

Webber Wentzel Comments

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2022 (Omnibus Bill)

- Please find below our comments on the amendments proposed by the Omnibus Bill to:
 - (in Part A) the Companies Act, 2008;
 - (in Part B) the Trust Property Control Act, 1988; and
 - (in Part C) the Nonprofit Organisations Act, 1997.
- We would welcome the opportunity to provide more detail on request, should it be required. Our key contact's contact details appear below:

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s 52	s 1	<p>introduction of new definition of "beneficial owner":</p> <p><u>"beneficial owner"–</u> (a) <u>has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and</u></p> <p><u>[the Financial Intelligence Centre Act, 2001, in its present form, defines "beneficial owner" as follows:</u></p> <p>"beneficial owner", in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly– (a) owns the legal person; or (b) exercises effective control of the legal person;]</p> <p><u>[the Omnibus Bill replaces this definition with the following definition of "beneficial owner":</u></p> <p>"beneficial owner"– (a) means a natural person who directly or indirectly– (i) ultimately owns or exercises effective control of– (aa) a client of an accountable institution; or (bb) a legal person, partnership or trust that owns or exercises</p>	<ul style="list-style-type: none"> • The Companies Amendment Bill, 2021 proposed to introduce the definition of "true owner", which was linked to the concept of beneficial interest in the definition and via section 56 of the Act. Unlike the proposed definition of "true owner", the definition of "beneficial owner" proposed by the Omnibus Bill is not expressly linked to beneficial interest – which we understand is the intention, for the concepts to be different. • We submit that the two terms are distinct and, to avoid confusion, the provisions relating to "beneficial owner" should preferably be dealt with in a separate new section so as not to be confused with the concept of "beneficial interest". • We submit that the cross-reference to the Financial Intelligence Centre Act, 2001 (FICA) may not be ideal as FICA also includes the horizontal relationship between an entity and its clients. If the intention is not to require companies to also look at the horizontal relationships and clients' beneficial owners, the reference to the definition in FICA is too wide. • We submit that the legislator may wish to consider clarifying what is meant by the terms "effective control" and "control" (used in the definition of "beneficial owner") since while control in the company law context is generally determined with reference to, for example, a <u>majority</u> of the voting rights associated with a company's securities, for purposes of FICA, ownership of 25% or more of the shares with voting rights in a legal person is understood to usually be sufficient to exercise control of it. On a plain reading of the definition, it would appear that the lower threshold is now also made applicable to the Act for purposes of the determination of beneficial ownership. However, the determination of "control" in accordance with section 2(2) of the Act is arguably applicable for all purposes of the Act. Given this discrepancy, there is potential for confusion as to who would be considered beneficial owners.

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		<p style="text-align: center;">effective control of, as the case may be, a client of an accountable institution; or</p> <p style="text-align: center;">(ii) exercises control of a client of an accountable institution on whose behalf a transaction is being conducted; and</p> <p>(b) includes–</p> <p style="padding-left: 20px;">(i) in respect of legal persons, each natural person contemplated in section 21B(2)(a);</p> <p style="padding-left: 20px;">(ii) in respect of a partnership, each natural person contemplated in section 21B(3)(b); and</p> <p style="padding-left: 20px;">(iii) in respect of a trust, each natural person contemplated in section 21B(4)(c), (d) and (e);]</p> <p>(b) <u>for the purposes of this Act, in respect of a company, includes, but is not limited to, a natural person who, directly or indirectly, ultimately owns or exercises control of a company, including through–</u></p> <p style="padding-left: 20px;">(i) <u>ownership of the securities of the company;</u></p> <p style="padding-left: 20px;">(ii) <u>the exercise or control of the exercise of the voting rights associated with securities of that company;</u></p> <p style="padding-left: 20px;">(iii) <u>the exercise or control of the exercise of the right to appoint or remove members of the board of directors;</u></p> <p style="padding-left: 20px;">(iv) <u>ownership, or the exercise of control of–</u></p>	<ul style="list-style-type: none"> • We further submit that the legislator may wish to consider providing for the threshold, if any, in regulations to the Act rather than hardcoding the percentage in the Act. Any such threshold should be determined in consultation / agreement with the Financial Intelligence Centre to ensure consistency throughout the market and in respect of different legal persons. • We also submit that if the legislator does not wish to provide for a threshold at present, it may wish to consider providing for the power (to prescribe a threshold) in the Act, should a threshold become desirable in future (so avoiding the process of amending the Act at that time).

