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10 October 2022

TO: STANDING COMMITTEE ON FINANCE

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SUBMISSION BY MEDIA MONITORING AFRICA:

**GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING)
AMENDMENT BILL**

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INTRODUCTION

1. Media Monitoring Africa (“**MMA**”) welcomes the opportunity to provide this submission to the Standing Committee on Finance (“**Committee**”) on General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill (B18-2022) (“**Bill**”). MMA’s submissions pertain to proposed amendments to the Non-profit Organisations Act 71 of 1997 (“**NPO Act**”).
2. We note that the South African government is committed to avoiding grey listing by the Financial Action Task Force (“**FATF**”). We recognise that grey listing could have dire economic consequences for the country. Chief among these is an acute reduction of investor confidence and capital inflows. This in turn would impact various spheres of the economy and exacerbate existing macro- and socio-economic challenges. We note that the government is expected to ensure progress in complying with the FATF’s 40 technical compliance criteria (or standards) in time for reviews in late October, December, and a final decision in February 2023.
3. Notwithstanding the need to avoid grey listing, MMA is deeply concerned by the process associated with responding to the FATF, MMA is particularly concerned by the curtailed timeframes for public comment. MMA is of the view that the somewhat self-created urgency of this process deeply undermines public participation. MMA is further concerned by the proposed amendments to the NPO Act. MMA is concerned that the proposed amendments relating to the compulsory registration of Non-Profit Organisations (“**NPOs**”) would have a chilling effect on the functioning of civil society. MMA is concerned that the response is disproportionate to the low threat of terrorism financing in South Africa’s NPO sectors. MMA is concerned that “not only has our government failed to allow for anything like meaningful consultation, it has also put forward suggestions that would have far-reaching — and patently unconstitutional — repercussions.”¹ We also note that no civil society bodies were consulted. In developing the draft Bill making the necessity for meaningful public engagement even greater.
4. As set out below, MMA makes three core submissions, and has structured the submission as follows:
 - 4.4. **First**, we provide a brief overview of MMA.
 - 4.5. **Second**, we state our concerns with the process associated with this law reform exercise.
 - 4.6. **Third**, we unpack our concerns relating to the NPO Bill.
 - 4.7. **Fourth**, we discuss proportionality and suggest that less restrictive means are available to achieve the same outcome.

¹ W Bird, ‘SA’s harebrained scheme to register NPOs will not solve terrorist financing concerns’ (9 October 2022) (accessible here: <https://www.dailymaverick.co.za/article/2022-10-09-sas-harebrained-scheme-to-register-npos-will-not-solve-terrorist-financing-concerns/>).

5. These are dealt with in turn below.
6. We note upfront, that these submissions have been prepared in haste given the unreasonable timeframes within which these submissions were due. MMA reserves the right to supplement these submissions should the need arise.
7. MMA also notes that a date for oral hearings have also already been determined and we express our desire to make oral submissions at such hearings.

OVERVIEW OF MEDIA MONITORING AFRICA

8. MMA is a not-for-profit organisation that has been monitoring the media since 1993. MMA is an active South African civil society organisation seeking to promote a culture of human rights. MMA has and continues to play an active role in advocating for access to information, freedom of expression, and the responsible free flow of information to the public.
9. Through our work, we engage in a range of legislative, litigious, and advocacy processes, and have made various submissions to government, regulatory authorities, and international bodies on key questions relating to, among others, freedom of expression, access to information, equality, children's rights, privacy, and electoral integrity.
10. As a long-standing and active civil society organisation, MMA has garnered notable experience in understanding the civil society landscape, and the important role of civil society in advancing our constitutional democracy and has been fortunate to have worked with multiple organisations advancing various fundamental rights and freedoms. As such, our submissions to the Committee are therefore informed by the knowledge we have garnered over the years.²
11. MMA is also an active member of the NPO Working group that is coordinated by Inyathelo. It was set up to respond to the Draft Amendment to the NPO Act.³ To the extent that our submissions align with those of NPO members we hereby endorse them and those of other members.

