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18 August 2022

CHAIRPERSON OF THE PORTFOLIO COMMITTEE ON POLICE
Ms Tina Joemat-Pettersson, MP
Ms Babalwa Mbengo

By email: POCDATARAamendmentbill@parliament.gov.za

Dear Ms Mbengo,

RE: AFRIFORUM PARLIAMENTARY SUBMISSION - PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES AMENDMENT BILL (GG NO: 46649 - 1/07/2022)

"As for civil liberties, anyone who is not vigilant may one day find himself living, if not in a police state, at least in a police city." – Gore Vidal

1. This submission is made on behalf of AfriForum NPC, by Hurter Spies Inc, as attorneys of record. AfriForum does not support the passing of the above Bill (hereafter 'the Amendment') in its present format.

2. Whilst AfriForum welcomes the state's commitment to international law and the integration of binding international norms into our domestic law,[1] certain novel additions brought about by the Amendment represent a threat to the rule of law and Constitutional guarantees.[2]

3. The state has identified the objectives of the Amendment to be as follows:

   3.1 "To update the principal Act to developments in international law,

   3.2 To give effect to certain Constitutional Court judgments and,

   3.3 To address challenges experienced with conducting investigations and prosecutions." [sic]

4. In brief, AfriForum does not substantively question the means by which the first and second objectives are to be achieved with the Amendment. It is the third objective which has been inexpertly executed and thereby dooms the proposed measures to legal review and scrutiny should they be passed. There is a glaring discrepancy between those provisions intended to update the core of the Act, and those which are intended to expand the state's police powers. The latter apparently have been tacked-on as an afterthought and not properly considered.

OVERVIEW OF ASPECTS TO BE RECONSIDERED AND/OR SEVERED

5. The following sections are thus impugned and should be reconsidered and/or severed from the Amendment on grounds of necessity, practical workability, and unconstitutionality:

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[1] AfriForum, for example, welcomes certain aspects of the Amendment such as the implementation of Constitutional Court recommendations (S v Okah) – removing infamous 'national liberation' clause (s1(4) to address tension between commitments to African Union and United Nations – accession to previously ignored conventions relating to highly specific species of terrorist acts (Maritime & Nuclear).

[2] AfriForum does not profess expertise in the regulation and control of illicit finance and thus does not purport to comment on the esoteric aspects of the Amendment in that specific aspect.

5.1 Amendment of certain definitions as captured in section 1:

5.1.1 *“Property”*

5.1.1.1 The section was already overbroad and vague. The expansion thereof has exacerbated the problem.

5.1.2 *“Terrorist activity”*

5.1.2.1 The addition of 1(b)(iv), to wit, “can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to… further the objectives of an entity engaged in terrorist activity”, further complicates an already notoriously contested definition.

5.1.2.2 ‘Reasonably be regarded’ unacceptably introduces negligence as a form of *mens rea* for committing terrorist offences.

5.1.2.3 This is legally imprecise for purposes of criminal law and is a common issue with anti-terrorism legislation globally.

5.2 Insertion of clause 3A

Prohibition of publication with unlawful terrorism related content

5.2.1 Unjustifiably violates rights to freedom of expression, association, and conscience.

5.2.2 Vulnerable to disproportionate, arbitrary, discretionary abuse.

5.2.3 Overbroad definition and form of intent violates principle of legality.

5.3 Insertion of clause 4A

Offence relating to attempt to leave the Republic

5.3.1 Unjustifiable violation of freedom of movement and unnecessary duplication of pre-existing offence captured in other legislation.

5.4 Amendment of s23(2)(a)

Freezing Orders – "**reasonable grounds**'

5.4.1 'Reasonably be regarded' introduces a form of negligence as sufficient *mens rea* for criminal liability – see above. Overextends the power of police officials.

5.4.2 Likely to lead to complex litigation.

5.4.3 Soon to be dealt with in specialist amendments to FICA.

5.5 Insertion of s24A & s24B

Application for Decryption Direction & Order to Disable Access to Internet or Social Media Site

5.5.1 Potential for abuse as seen with RICA legislation.

5.5.2 Potentially unjustifiable violation of the right to privacy, given nebulous definition of 'terrorist activity' and relaxed burden of proof.

