This would ensure the safety and security of citizens and all persons who are residents in the country, the tourism industry shall also be boosted and the direct and indirect foreign investment opportunities shall be created. The benefits for the country will be deterrence of terrorism, a safer and more secure environment, also benefitting investment in the country.

- Please provide two other options for resolving the problems identified if this proposal were not adopted.

The legislation stems from International Law obligations, including international instruments to which the Republic is already a Party to and binding Chapter VII of the United Nations Charter Resolutions. There is thus an obligation on the Republic to comply and even though there might be another option to obtain some of the desired results, it would not affect compliance with the legal imperative to legislate in this regard.

| | |
|------------------|--|
| Option 1. | |
| Option 2. | |

- What measures are proposed to reduce the costs, maximise the benefits, and mitigate the risks associated with the legislation?

In terms of investigation and prosecution and of the relevant crimes, processes and functionalities relating to obtaining warrants are clarified. Definitions and the issue of

jurisdiction will be easier to interpret. The process relating to the publication in South Africa of United Nations Security Council listings will be more effective. Risks can be mitigated through communication processes.

8. Is the proposal (mark one; answer all questions)

| | Yes | No |
|--|-----|----|
| a. Constitutional? | X | |
| b. Necessary to achieve the priorities of the state? | X | |
| c. As cost-effective as possible? | X | |
| d. Agreed and supported by the affected departments? | X | |

9. Which NDP priorities would be most supported by this proposal?

It is stated in the NDP that: **“Interconnected risks are shown by the links among food, fuel and water in the context of climate change; among illicit trade, organised crime, corruption and terrorism in the context of fragile states and cybercrime; weak systems of global governance.”** [page 95 of NDP] and refers to **“the proliferation of threats to human and state security;”** [page 235 of NDP]

The Republic had been nominated by the Southern African Development Community (SADC), endorsed by the African Union and elected by the United Nations General Assembly to serve as a non-member on the United Nations Security Council for the period between 2019 and 2020. As a responsible global citizen and taking into account this position the Republic should be exemplary in fulfilling its obligations in terms of International Law. Upon the election the President confirmed: **“We are committed to addressing the root causes of conflict, including inequality and underdevelopment, and promoting inclusive political dialogue.”** The safety of the Republic is a key element of the NDP as well as economic growth and stability. The Bill should promote these aspirations.