FAILURE TO ENABLE MEANINGFUL PUBLIC PARTICIPATION

12. In the last 2 years, MMA has made over 20 submissions to various portfolio committees, chapter 9 institutions, regulators, and international bodies. MMA truly values the public participation process and supports the necessary constitutional obligation to enable meaningful public participation. As an advocate for freedom of expression and access to information MMA recognises the inherent importance of enabling members of the public to make informed decisions about matters that affect them. It is deeply regrettable that this law reform has fallen short of our constitutional standards to enable the public to meaningfully engage on matters that have significant socio-economic consequences.

² For more information about MMA, please visit mediamonitoringafrica.org.

³ More on the NPO working group can be found here. <https://www.inyathelo.org.za/index.php/npoamendmentbill>.

13. On 27 September 2022, the Standing Committee on Finance released its call for written submissions on the Bill. The deadline for submissions is 12h00, 10 October 2022, less than 10 working days. MMA understands that their timeframes aligned with the FAFT assessment, but MMA is also aware that South Africa's most recent evaluation occurred between April 2019 and May 2021, and the report was **made public in October 2021**.⁴ It is our understanding that South Africa has been given until end-October 2022 to demonstrate progress toward undertaking these priority actions through policy proposals and institutional reforms. It will then be re-evaluated once again in December to establish the degree to which said proposals have been advanced. Thereafter, a final decision on South Africa's status will be taken in February 2023.
14. While MMA understands the pressing nature of meeting the October deadline, MMA is of the view that this urgency is self-created. The government has been aware of the recommendations and time frames for a year, and is only now, on extremely curtailed timeframes allowing the public to engage in this process. The tight timeframe to comment is insufficient and falls short of the constitutional duty to enable public participation.
15. Our Constitution imposes "a constitutional obligation on legislatures to facilitate public participation in the law-making process."⁵ One of the ways in which our Constitution envisages participation is by requiring the legislature and other processes of the legislature to enable "public participation in the making of laws by Parliament and other deliberative legislative assemblies".⁶
16. Section 59(1) of the Constitution requires the National Assembly to facilitate public involvement in the legislative processes of the Assembly and its committees. This creates a **duty** to ensure public participation. MMA submits that public participation is not "just a matter of legislative etiquette or good governmental manners" it is a "**constitutional obligation**",⁷ that that includes "**creating effective opportunities for participation**".⁸
17. The substance of the right to public participation has been given expression through the jurisprudence of our Courts who have on many occasions affirmed that members of the public must be afforded a "**reasonable opportunity**" to participate,⁹ setting reasonableness as the standard by which public participation must be measured.¹⁰
18. The Committee has given a period of less than 10 working days to allow members of the public, including civil society organisations, to consider and review the proposed changes.

⁴ FAFT, South Africa, (accessible here: <https://www.fatf-gafi.org/countries/#South%20Africa>).

⁵ *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 107.

⁶ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amicus Curiae)* [2005] ZACC 14.at para 113.

⁷ *Doctors for Life*, Sachs J separate concurring judgment at para 231.

⁸ *Doctors for Life* para 105.

⁹ *New Clicks and Doctors for Life*.

¹⁰ *South African Veterinary Association v Speaker of the National Assembly and Others* [2018] ZACC 49.

This time undermines the reasonable opportunity threshold required for meaningful public participation. Nicole Copley explains:¹¹

- “there has been no consideration of, no appreciation of the sector in the last-minute mad rush to get this Bill through;
- there was no prior consultation with the sector (27 September was the first time it was made available); and
- being such an octopus of a Bill, it has been almost impossible to communicate the import, impact, and nuance of it in a way which allows meaningful engagement and response by the broader non-profit sector.”

19. MMA aligns with Copley’s explanation. While the MMA understands that government is now under pressure to respond to the FAFT’s recommendation, it has had sufficient time to do so and the urgency now placed on the public has the protentional to affect the reasonableness and meaningfulness of the participation process. In the context of legislative timetables, our Courts have found, that “[w]hen it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted...**timetables must be subordinated to the rights guaranteed in the Constitution and not the rights to the timetable.**”¹² The same applies here, while there is a temptation to curtail timeframes, this impedes meaningful public participation, which in turn threatens the legitimacy of this law reform process.
20. Given the socio-economic impact of the FAFT rating, MMA submits that the Committee recommends that the appropriate ministry or department engage with the FAFT in order to seek an extension on South Africa’s upcoming deadline. To the extent that an extension cannot be granted, MMA submits that members of the public should be enabled to engage directly with the FAFT on the Bills and processes.