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		<p><u>(aa) a holding company of that company;</u> <u>(bb) a juristic person other than a holding company of that company;</u> <u>(cc) a body of persons corporate or unincorporate;</u> <u>(dd) a partnership; or</u> <u>(ee) any other category or type of entity that may be specified in regulations for this purpose, that owns or is able to exercise control of, as the case may be, that company, including through a chain or network of ownership; or</u> (v) <u>the ability to otherwise materially influence the decision-making or policy of the company;</u></p>	
s 53	s 33	<p>amendment of section 33 as follows:</p> <p>33. Annual return.</p> <p>(1) Every company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the end of the anniversary of the date of its incorporation, including in that return—</p> <p>(a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7); and</p> <p><u>(aA) a copy of the company's securities register as required in terms of section 50; and</u></p> <p><u>(aB) a copy of the register of the disclosure of beneficial interest as required in terms of section 56; and</u></p> <p>(b) any other prescribed information.</p>	<ul style="list-style-type: none"> • It is not clear from the proposed insertion of the new section 33(1)(aA) whether companies should file a copy of their members' register (and only a list of shareholders) as it stands at the same financial year end as the latest annual financial statements filed with the Commission, or whether it should provide historical shareholdings (and a complete copy of the securities register) too. If the latter, this proposal would present many practical challenges, especially in the case of listed companies as their registers could be out of date soon after filing. • As regards the amendments proposed to be made to section 33 by the Omnibus Bill, the annual return (which will include copies of a company's annual financial statements, its securities register and its register of the disclosure of beneficial interest) will contain confidential information, commercially sensitive and potentially competitive information, to which any prescribed person will have access, including, for example, a major competitor of a company who falls within a category of prescribed persons. Granting rights to access such information to persons other than registered

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		<p>(1A) (a) The Commission must make the annual return contemplated in subsection (1) available electronically to any person as prescribed.</p> <p>(b) The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p> <p>(2) Every external company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered in terms of section 23(1).</p> <p>(3) Each year, in its annual return filed in terms of subsection (1), every company must designate a director, employee or other person who is responsible for the company's compliance with the requirements of this Part, and Chapter 3, if it applies to the company.</p>	<p>shareholders, holders of beneficial interests in securities issued by the company, accountable institutions that require specific prescribed information and regulatory authorities would be inappropriate (and potentially unconstitutional) having regard to the policy objectives which the proposed amendments in the Omnibus Bill are intended to achieve and the privacy rights enshrined in the Constitution.</p> <ul style="list-style-type: none"> • In light of the foregoing, we submit that the prescribed persons to whom the annual return should be made available electronically should be restricted to registered shareholders, holders of beneficial interests in securities, accountable institutions that require specific prescribed information and regulatory authorities. • If the persons who are prescribed are not limited as suggested above, a company should have the right, within reason, to require: <ul style="list-style-type: none"> ○ that the company should be advised of the request for the annual return; ○ any person requesting the annual return to provide reasons for the request, to be made available to the company, and that the company should be entitled to request the Commission to refuse to make the annual return available if reasonable reasons are not provided by such person; and ○ signature of a confidentiality and non-disclosure agreement to protect the company's legitimate interests (and those of parties listed in the documents). • We submit that there is a risk that information contained in the registers may be used for fraudulent purposes if too widely available, without safeguards as proposed, and that there is also a risk of exposure of persons listed in the registers to unsolicited contact. • We also caution that companies and the Commission may be required to disclose personal information of registered shareholders and beneficial

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			owners where the disclosure of this information may be prohibited under foreign legislation.
s 54	s 50	<p>amendment of section 50 as follows:</p> <p>50. Securities register and numbering.</p> <p>(1) Every company must–</p> <p>(a) establish or cause to be established a register of its issued securities in the prescribed form; and</p> <p>(b) maintain its securities register in accordance with the prescribed standards.</p> <p>(2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued–</p> <p>(a) the total number of those securities that are held in uncertificated form; and</p> <p>(b) with respect to certificated securities–</p> <p>(i) the names and addresses of the persons to whom the securities were issued;</p> <p>(ii) the number of securities issued to each of them;</p> <p>(iii) the number of, and prescribed circumstances relating to, any securities–</p> <p>(aa) that have been placed in trust as contemplated in section 40(6)(d); or</p> <p>(bb) whose transfer has been restricted;</p> <p>(iv) in the case of securities contemplated in section 43–</p>	<ul style="list-style-type: none"> • The proposed new section 50(3A)(a) requires every company to record in its securities register prescribed information regarding the natural persons who are the beneficial owners of the company, in the prescribed form, and to ensure that this information is updated within the prescribed period after any changes in beneficial ownership have occurred. • It is questionable how far up the structure a company can reasonably be expected to extend its enquiry, eg: <ul style="list-style-type: none"> ○ as regards foreign shareholders and foreign beneficial owners, the proposed amendments may be practically difficult (if not impossible) for companies to enforce in many respects, as foreign registered holders of securities and foreign beneficial owners are generally not bound by the Act to provide such information to the company. Under the Act: <ul style="list-style-type: none"> ▪ registered holders of securities in public companies are obliged in terms of section 56(3) of the Act to disclose the identities of persons on whose behalf securities are held, the identity of each person with a beneficial interest in the securities so held, etc; ▪ registered holders of securities and <u>holders of beneficial interests</u> in any company (whether public or private) are obliged in terms of section 56(5) of the Act to make a disclosure in respect of beneficial interests only where the company requires a disclosure to be made by notice in writing; and ▪ persons must notify regulated companies of acquisitions and disposals of beneficial interests in securities in the circumstances contemplated in section 122 of the Act; and