5.5.3 Impractical as it duplicates similar but tempered processes already tested and accepted by judiciary.

5.5.4 Likely to lead to litigation.

5.6 Repeal of s26

Parliamentary supervision

5.6.1 Unjustifiable violation of separation of powers doctrine. S26A of Financial Intelligence Centre Act makes no provision for tabling of announcement/designation in Parliament.

6. A comprehensive, individualised analysis of each of the abovementioned aspects of these proposals is beyond the scope of this submission. AfriForum intends to deal with those elements of these proposals which are common to them all under separate headings herein below.

7. The Protection Of Constitutional Democracy Against Terrorist And Related Activities Act ("POCDATARA") has not been frequently utilised and consequently **has not been frequently tested for Constitutional compliance.**

8. Legal scholars have however long indicated that **the Act is long, complex, overbroad, and vague in several worryingly material respects**, at times going further than even United States anti-terror legislation and the Internal Security Act employed by the Apartheid regime to quell dissent and commit atrocities.[3]

9. This fact must necessarily be borne in mind by the legislature which seeks to extend and strengthen the state's powers in terms of the Act.

AFRIFORUM ACKNOWLEDGES NEED FOR LEGISLATIVE INTERVENTION

[3] For a cogent summary of this criticism, see Cachalia, A 2010. 'Counter-Terrorism and International Cooperation Against Terrorism — An Elusive Goal: a South African Perspective' *South African Journal on Human Rights*, 26:3, 510-535 and Powell C, 2004. 'Terrorism and Governance in South Africa and Eastern Africa' in Faculty of Law,
National University of Singapore Symposium on Comparative Anti-Terrorism Law & Policy (24–26 June 2004).

10. It should be noted that AfriForum **does** recognize the need for intervention in this legislative field to some extent.

11. As the state will be aware, reports this year indicate that the Republic has become a hub for money laundering and the financing of terrorist groups.[4] It appears beyond doubt that the Republic is abused as a conduit both for foreign groups to funnel money to their subsidiaries in Africa, and for supporters of such groups to funnel money in the other direction. This fact is evidenced by, *inter alia*:

    11.1 The United States Treasury sanctioning four individuals based in the Republic for the alleged financing of the Islamic State of Iraq and Syria (ISIS).[5]

    11.2 The contents of the United Nations Counter Terrorism ED report, as referenced by the memorandum attached to the Bill.

    11.3 Potential 'greylisting' of the Republic by global watchdog group the Financial Action Task Force.[6]

12. However, the above largely indicates that the Republic is an entrepot and hub for terrorists and other agents operating outside of the Republic's borders, **rather than an immediate and pressing threat to the safety and security of the Republic** and its citizens.

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[4] See *inter alia* Fabricius P, 'South Africa a Growing Conduit for Islamic State Funds Says New UN Report' *Daily Maverick* 22 July 2022 available at [https://www.dailymaverick.co.za/article/2022-07-22-south-africa-a-growing-conduit-for-islamic-state-funds-says-new-un-report/],
The Economist 2022 'Islamic State is Using South African Money to Build its Network' 16 April 2022 available at [https://www.economist.com/middle-east-and-africa/2022/04/16/islamic-state-is-using-south-african-money-to-build-its-network]

[5] Fabricius P, 'US Sanctions Four Alleged ISIS Ringleaders in South Africa' *Institute for Security Studies* 4 March 2022 available at [https://issafrica.org/iss-today/us-sanctions-four-alleged-isis-ringleaders-in-south-africa]

[6] Smit S, 'What the FICA? South Africa's Possible Greylisting in Black and White' *Mail & Guardian* 5 August 2022 available at [https://mg.co.za/business/2022-08-05-what-the-fica-south-africas-possible-greylisting-in-black-and-white/]

13. The threat of domestic terrorism aimed at the Republic itself – while certainly a growing threat – is presently **embryonic**.