REQUIREMENTS FOR REGISTRATION

NPOs are vital for defending our constitutional democracy

“Though not the sole determinant of a robust democracy – government and the markets must also play their rightful role to achieve this goal – a vibrant civil society does strengthen a state’s democratic credentials and should therefore be accorded facilitation and protection similar to the public and private sectors to enable it to contribute effectively. Civil society acts as both a counterweight and complement to government and business in a democracy, providing avenues through which people directly or indirectly exert their influence on public affairs and matters that affect them.

When societies are deprived of diverse forms and spaces for people to associate with and mobilise, the opinions and preferences of those with

¹¹ N Copley, ‘Mandatory registration requirement in money-laundering and terrorist financing bill will badly hurt SA non-profits’ (8 October 2022) (accessible here: <https://www.dailymaverick.co.za/article/2022-10-08-mandatory-registration-requirement-in-money-laundering-and-terrorist-financing-bill-will-badly-hurt-sa-non-profits/>).

¹² *Doctors for Life* para 194.

privilege or access to power tend to dominate. Disfavoured viewpoints all but disappear and society loses the freedoms of choice and representation. Contestation through fair elections may be eliminated or rendered meaningless if people are not free to mobilize votes, articulate preferences, and represent interests. Civil society promotes and facilitates these spaces for engagement.”¹³

21. Civil society, of which NPOs are a part of, is a vital component of functioning democracies and indispensable for the full protection of human rights. Undue restrictions of civil society space have a negative impact on implementing international human rights standards.
22. MMA supports the above position, and it is precisely because of the fundamental role NPOs and civil society play that any imposition on their ability to function must be treated with care and consideration. MMA submits that the rushed nature of this law reform process and the proposed blanket registration requirement shows little regard for the important role of NPOs in South Africa. This does not align with our constitutional imperatives. “South Africa’s model Constitution provides a special place for civil society to play an oversight role of democratic institutions, monitor human rights and give citizens, especially the poor, vulnerable and excluded, the tools to know and assert their rights.”¹⁴ Failing to recognise and respect the role of NPOs and civil society is a constitutional failure.

International human rights law

23. MMA notes that it is well established that the legal framework within which NPOs operate must be consistent with international human rights law.¹⁵ This is due to the acceptance, by way of a Resolution from the United Nations General Assembly, that “everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”¹⁶ It is trite that the right to freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political, and social rights.
24. In her 2012 Report, Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, explained that the right to freedom of association is an essential component of democracy, empowering people to express their political opinions, engage in

¹³ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association (2017) A/HRC/35/28 (accessible https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session35/Documents/A_HRC_35_28_AUV.docx).

¹⁴ W Gumede, ‘Our heritage is a successful civil society’ (28 September 2018) (accessible here <https://mg.co.za/article/2018-09-28-00-our-heritage-is-a-successful-civil-society/>).

¹⁵ UN Human Rights Counsel, ‘Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development’ A/HRC/RES/27/31 (2014) (accessible here: http://freeassembly.net/wp-content/uploads/2014/11/A_HRC_27_L.24-ENG.pdf).

¹⁶ UN General Assembly, ‘Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’ A/RES/53/144 (1999) (accessible here: <https://www.ohchr.org/sites/default/files/Documents/Issues/Defenders/Declaration/declaration.pdf>).

cultural, economic, and social activities, and hold leaders accountable.¹⁷ She explains further that such “interdependence and interrelatedness” with other rights make it a valuable indicator of a State’s respect for the enjoyment of many other human rights.