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		<p>(aa) the number of those securities issued and outstanding; and</p> <p>(bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and</p> <p>(v) any other prescribed information.</p> <p>(3) If a company has issued uncertificated securities, or has issued securities that have ceased to be certificated, as contemplated in section 49(5), a record must be administered and maintained by a participant or central securities depository in the prescribed form, as the company's uncertificated securities register, which–</p> <p>(a) forms part of that company's securities register; and</p> <p>(b) must contain, with respect to all securities contemplated in this subsection, any details–</p> <p>(i) referred to in subsection (2)(b), read with the changes required by the context; or</p> <p>(ii) determined by the rules of the central securities depository.</p> <p>(3A) (a) <u>A company must record in its securities register prescribed information regarding the natural persons who are the beneficial owners of the company, in the prescribed form, and must ensure that this information is updated within the prescribed period after any changes in beneficial ownership have occurred.</u></p> <p>(b) <u>The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with</u></p>	<ul style="list-style-type: none"> ○ as regards trusts, each natural person contemplated in subsection (a) of the definition of "beneficial owner" introduced into the Act by the Omnibus Bill will be a beneficial owner, resulting in administratively onerous requirements being placed on companies. • We submit that, in many instances, it will be extremely difficult for companies to establish the beneficial owners of securities in the company. It is, however, understood that the need for the record is to avoid the potential greylisting of South Africa, following the recommendations made by the Financial Action Task Force (FATF). • In relation to ease of doing business and the administrative burden associated with performing the exercise of updating the prescribed information at prescribed intervals, where companies make use of service providers such as Strate (Pty) Ltd to manage their registers there is a cost implication associated with discharging an obligation to routinely request information from potentially thousands of registered shareholders. This exercise will increase the cost of doing business in South Africa, and this cost is a cost that will ultimately be passed on to shareholders. It is, however, understood that the need for the record is to avoid the potential greylisting of South Africa, following the recommendations made by the FATF. • All accountable institutions that are companies will be required to list the broad groups of natural persons contemplated in section 21B of FICA in their securities register as beneficial owners and record the same information with the Commission. It is unclear how a company should report in its securities register and record with the Commission certain "once-off" beneficial owners, eg persons who are authorised to represent an entity in a specific transaction or to establish a relationship. • We submit that the legislator may wish to consider clarifying whether the incorporation of the meaning of "beneficial owner" in FICA will, for purposes of the Act, only apply to companies that are accountable institutions (ie listed

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		<p>the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p> <p>(4) A securities register, or an uncertificated securities register, maintained in accordance with this Act is sufficient proof of the facts recorded in it, in the absence of evidence to the contrary.</p> <p>(5) Unless all the shares of a company rank equally for all purposes, the company's shares, or each class of shares, and any other securities, must be distinguished by an appropriate numbering system.</p>	<p>in Schedule 1 to FICA) or to clients of accountable institutions, as defined in FICA, or to all companies. It is our understanding that the obligation to identify the natural persons contemplated by the meaning of "beneficial owner" in FICA will apply to all companies. We, however, submit that the present wording is not entirely clear.</p>
s 55	s 56	<p>amendment of section 56 as follows:</p> <p>56. Beneficial interest in securities and beneficial ownership of company.</p> <p>(1) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.</p> <p>(2) A person is regarded to have a beneficial interest in a security of a public company if the security is held <i>nomine officii</i> by another person on that first person's behalf, or if that first person—</p> <p>(a) is married in community of property to a person who has a beneficial interest in that security;</p> <p>(b) is the parent of a minor child who has a beneficial interest in that security;</p> <p>(c) acts in terms of an agreement with another person who has a beneficial interest in that security, and the</p>	<ul style="list-style-type: none"> Given the proposed amendments to other sections of the Act to require a company to include details of beneficial owners in its securities register (section 50) and to include a copy of its securities register and a copy of its register of disclosure of beneficial interest in its annual return (section 33), it is not clear why a separate record (the record containing prescribed information relating to beneficial owners contemplated in section 56(12)) is required. Please see our comments above relating to the practical difficulties and administrative burden associated with performing the exercise of updating the prescribed information at prescribed intervals, particularly for listed companies. We note that the reference to "Notices" in section 56(12) should rather be to "notices". Unlike the definition of "true owner" proposed by the Companies Amendment Bill, 2021, the definition of "beneficial owner" proposed by the Omnibus Bill has not been expressly linked to the definition of beneficial interest in the Companies Act in the definition or via section 56. The interaction between