14. It is apparent that the state and legislature, in the act of strengthening capacity to detect and prevent issues of real and legitimate concern*, viz*, exploitation of the Republic's systems to aid and abet terrorism in other countries, **has also belatedly and in an ill-considered, disproportionate manner sought to address comparatively minor domestic concerns.**

15. The state must **build a legislative wall** between specialist legal frameworks aimed at two separate phenomena.

16. Those aspects of the Amendment concerned with domestic terrorism and the investigation thereof are **neither necessary nor lawful.**

17. They represent state overreach and at the very least require **far more consideration** before thought is given to passing them. They have the potential to significantly restrict and/or violate guaranteed political freedoms and Constitutional rights and may entangle the state in a protracted battle before the judiciary.

18. It is against this backdrop that AfriForum wishes to direct its concerns and objections to those aspects, provisions, and clauses to be adopted by the Amendment set out herein above.

GROUNDS OF IMPUGNMENT

NEW INVESTIGAVITE & POLICING MEASURES ARE NOT NECESSARY

19. There is no justification or pressing need for the proposed insertions outlined above. The state has not identified in its explanatory

memorandum exactly why highly invasive measures such as the proposed s3A and s24A and B are necessary to combat terrorism at a local level.

20. The state has not demonstrated why the ordinary rules and powers as set out in *inter alia* the Criminal Procedure Act 51 of 1977, the Prevention of Organised Crime Act 121 of 1998, and the Financial Intelligence Center Act 38 of 2001, are insufficient to investigate and prosecute cases of domestic terrorism.

20.1 It also appears extremely likely that the FICA will be drastically amended very shortly, calling into question why the current measures introduced under the Amendment are at all required. It also poses a frustration in the deliberation of the FICA amendment in relation to questions of duplication, tension, and contradiction between statutes.

21. A brief survey of a sample of instances of planned domestic terrorism reveal that the state has yet to cite pre-existing statute or precedent as an obstacle to its objectives in this arena, and indeed has been successful to some extent in its investigations and prosecutions:

21.1 **Harry Knoesen and 'Crusaders' group: planned terrorist attack in late 2019**

20.1.1 Successfully prosecuted under POCDATARA as of June 2022.[7]

21.2 **Henry Okah: Nigerian national who had executed notorious terror attacks in Nigeria from South Africa**

[7] South African Police Service, media statement, Directorate for Priority Crimes Investigation, 6 June 2022 available at [https://www.saps.gov.za/newsroom/msspeechdetail.php?nid=40254]

21.2.1 Successfully prosecuted on 13 counts under POCDATARA recently; recommendation made by Constitutional Court on technical jurisdictional question and clarity of language - to be implemented by this Amendment and welcomed by AfriForum.

21.3 **Bomb plot in wake of murder of Eugene Terre'blanche in 2010**

21.3.1 Successfully foiled by police officials without aid of expanded powers proposed by Amendment.[8]

21.4 **Tulsie twins: attempted to leave South Africa to join ISIS**

21.4.1 Brothers had twice attempted to leave the Republic to join ISIS and were twice rebuffed by the authorities – without the need for expanded powers.

21.4.2 The two were charged in terms of POCDATARA. Convicted in terms of plea-bargain with the state. Presiding officer condemned delays in investigation and trial as 'preposterous'.[9]

22. It is apparent that the problem does not lie with the legislation or regulatory environment, **but with the execution thereof by state organs who are chronically and perennially under-resourced, mismanaged, incompetent and inept**.

23. By way of contrast to the above, where the state has failed to prosecute those charged under POCDATARA, **it has not been due to the**

[8] Smith D, 'South African Police Foil White Extremist Bomb Plot' *The Guardian*, 7 May 2010, available at [https://www.theguardian.com/world/2010/may/07/south-africa-white-extremist-bomb]

[9] Op Ed: Global Initiative Against Transnational Organised Crime 'Farhad Hoomer and the Broader Picture of Islamic State Linked Cases in South Africa' *Daily Maverick* 3 March 2022 available at [https://www.dailymaverick.co.za/article/2022-03-03-farhad-hoomer-and-the-broader-picture-of-islamic-state-linked-cases-in-south-africa/]

legislation but due to the incompetence of the prosecuting authority and investigating officials.