25. The right is tied to a corresponding duty on States. States have a responsibility and obligation to protect, promote, and respect all human rights and fundamental freedoms, including the implementation of steps necessary to foster an environment that enables all persons to enjoy their right to associate. States are therefore required to adopt such legislative, administrative, and other steps as may be necessary to ensure that the rights and freedoms contained are effectively guaranteed. Our Constitution similarly envisages the right to freedom of association – a right guaranteed to “everyone”.
26. We raise this due to the concern that the compulsory registration of NPOs (both domestic and foreign) envisaged in the NPO Bill **implicates and erodes the right to freedom of association.**

Compulsory registration

27. While different routes can be pursued when it comes to registration, the prevailing international human rights law position favours a “notification procedure”, rather than a “prior authorization procedure” that requests the approval of the authorities to establish an association as a legal entity. Former Special Rapporteur Kiai explains that the former complies better with international human rights law and should be implemented by States.¹⁸ This is supported by the position that registration should not be compulsory. NPOs “should be allowed to exist and carry out collective activities without having to register if they so wish.”¹⁹ Research from Freedom House on anti-NGO measures in Africa finds that legal frameworks that mandate registration rather than mere notification of their existence, “improperly abridge the right to freedom of association”.²⁰
28. From an international law perspective, any restriction on the right to freedom of association and the rights of associations must be necessary for a democratic society and, thus, proportional to their legitimate aim. In terms of our Constitution, per section 36, any limitations on a right in the Bill of Rights must be **reasonable and justifiable** in an open and democratic society based on human dignity, equality, and freedom.
29. In light of the above, and what follows below, we submit that **the compulsory registration for NPOs has the potential to violate the right to freedom of association, and at this stage, it appears that such limitation falls short of a necessary, proportionate and reasonable, and justifiable limitation.**

¹⁷ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27 (2012) (accessible here: http://freeassembly.net/wp-content/uploads/2013/10/A-HRC-20-27_en-annual-report-May-2012.pdf).

¹⁸ Id.

¹⁹ UN General Assembly, ‘Human rights questions: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms’ (2004) A/59/401 (accessible here: <https://digitallibrary.un.org/record/533579?ln=en>).

²⁰ Freedom House, ‘Freedoms Under Threat: The Spread of Anti-NGO Measures in Africa’ (2019) (accessible here: https://freedomhouse.org/sites/default/files/2020-02/05132019_UPDATED_FINAL_Africa_Special_Brief_Freedoms_Under_Threat.pdf).

Foreign NPOs

30. MMA is of the view that the position of favouring notification over compulsory or mandated registration should apply. NPOs, whether domestic or foreign should be subject to the same process and standards. The United Nations Secretary-General explains that “foreign NGOs carrying out activities for the promotion of human rights must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives”.
31. We note with concern that some African states have applied unfair application procedures, inordinate registration delays, and unnecessary registration conditions on foreign NPOs. Subject to the specific context and legal framework, there is a reasonable likelihood that unfair requirements targeted at foreign NPOs can violate the right to freedom of assembly and association.²¹
32. Similar concerns have arisen in countries such as the Russian Federation, Azerbaijan, Turkey, and Hungary. The Council of Europe’s Parliamentary Assembly has noted with concern various legislative changes in these countries resulting in the identification of and restrictions on “undesirable foreign organisations” or “foreign agents” making it difficult for foreign and international NPOs to operate.²² These changes threaten the survival of civil society and can undermine the freedom of expression and freedom of association as enshrined in the leading international human rights instruments and can have a deterrent effect on the exercise of those freedoms.
33. We highlight these examples to illustrate our concern with the compulsory registration of NPOs, including foreign NPOs. This position is **inconsistent with the principles of international human rights law and our Constitution and has the potential to erode the functioning of civil society**. Accordingly, we strongly recommend the removal of the peremptory requirement that NPOs “must be registered”.

PROPORTIONALITY

34. MMA submits that any undue restrictions on NPOs implicate and undermine constitutional rights, and any imposition of restrictions must therefore be reasonable and justifiable.
35. The limitation on the right must be **proportional** to the effect to be produced by limiting the right.
36. MMA submits that the current response – the proposed mandatory registration requirement – is disproportionate for three primary reasons:
 - 36.1. The response is **disproportionate** to the identified risk;

²¹ Freedom House above.

²² Committee on Legal Affairs and Human Rights, ‘How to prevent inappropriate restrictions on NGO activities in Europe?’ (2016) (accessible here: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22310&lang=en>).