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		<p>agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in that security;</p> <p>(d) is the holding company of a company that has a beneficial interest in that security;</p> <p>(e) is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of a juristic person that has a beneficial interest in that security; or</p> <p>(f) gives directions or instructions to a juristic person that has a beneficial interest in that security, and its directors or the trustees are accustomed to act in accordance with that person's directions or instructions.</p> <p>(3) If a security of a public company is registered in the name of a person who is not the holder of the beneficial interest in all of the securities in the same company held by that person, that registered holder of security must disclose—</p> <p>(a) the identity of the person on whose behalf that security is held; and</p> <p>(b) the identity of each person with a beneficial interest in the securities so held, the number and class of securities held for each such person with a beneficial interest, and the extent of each such beneficial interest.</p> <p>(4) The information required in terms of subsection (3) must—</p> <p>(a) be disclosed in writing to the company within five business days after the end of every month during which a change has occurred in the information</p>	<p>the two terms is therefore not clear. We submit that this should be clarified – and that it should be stated that the two records are distinct.</p> <ul style="list-style-type: none"> • Unlike the Companies Amendment Bill, 2021, again, the Omnibus Bill does not seek to amend the provisions of section 56 to extend the obligation placed on regulated companies to disclose beneficial interests in their annual financial statements to all companies, but rather has proposed a change in the title of the section to include beneficial ownership and the addition of requirements to file a record of beneficial owners with the Commission and update such record. It therefore appears that if the Omnibus Bill's proposed amendments are introduced, two distinct sets of disclosure obligations will exist under the Act: <ul style="list-style-type: none"> ○ one of disclosure of beneficial interests (equal to or in excess of 5% of the total number of securities of a class of securities issued by a company) by regulated companies in their annual financial statements, as is the case currently; and ○ one of disclosure of beneficial ownership by all companies in their annual return and register of prescribed information filed with the Commission. • We submit that the legislator may wish to consider clarifying its intention that there be two distinct records and that, under the present amendments, the beneficial owner record is required to be filed. We submit that the legislator may also wish to provide expressly that shareholders are obliged to provide the required information (similar to the obligations in respect of beneficial interests). • We submit that there should be an interim period to enable listed companies to put in place the necessary systems, personnel, etc to be able to comply with this obligation within a specified time period.

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		<p>contemplated in subsection (3), or more promptly or frequently to the extent so provided by the requirements of a central securities depository; and</p> <p>(b) otherwise be provided on payment of a prescribed fee charged by the registered holder of securities.</p> <p>(5) A company that knows or has reasonable cause to believe that any of its securities are held by one person for the beneficial interest of another, by notice in writing, may require either of those persons to—</p> <p>(a) confirm or deny that fact;</p> <p>(b) provide particulars of the extent of the beneficial interest held during the three years preceding the date of the notice; and</p> <p>(c) disclose the identity of each person with a beneficial interest in the securities held by that person.</p> <p>(6) The information required in terms of subsection (5) must be provided not later than 10 business days after receipt of the notice.</p> <p>(7) A company that falls within the meaning of "regulated company" as set out in section 117(1)(i) must—</p> <p>(a) establish and maintain a register of the disclosures made in terms of this section; and</p> <p>(b) publish in its annual financial statements, if it is required to have such statements audited in terms of section 30(2), a list of the persons who hold beneficial interests equal to or in excess of 5% of the total number of securities of that class issued by the company, together with the extent of those beneficial interests.</p>	

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		<p>(8) Subsections (9) to (11) do not apply in respect of securities that are subject to the rules of a central securities depository.</p> <p>(9) A person who holds a beneficial interest in any securities may vote in a matter at a meeting of shareholders, only to the extent that—</p> <p>(a) the beneficial interest includes the right to vote on the matter; and</p> <p>(b) the person's name is on the company's register of disclosures as the holder of a beneficial interest, or the person holds a proxy appointment in respect of that matter from the registered holder of those securities.</p> <p>(10) The registered holder of any securities in which any person has a beneficial interest must deliver to each such person—</p> <p>(a) a notice of any meeting of a company at which those securities may be voted on within two business days after receiving such a notice from the company; and</p> <p>(b) a proxy appointment to the extent of that person's beneficial interest, if the person so demands in terms of subsection (11).</p> <p>(11) A person who has a beneficial interest in any securities that are entitled to be voted on at a meeting of a company's shareholders, may demand a proxy appointment from the registered holder of those securities, to the extent of that person's beneficial interest, by delivering such a demand to the registered holder, in writing, or as required by the applicable requirements of a central securities depository.</p> <p>(12) A company must file a record with the Commission, in the prescribed form and containing the prescribed information,</p>	