24. The dropping of charges against the infamous Farhad Hoomer, who is alleged to have orchestrated a deadly attack on a mosque in Verulam among much else, is an extremely illustrative example of the problem.[10]

25. As revealed in a recent report authored by the Global Initiative Against Transnational Organised Crime group, which is quoted at length for its cogency:[11]

> "The institutions tasked with identifying, prosecuting, and preventing terrorism cases in South Africa are **fundamentally weak**. Investigators with close knowledge of Islamic State-linked groups told GI-TOC that South African authorities **do not currently have enough technical and specialist capacity to deal with cases of this nature.** An officer in the Hawks unit for Crimes Against the State expressed concerns that the unit is "seriously **understaffed**", with only around 20 officers with the requisite knowledge and experience nationwide. Several sources told GI-TOC that there is a single South African Police Service expert who analyses data seized in terror raids... This **lack of investigative capacity has led to delays in prosecutions**. The magistrate in the Verulam mosque attack prosecution criticised "unreasonable" delays, which led to the case being dropped." (own emphasis)

26. The introduction of new measures such as the proposed s3A cannot address the problem as described. Any obstacles or issues experienced by the state are fundamentally capacity, training, and resource related.

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[10] Pillay K, 'KZN Terror Suspects Accused of Woolworths Bombing and Deadly Mosque Attack Free After 2-year Court Battle' *IOL.com,* July 14 2020, available at [https://www.iol.co.za/news/south-africa/kwazulu-natal/kzn-terror-suspects-accused-of-woolworths-bombings-and-deadly-mosque-attack-free-after-2-year-court-battle-50948917]

[11] *Ibid* footnote 9

27. This is not to mention the fact that measures like the proposed s24B will likely prove **unenforceable**, given that most of the content on the internet is hosted and/or disseminated by massive supranational companies such as Meta, who act as secondary publishers, or alternatively not hosted on traceable servers at all – such as on the so-called 'dark web'.

28. The jurisdictional questions involved are complex and there seems to have been little thought given to such challenges. A single clause is wholly insufficient to address such a massive task and to suggest otherwise would be disingenuous. That it has been attempted is further evidence of how belatedly these sections must have been introduced. Such **complex legal issues merit *lex specialis* application** and deliberation.

OVERREACH & UNCONSTITUTIONALITY

29. The proposals contained in the Amendment remain simply unconstitutional despite the practical constraints as mentioned.

30. Measures such as s24B ostensibly violate all established principles of due process by disdaining the *audi alteram partem* doctrine and the right to be presumed innocent without any concomitant justification. Such a step is self-evidently capable of abuse, particularly in South Africa, and allows for disproportionate and discretionary utilisation and enforcement.

31. It should above all be recalled that **the definition of 'terrorism' is notoriously contested across the world**. There is no single internationally agreed upon meaning. The South African definition is generally no poorer or better than any other. The fact remains that the inherent uncertainty and vagueness associated with the act of 'terrorism' **enjoins the legislature to tread extremely carefully where criminal liability is tied to such a vague, flexible, and broad definition**, which is also politically loaded.

31.1 To mention but one practical example – **the proposed s3A contains the word 'encourage' as an act or conduct attracting criminal liability**. The U.N has itself advised that the word 'encourage' is part of a package of terminology that is overbroad in terms of anti-terror legislation, with reference specifically to legislation adopted in Southern Africa.[12]

31.2 Similarly, the Commissioner for Human Rights of the Council of Europe wrote in 2018 as follows in respect of a disturbing conviction rate attendant to the 'promotion' or 'encouragement' of terrorism as an offence:[13]

"Before adopting any new counter-terrorism measures, member states should pay attention to existing human rights standards and notably ensure that these measures are compatible with Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights, which guarantee the right to freedom of expression…In its General Comment No. 34 published in 2011, the UN Human Rights Committee underlined in that respect that **"such offences as 'encouragement of terrorism' and 'extremist activity' as well as offences of 'praising', 'glorifying', or 'justifying' terrorism**, should be clearly defined to ensure that they do not lead to **unnecessary or disproportionate interference with freedom of expression**…The Joint Declaration on Freedom of Expression and Responses to Conflict Situations adopted in 2015 also insisted on the need for States to "refrain from applying restrictions relating to 'terrorism' in an unduly broad manner. Criminal responsibility for expression relating to terrorism should be **limited**