36.2. The response **does not respond** to the recommendations provided by FAFT; and

36.3. The response may have **adverse consequences**.

The response does not respond to the identified risk

37. In South Africa's own risk assessment, published in March 2022, it appears that the NPO sector is not at high risk for terrorism financing:

“Charities and non-profit organisations (NPOs) play a critical role in providing educational, religious, and humanitarian services. While crucial in many ways to daily life in the developing world, charities and NPOs can be exploited and used as vehicles to raise, store and divert funds toward terrorism.

The NPO sector in South Africa is well established and comprises various voluntary charities and associations. South African-based NPOs and charities are vulnerable to potential abuse by terrorist groups despite the fact that it is **not currently assessed as posing a significant terrorism financing risk**. Although **there have been no terrorism financing convictions related to the South African NPO sector**, the prevalence of cash and specifically charities operating near or in conflict zones associated with terrorism pose a higher terrorism financing risk. These charities and NPOs, or individuals within the charities and NPOs are at risk of being exploited by terrorist groups in these areas.”

38. While there may be some risk, as explained by the FAFT explains in revised recommendation 8:

“Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the **country has identified as being vulnerable to terrorist financing abuse**. Countries should apply focused and **proportionate measures**, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse.”

39. From a plain reading of South Africa's assessment and the FAFT recommendation, the law reform process and potential consequences for South Africa's NPO sector are disproportionate to the minimal risk identified.

40. Interestingly, in its recommendations to South Africa, the FAFT notes that “no assessment has ever been undertaken to identify the nature of threats posed by terrorist entities to the NPOs which are at risk as well as how terrorist actors abuse those NPOs”. Given the March 2022 mapping, it appears that this position has changed, and the South African government has confirmed that while there is some vulnerability there is currently no significant threat. This position is what should inform a proportionate response. MMA submits that the

proposed changes to the NPO Bill are not a proportionate response to a self-identified low-risk.

The response does not respond to the recommendations provided by FAFT

41. Notably, the primary concerns of the FAFT were that (i) South Africa has not yet done an assessment of their broader NPO sector to identify those organizations, based on their characteristics or activities, which put them at risk of TF abuse; and (ii) South Africa also has no capacity to monitor or investigate NPOs identified to be at risk of TF abuse.
42. Based on these concerns the FAFT rated South Africa non-compliance with recommendation 8.
43. It appears that South Africa's March assessment may address the first concern. The second concern is worth further consideration. To MMA's current knowledge little has been done to address this concern. Rather, the government has elected to implement a "quick fix", and require NPOs to register. This does not solve a capacity vacuum and it does not create an enabling environment for NPOs. Rather, a lack of capacity can increase risk. As explained by the Open Government Partnerships:

"Weak institutional environments harm nonprofit organizations and weaken the control of terrorism financing. Unclear rules and processes hinder the potential support of nonprofits, can physically endanger nonprofit organizations, and weakens the ability of the government to identify actual risks. Government efforts to strengthen the NGO board (the unit responsible for implementing the recommendations) must include proactive engagement with nonprofit representatives and identify a proportionate response"

44. As will be discussed below, there are alternative and less restrictive means that boost capacity, ensure accountability, and mitigate vulnerability for NPOs being susceptible to terrorist financing abuse.

The response may have adverse consequences

45. In 2019, the Working Group on Torture and Terrorism (composed of 17 NGOs coming from around the world, working across 32 countries) along with the SOS-Torture Network prepared submissions to the UN Office of the High Commissioner for Human Rights, in which they highlighted that the "FATF's recommendation 8 is playing a **destructive role** on civil society freedom and vital human rights work." They explained as follows:²³
 - "In practice, FATF and its regional bodies have exerted considerable influence, pressuring governments to adopt or amend national counter-terrorism legislation

²³ "Torture & terrorism" Working group ,FATF's recommendation 8 on non-profit organizations: A new tool to unfairly and dangerously shrink civil society space (2019) (accessible here: https://www.ohchr.org/sites/default/files/Documents/Issues/Terrorism/SR/Submissions/OMCT_GA74CT.pdf).

following an opaque process. Regularly they are devoid of proper consultation with HRDs/civil society and characterized by an almost complete lack of accountability.”