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		<p>regarding the natural persons who are the beneficial owners of the company, and must ensure that this information is updated by filing Notices with the Commission within the prescribed period after any changes in beneficial ownership have occurred.</p> <p>(13) The prescribed requirements referred to in subsection (12) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p>	
s 56	s 69	<p>amendment of section 69 as follows:</p> <p>69. Ineligibility and disqualification of persons to be director or prescribed officer.</p> <p>(1) In this section, "director" includes an alternate director, and—</p> <p>(a) a prescribed officer; or</p> <p>(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board.</p> <p>(2) A person who is ineligible or disqualified, as set out in this section, must not—</p> <p>(a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director; or</p> <p>(b) act as a director of a company.</p> <p>(3) A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.</p>	<ul style="list-style-type: none"> We note that the citation of legislation referenced in section 69(8)(b)(iv)(cc) should be consistent throughout, ie: "under this Act, the Insolvency Act, 1936, (Act No. 24 of 1936), the Close Corporations Act, 1984 (Act No. 69 of 1984), the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Financial Markets Act, 2012 (Act No. 69 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorism and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011);". We note, with reference to our comment above, that section 69(8)(b)(iv)(cc) should conclude with a full stop rather than a semi-colon.

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		<p>(4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to section 70(2).</p> <p>(5) A person who has been placed under probation by a court in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984), must not serve as a director except to the extent permitted by the order of probation.</p> <p>(6) In addition to the provisions of this section, the Memorandum of Incorporation of a company may impose–</p> <p>(a) additional grounds of ineligibility or disqualification of directors; or</p> <p>(b) minimum qualifications to be met by directors of that company.</p> <p>(7) A person is ineligible to be a director of a company if the person–</p> <p>(a) is a juristic person;</p> <p>(b) is an unemancipated minor, or is under a similar legal disability; or</p> <p>(c) does not satisfy any qualification set out in the company's Memorandum of Incorporation.</p> <p>(8) A person is disqualified to be a director of a company if–</p> <p>(a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or</p> <p>(b) subject to subsections (9) to (12), the person–</p> <p>(i) is an unrehabilitated insolvent;</p>	

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		<p>(ii) is prohibited in terms of any public regulation to be a director of the company;</p> <p>(iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or</p> <p>(iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—</p> <p>(aa) involving fraud, misrepresentation or dishonesty, <u>money laundering, terrorist financing, or proliferation financing activities as defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); or</u></p> <p>(bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or</p> <p>(cc) under this Act, the Insolvency Act, 1936, (Act <u>No.</u> 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001-(Act 38 of 2001), the Financial Markets Act, 2012, or Chapter 2 of the Prevention</p>	

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		<p>and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorism and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011);</p> <p>(9) A disqualification in terms of subsection (8)(b)(iii) or (iv) ends at the later of–</p> <p>(a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or</p> <p>(b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).</p> <p>(10) At any time before the expiry of a person's disqualification in terms of subsection (8)(b)(iii) or (iv)–</p> <p>(a) the Commission may apply to a court for an extension contemplated in subsection (9)(b); and</p> <p>(b) the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.</p> <p>(11) A court may exempt a person from the application of any provision of subsection (8)(b).</p> <p>(11A) The Registrar of the Court must, upon–</p> <p>(a) the issue of a sequestration order;</p>	

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		<p>(b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or</p> <p>(c) a conviction for an offence referred in subsection (8)(b)(iv),</p> <p>send a copy of the relevant order or particulars of the conviction, as the case may be, to the Commission.</p> <p>(11B) The Commission must notify each company which has as a director to whom the order or conviction relates, of the order or conviction.</p> <p>(12)</p> <p>(13) The Commission must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law.</p>	
s 57		<p>amendment of Arrangement of Sections by the substitution for item 56 of the following item:</p> <p>56. Beneficial interest in securities and beneficial ownership of company.</p>	Please see our comments on the proposed amendments to section 56 above.

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Part B: Proposed Amendments to the Trust Property Control Act, 1988			
Bill	TPCA 1988	amendment	comment
s 1	s 1	<p>introduction of new definition of "accountable institution":</p> <p><u>"accountable institution" has the meaning defined in section 1 and Schedule 1 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);</u></p> <p><u>[the Financial Intelligence Centre Act, 2001, in its present form, defines "accountable institution" as follows:</u></p> <p style="padding-left: 40px;">"accountable institution" means a person referred to in Schedule 1;]</p>	<p>We submit that this definition should be amended as follows:</p> <p>"accountable institution" has the meaning defined in section 1(1) and Schedule 1 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);".</p>
s 1	s 1	<p>introduction of new definition of "beneficial owner":</p> <p><u>"beneficial owner"–</u></p> <p>(a) <u>has the meaning defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); and</u></p> <p><u>[the Financial Intelligence Centre Act, 2001, in its present form, defines "beneficial owner" as follows:</u></p> <p style="padding-left: 40px;">"beneficial owner", in respect of a legal person, means a natural person who, independently or together with another person, directly or indirectly–</p> <p style="padding-left: 80px;">(a) owns the legal person; or</p> <p style="padding-left: 80px;">(b) exercises effective control of the legal person;]</p>	<ul style="list-style-type: none"> • We submit that the legislator may wish to consider clarifying what is meant by the terms "effective control" and "control" (used in the definition of "beneficial owner") since while control in the company law context is generally determined with reference to, for example, a <u>majority</u> of the voting rights associated with a company's securities, for purposes of the Financial Intelligence Centre Act, 2001, ownership of 25% or more of the shares with voting rights in a legal person is understood to usually be sufficient to exercise control of it. • We further submit that the legislator may wish to consider providing for the threshold, if any, in regulations to the Act rather than hardcoding the percentage in the Act. Any such threshold should be determined in consultation / agreement with the Financial Intelligence Centre to ensure consistency throughout the market and in respect of different legal persons. • We also submit that if the legislator does not wish to provide for a threshold at present, it may wish to consider providing for the power (to prescribe a threshold) in the Act, should a threshold become desirable in future (so avoiding the process of amending the Act at that time).