[12] United Nations Security Council Counter-Terrorism Committee *Global Survey of the implementation of Security Council Resolution 1624 by Member States* [March 2021] available at [https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/ctc_gis_1624.pdf]

[13] Commissioner for Human Rights, Council of Europe 'Misuse of anti-terror legislation threatens freedom of expression' Strasbourg, 4 December 2018, available at [https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression]

to those who incite others to terrorism; vague concepts such as 'glorifying', 'justifying' or 'encouraging' terrorism should not be used." (own emphasis)

31.3 S3A could also criminalise conduct that would not otherwise constitute terrorism. Criminalising the mere ownership of such material self-evidently creates enormous potential for abuse and is wholly disproportionate to the threat actually posed by domestic terrorism. The Amendment would criminalise curious individuals who may have no link whatsoever to terrorist groups or intend to act in any way.

32. The well-known RICA controversy and abuse of interception processes against investigative groups like amaBhungane[14] serves as an extremely prescient example of how expanded powers of investigation cause more harm than good. The proposed measures pose the exact same risks.

33. In addition, on a broad basis, the proposed measures have the potential to unjustifiably violate the rights to freedom of expression and association; to privacy; to freedom of conscience; access to information; among a host of other civil liberties and guarantees.

34. Examples of how the vagueness and overbreadth of the definitions of 'terror activity' and 'terror related material', combined with expanded discretionary powers of investigation and action, may have disastrous effect, are not difficult to imagine.

34.1 The brewing political storm surrounding the so-called 'CapeExit' secessionist movement is pertinent. Under the present definition and with the adoption of the newly proposed measures, any person advocating or 'encouraging' secession would be

[14] *AmaBhungane Centre for Investigative Journalism NPC and Another v Minister of Justice and Correctional Services and Others; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC and Others* (CCT 278/19; CCT 279/19) [2021] ZACC 3

criminally liable and vulnerable to bans on access to information; or even freezing orders, based on the lowered standard of 'reasonable grounds' and the notion of endangering the 'unity' or 'territory' of the Republic.

34.2 A further pertinent example would be the pervasive Palestine-Israel debate, for which there is extremely strong and vocal support on both sides of the divide in the Republic. Having excised the infamous s1(4) exclusion, the Palestinian conflict may conceivably fall under the definition of 'terrorism' under the definition as mentioned. Hence, peaceful demonstrations and financial support for that particular cause may become criminalised as forms of 'encouragement' or 'indirect' facilitation of terrorism.

34.3 The above is further underlined by the fact that the Amendment **proposes severe increases in sentence for offences thereunder.**

35. Failing to address the above concerns will in all likelihood engender legal uncertainty; further delay the prosecution of cases as astute defense counsel exploit the definitional and constitutional *lacunae*; and account for inefficient duplication between statutes, particular in light of legislation like the Regulation of Foreign Military Assistance Act 15 of 1998, as well as the very recently promulgated (and similarly controversial) Cybercrimes Act 19 of 2020, which has partially commenced and provides for significant powers of search and investigation.

MISSED OPPORTUNITY

36. AfriForum is of the firm view that the legislature would have been far better served, and even Constitutionally enjoined, to rework, simplify, and tighten the definition of 'terrorist activity' and similar deficiencies as outlined by

scholars over the years – in addition to the welcomed and positive developments as set out above.

37. Such efforts, in combination with the integration(s) as proposed, and in the absence of expanded investigative powers afforded to the state, would have represented noteworthy legislative work.

CONCLUSION

38. The impugned provisions suffer from an acute lack of necessity and justification. By passing this Bill, the legislature would be creating problems in response to an issue which barely requires a solution at this stage. These problems would affect every South African who engages in the online political world, or even purports to support a mildly controversial cause.

39. The above is lamentable given that there are certainly aspects of the Amendment which are laudable and represent a symbolically and practically important gesture to the international community.

40. **AfriForum remains of the view that the legislation should thus be reconsidered and postponed pending further deliberation, as well as pending legal reform in the financial intelligence sector. It should not pass as presently formulated.**

Yours faithfully,

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HURTER SPIES INC.

Per. DJ Eloff