- “Among the real-life impact of the FATF’s recommendation is often an overly-complicated, **restrictive registration requirement, limitations or de facto prohibition of foreign funding for critical human rights work**, as well as the targeting of human rights work through restrictive banking laws.”
46. The group goes on to list several examples of countries in order to demonstrate the concerns and harms caused by recommendation 8. In India for example, in Indonesia, following a rating from the AGP (Asian Pacific Group, FATF-style regional body) that Indonesia was non-compliant with recommendation 8, embarked on law reform reforming laws pertaining to NGOs. According to the Working Group, the new laws **infringed upon the rights to freedom of association, expression, and religion, and provide the government with wide latitude to obstruct NGO work. The law imposes a variety of vague obligations and prohibitions on NGO activities, and severe limitations on the creation of foreign-funded organizations.**
47. Reports from Pakistan note that “thousands of small and medium level non-governmental organisations (NGOs) have suffered during the government’s campaign to regularise their affairs in a bid to fulfil the requirements of Financial Action Task Force (FATF), the global watchdog for illicit financing.”²⁴ According to the reports, the mapping of NGOs started in May 2019 to fulfil the FATF requirements and resulted in the provincial government **deregistering around 3,851 NGOs out of the total of 4,935**, working in different sectors in the province.
48. Community World Service Asia, (CWS) a humanitarian and development organisation, recently reflected on the impact of the FATF standards on the non-profit sector during COVID-19. As a general observation, CWSA remarked that “although many countries have pursued initiatives to counter terrorism funding by multilateral legislative structures such as the FATF, steps such as Recommendation 8 have had unexpected implications for non-profit organisations (NPOs). The strong requirement to control the sector as a whole for greater efficiency and accountability has contributed to the following:²⁵
- increasing surveillance and state regulation;
 - for obtaining and sharing financial services for growth and humanitarian relief, human rights, and development work;
 - the creation of onerous and restrictive laws, rules, and regulations for the sector; and
 - the cutting back, in general, of the field of civil society, with Recommendation 8 improving the instruments already in use by the government, such as counter-terrorism laws and regulations, to overregulate civil society.

²⁴ Ashfaq, ‘NGOs bear brunt of govt’s drive to fulfil FATF requirements’ (2020) (accessible here <https://www.dawn.com/news/1593118>).

²⁵ Impact of the FATF standards on the non-profit sector during COVID-19 (2020) (accessible here <https://communityworldservice.asia/impact-of-the-fatf-standards-on-the-non-profit-sector-during-covid-19/>).

49. The FAFT itself acknowledges that there are challenges and there are some states that misuse FAFT compliance for more nefarious agendas:²⁶

“In response to ongoing concerns that AML/CFT measures were having a chilling effect on NPOs’ legitimate activity, in June 2016 the FATF revised its Standards and Methodology to clarify the subset of NPOs, which should be subject to supervision and monitoring. The revised Recommendation 8 aims to protect NPOs from potential TF abuse while also ensuring that focused risk-based measures do not unduly disrupt or discourage legitimate charitable activities. The Interpretive Note specifically states that “measures to protect NPOs from potential terrorist financing abuse should be targeted and in line with the risk-based approach. It is also important for such measures to be implemented in a manner which respects countries’ obligations under the Charter of the United Nations and international human rights law.” **However there continue to be countries that incorrectly implement the Standards and justify restrictive legal measures to NPOs in the name of “FATF compliance”, both unintentionally and, in some cases, intentionally.**”

50. We mention all this, not to discredit the FAFT or its standards, but to highlight that there can be adverse consequences when states pursue law reform processes with a focus on combatting terrorism and money laundering, rather than creating enabling environments for NGOs to thrive. MMA may by no means discounts the real concern and challenges posed by terrorism and money laundering. We do however take the position that any measures taken, whether to provide a framework for NGOs, or for counter-terrorism and security, must respect international human rights law.
51. Even if the Constitutionality hurdle for the compulsory registration can be overcome, which in its current form we would assert it cannot there is the issue of the practical implications of the proposed law which would itself open the amendment to further challenge. Currently, the Directorate who would receive all registration information is answerable to the Minister only. There are no checks or balances on a potential abuse where for example a Minister takes a disliking to an NPO or group of NPO’s they may for example have their registration denied, and there is currently no form of appeal. In addition the requirements as they stand would make thousands if no millions of NPO’s illegal simply because expecting them to register if they are a local dance group, or residents’ associations or church group. In practical terms expecting all these to register would take years and expend significant resources on ensuring compliance – all the while not focusing on those entities who may actually pose a risk of terrorism financing.