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2022

Part B: Proposed Amendments to the Trust Property Control Act, 1988

Bill	TPCA 1988	amendment	comment
		<p>[the Omnibus Bill replaces this definition with the following definition of "beneficial owner":</p> <p>"beneficial owner"–</p> <p>(a) means a natural person who directly or indirectly–</p> <p>(i) ultimately owns or exercises effective control of–</p> <p>(aa) a client of an accountable institution; or</p> <p>(bb) a legal person, partnership or trust that owns or exercises effective control of, as the case may be, a client of an accountable institution; or</p> <p>(ii) exercises control of a client of an accountable institution on whose behalf a transaction is being conducted; and</p> <p>(b) includes–</p> <p>(i) in respect of legal persons, each natural person contemplated in section 21B(2)(a);</p> <p>(ii) in respect of a partnership, each natural person contemplated in section 21B(3)(b); and</p> <p>(iii) in respect of a trust, each natural person contemplated in section 21B(4)(c), (d) and (e);]</p>	<ul style="list-style-type: none"> We note that this definition should conclude with a semi-colon rather than a full stop.

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Part B: Proposed Amendments to the Trust Property Control Act, 1988

Bill	TPCA 1988	amendment	comment
		<p>(b) <u>for the purposes of this Act, in respect of a trust, includes, but is not limited to, a natural person who directly or indirectly ultimately owns the relevant trust property or exercises effective control of the administration of the trust, including–</u></p> <ul style="list-style-type: none"> (i) <u>each founder of the trust;</u> (ii) <u>if a founder of the trust is a legal person or a person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership;</u> (iii) <u>each trustee of the trust;</u> (iv) <u>if a trustee of the trust is a legal person or a person acting on behalf of a partnership, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person or partnership;</u> (v) <u>each beneficiary referred to by name in the trust deed or other founding instrument in terms of which the trust is created;</u> (vi) <u>if a beneficiary referred to by name in the trust deed is a legal person or a person acting on behalf of a partnership or in pursuance of the provisions of a trust agreement, the natural person who directly or indirectly ultimately owns or exercises effective control of that legal person, partnership or trust; and</u> 	

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Bill	TPCA 1988	amendment	comment
		(vii) <u>a person who, through the ability to control the votes of the trustees or to appoint the trustees, or to appoint or change the beneficiaries of the trust, exercises effective control of the trust.</u>	
s 2	s 6	<p>amendment of section 6 as follows:</p> <p>6. Authorization of trustee and security.</p> <p>(1) Any person whose appointment as trustee in terms of a trust instrument, section 7 or a court order comes into force after the commencement of this Act, shall act in that capacity only if authorized thereto in writing by the Master.</p> <p>(1A) <u>A person is disqualified from being authorized as a trustee if the person—</u></p> <p>(a) <u>is an unrehabilitated insolvent;</u></p> <p>(b) <u>has been prohibited by a court to be a director of a company, or declared by a court to be delinquent in terms of section 162 of the Companies Act, 2008 (Act No. 71 of 2008), or section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984);</u></p> <p>(c) <u>is prohibited in terms of any law to be a director of a company;</u></p> <p>(d) <u>has been removed from an office of trust, on the grounds of misconduct involving dishonesty;</u></p> <p>(e) <u>has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—</u></p>	<ul style="list-style-type: none"> • We note that the citation of legislation referenced in section 6(1A)(e)(ii) and section 6(1A)(e)(iii) should be consistent with the convention used in the Act, ie: <ul style="list-style-type: none"> ○ as regards section 6(1A)(e)(ii): "in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or (5) of the Companies Act, 2008 (Act No. 71 of 2008); or"; and ○ as regards section 6(1A)(e)(iii): "under this Act, the Companies Act, 2008 (Act No. 71 of 2008), the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984 (Act No. 69 of 1984), the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Financial Markets Act, 2012 (Act No. 19 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011); or". • We submit that the phrase "the end of" should be inserted at the beginning of subsection (1B)(b), as follows: <p style="margin-left: 40px;">"(1B) A disqualification in terms of subsection (1A)(d) or (e) ends at the later of—</p>

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Bill	TPCA 1988	amendment	comment
		<p>(i) <u>involving fraud, misrepresentation or dishonesty, money laundering, terrorist financing or proliferation financing activities as defined in section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);</u></p> <p>(ii) <u>in connection with the promotion, formation or management of a company, or in connection with any act contemplated in section 69(2) or (5) of the Companies Act, 2008; or</u></p> <p>(iii) <u>under this Act, the Companies Act, 2008, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001, the Financial Markets Act, 2012 (Act No. 19 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011); or</u></p> <p>(f) <u>is an unemancipated minor, or is under a similar legal disability.</u></p> <p>(1B) <u>A disqualification in terms of subsection (1A)(d) or (e) ends at the later of–</u></p>	<p>(a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or</p> <p>(b) <u>the end of</u> one or more extensions, as determined by a court from time to time, on application by the Master in terms of subsection (1C).".</p> <ul style="list-style-type: none"> • We note that the space between "(1A)" and "(a)" in subsection (1D) should be deleted. • We submit that the following additional subsections should be included after subsection (1G): <ul style="list-style-type: none"> "(1H) <u>A person who is disqualified, as set out in this section, must not–</u> <u>(a) be appointed as a trustee, or consent to being appointed as a trustee; or</u> <u>(b) act as a trustee.</u> <u>(1I) The trustees of a trust may not knowingly permit a disqualified person to serve or act as a trustee of the trust."</u>

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Bill	TPCA 1988	amendment	comment
		<p>(a) <u>five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or</u></p> <p>(b) <u>one or more extensions, as determined by a court from time to time, on application by the Master in terms of subsection (1C).</u></p> <p>(1C) <u>At any time before the expiry of a person's disqualification in terms of subsection (1A)(d) or (e)–</u></p> <p>(a) <u>the Master may apply to a court for an extension contemplated in subsection (1B)(b); and</u></p> <p>(b) <u>the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.</u></p> <p>(1D) <u>A court may exempt a person from the application of any provision of subsection (1A) (a), (c), (d) or (e).</u></p> <p>(1E) <u>The Registrar of the Court must, upon–</u></p> <p>(a) <u>the issue of a sequestration order;</u></p> <p>(b) <u>the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or</u></p> <p>(c) <u>a conviction for an offence referred to in subsection (1A)(e).</u></p> <p><u>send a copy of the relevant order or particulars of the conviction, as the case may be, to the Master.</u></p>	

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Bill	TPCA 1988	amendment	comment
		<p>(1F) <u>The Master must notify each trust which has as a trustee to whom the order or conviction relates, of the order or conviction.</u></p> <p>(1G) (a) <u>The Master must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a trustee, in terms of an order of a court pursuant to this Act or any other law.</u></p> <p>(b) <u>The prescribed requirements referred to in paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</u></p> <p>(2) The Master does not grant authority to the trustee in terms of this section, unless–</p> <p>(a) he has furnished security to the satisfaction of the Master for the due and faithful performance of his duties as trustee; or</p> <p>(b) he has been exempted from furnishing security by a court order or by the Master under subsection (3)(a) or, subject to the provisions of subsection (3)(d), in terms of a trust instrument:</p> <p>Provided that where the furnishing of security is required, the Master may, pending the furnishing of security, authorize the trustee in writing to perform specified acts with regard to the trust property.</p> <p>(3) The Master may, if in his opinion there are sound reasons to do so–</p>	

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Bill	TPCA 1988	amendment	comment
		<p>(a) whether or not security is required by the trust instrument (except a court order), dispense with security by a trustee;</p> <p>(b) reduce or cancel any security furnished;</p> <p>(c) order a trustee to furnish additional security;</p> <p>(d) order a trustee who has been exempted from furnishing security in terms of a trust instrument (except a court order) to furnish security.</p> <p>(4) If any authorization is given in terms of this section to a trustee which is a corporation, such authorization shall, subject to the provisions of the trust instrument, be given in the name of a nominee of the corporation for whose actions as trustee the corporation is legally liable, and any substitution for such nominee of some other person shall be endorsed on the said authorization.</p>	
s 3	s 10	<p>amendment of section 10 as follows:</p> <p>10. Trust account.</p> <p>(1) Whenever a person receives money in his capacity as trustee, he shall deposit such money in a separate trust account at a banking institution or building society.</p> <p>(2) <u>A trustee must disclose their position as trustee to any accountable institution with which the trustee engages in that capacity, and must make it known to the accountable institution that the relevant transaction or business relationship relates to trust property.</u></p>	<ul style="list-style-type: none"> We submit that section 10(2) should be amended to require trustees to make these disclosures in writing, and to maintain a record of these disclosures for evidentiary purposes. We submit that the heading of section 10 should also be amended to reflect the expanded ambit of the section, as follows: "Trust account <u>and disclosure to accountable institutions</u>".