²⁶ FAFT, ‘High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards’ (2021) (accessible here <https://www.fatf-gafi.org/media/fatf/documents/Unintended-Consequences.pdf>).

ALTERNATIVE APPROACHES AND THE FOCUS ON CREATING AN ENABLING ENVIRONMENT

52. To do their work, NPOs involved in promoting fundamental rights need to be able to exercise their rights fully and without unnecessary or arbitrary restrictions. This necessitates that states fully implement their positive obligations to promote human rights and create an enabling environment for CSOs.
53. Enabling environments for NPOs breed a healthy NPO sector, one founded on openness and accountability, integrity, and public confidence in the administration and management of NPOs. This strengthens the ability of NPOs to conduct their work, in turn, becoming less vulnerable to concerns of terrorist financing.

Alternative and less restrictive means

54. FAFT identifies a need for capacity and institution building in South Africa, noting that:

“To mitigate against the risk of TF abuse of the NPO sector, South Africa should **implement an action plan with clear departmental responsibilities and deliverables**. They should designate a **competent authority responsible for the supervision or monitoring of NPOs**, ensuring that the designated competent authority is fully integrated within the country’s AML/CFT regime as being a member of the security cluster.”
55. This is a reasonable and proportionate response and assists in addressing the FAFT’s concerns with capacity. MMA submits that a hasty law reform process does not adequately address the concerns raised by the FAFT.
56. Given that risk is presently low, South Africa should use this opportunity to mitigate future risks. Such approaches include:
57. **Establishing mechanisms for cooperation, coordination, and information sharing** amongst all the relevant authorities, whereby relevant authorities liaise closely with NPOs in both formal and informal settings to advance cooperation, as has been done in Ireland.
58. **Conducting appropriate and continued risk-based monitoring** of NPOs vulnerable to TF abuse without disrupting or discouraging legitimate NPO activities, as proposed in Haiti.²⁷
59. **Awareness raising**. This may include undertaking outreach programs to raise awareness of terrorism financing risks and measures to combat such risks. In Germany, the government worked with an umbrella organisation of NPOs, to fund and develop guidance and workshops on risk management, integrity, transparency, and anti-corruption. ²⁸Canada has done well with its **awareness-raising events**, focused on increasing awareness of

²⁷ FAFT, (accessible here: <http://www.fatf-gafi.org/publications/high-risk-and-other-monitored-jurisdictions/documents/increased-monitoring-june-2022.html#Malta>)

²⁸ FAFT, Germany (accessible here: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Germany-2022.pdf>).

terrorism financing risks and vulnerabilities, including international best practices for mitigating terrorism financing risks in the charities sector, sound governance, accountability procedures, transparency reporting, as well as consultative processes and presentations by senior management.²⁹

CONCLUDING REMARKS

60. MMA reiterates its concern with this process and the hasty manner in which public participation has been conducted. Moreover, in the absence of further information from the Standing Committee, the current approach appears disproportionate to the identified risks and the recommendations set out by the FAFT. MMA submits that a rushed law reform process does not do justice to the FAFT recommendations, and jeopardises South Africa's rating which can have significant socio-economic consequences in an already fragile socio-economic climate.
61. Given the minimal risk identified by South Africa, proactive and collaborative approaches are far more likely to mitigate short-, medium-, and long-term risks of terrorism financing, are proportionate to the response needed and do not unduly hinder the ability of NPOs to fulfil their mandates. Engagement, monitoring, and awareness raising can achieve a beneficial outcome with the least risk to the functioning of our civil society sector.
62. MMA submits that to the extent the Committee persists with its law reform agenda to NPO registration that further opportunity and time be provided for public participation. To the extent the Committee abandons this approach, MMA recommends further opportunity and time for the public to engage on questions of cooperation, evaluation, and awareness raising.
63. MMA is available to provide any further information or clarity that may be of assistance to the Committee and is available to present oral submissions.

**Media Monitoring Africa
Johannesburg, October 2022**

²⁹ FAFT, Canada (accessible here: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Canada-2016.pdf>).