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Bill	TPCA 1988	amendment	comment
s 4	s 11	<p>amendment of section 11 as follows:</p> <p>11. Registration and identification of trust property.</p> <p>(1) Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984), section 40 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), and the provisions of the trust instrument concerned, a trustee shall—</p> <p>(a) indicate clearly in his bookkeeping the property which he holds in his capacity as trustee;</p> <p>(b) if applicable, register trust property or keep it registered in such manner as to make it clear from the registration that it is trust property;</p> <p>(c) make any account or investment at a financial institution identifiable as a trust account or trust investment;</p> <p>(d) in the case of trust property other than property referred to in paragraphs (b) or (c), make such property identifiable as trust property in the best possible manner; <u>and</u></p> <p>(dA) <u>record the prescribed details relating to accountable institutions which the trustee uses as agents to perform any of the trustee's functions relating to trust property, and from which the trustee obtains any services in respect of the trustee's functions relating to trust property;</u></p> <p>(dB) <u>the prescribed requirements referred to in paragraph (dA) must be prescribed after consultation</u></p>	<ul style="list-style-type: none"> • Unless there are good reasons for making the obligations enumerated in section 11 subject to the provisions of a trust instrument that we are not aware of, we submit that section 11(1) should be amended to read as follows: <ul style="list-style-type: none"> "Subject to the provisions of the Financial Institutions (Investment of Funds) Act, 1984 (Act No. 39 of 1984); <u>and</u> section 40 of the Administration of Estates Act, 1965 (Act No. 66 of 1965); and the provisions of the trust instrument concerned, a trustee shall—". • We note that subsection (1)(dA) should be renumbered subsection (1)(e) and that this subsection should conclude with a full stop rather than a semi-colon. • We note that subsection (dB) should be renumbered subsection (1A) and should be amended as follows: <ul style="list-style-type: none"> "(dB)(1A) the<u>The</u> prescribed requirements referred to in paragraph (dA)<u>subsection (1)(e)</u> must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).".

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Bill	TPCA 1988	amendment	comment
		<p>with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p> <p>(2) In so far as the registration or identification of trust property being administered by a trustee at the commencement of this Act does not comply with the requirements of subsection (1), the trustee shall within a period of 12 months after the said commencement take such steps or cause such steps to be taken as may be necessary to bring the registration or identification of such property into conformity with the said requirements.</p> <p>(3) Upon application in terms of subsection (2) to bring the registration of trust property into line with the provisions of subsection (1), the officer in charge of a deeds registry where such trust property is registered, shall free of charge take such steps as may be necessary to effect the required registration.</p>	
s 5	s 11A	<p>introduction of new section 11A:</p> <p><u>11A. Beneficial ownership.</u></p> <p>(1) <u>A trustee must–</u></p> <p>(a) <u>establish and record the beneficial ownership of the trust;</u></p> <p>(b) <u>keep a record of the prescribed information relating to the beneficial owners of the trust;</u></p> <p>(c) <u>lodge a register of the prescribed information on the beneficial owners of the trust with the Master's Office; and</u></p>	<ul style="list-style-type: none"> We submit that a duty to make information relating to the beneficial owners of a trust available to companies in which trusts are invested and to accountable institutions that require specific prescribed information should be placed on trustees. Alternatively, such companies should be included in the persons to whom the information must be made available (to be prescribed) (see below). In view of the fact that the prescribed information relating to beneficial owners is likely to include personal information and confidential information and may – depending on the information requirements prescribed – include sensitive commercial information, we submit that the persons to be prescribed should be limited to:

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Bill	TPCA 1988	amendment	comment
		<p>(d) ensure that the prescribed information referred to in paragraphs (a) to (c) is kept up to date.</p> <p>(2) The Master must keep a register in the prescribed form containing prescribed information about the beneficial ownership of trusts.</p> <p>(3) A trustee must make the information contained in the register referred to in subsection (1)(c), and the Master must make the information in the register referred to in subsection (2), available to any person as prescribed.</p> <p>(4) The prescribed requirements referred to in this section must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p>	<ul style="list-style-type: none"> ○ founders; ○ trustees; ○ beneficiaries; ○ companies in which trusts are invested (if not dealt with in terms of an amendment to this section (see above)); ○ accountable institutions that require specific prescribed information; and ○ regulatory authorities. <ul style="list-style-type: none"> • We also caution that trustees and the Master may be required to disclose personal information of beneficial owners where the disclosure of this information may be prohibited under foreign legislation.
s 6	s 19	<p>amendment of section 19 as follows:</p> <p>19. Failure by trustee to account or perform duties.</p> <p>(1) If any trustee fails to comply with a request by the Master in terms of section 16 or to perform any duty imposed upon himthe trustee by this Act, the trust instrument or by any other law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with suchthe Master's request or to perform suchthe duty.</p> <p>(2) A trustee who fails to comply with an obligation referred to in section 10(2), 11(1)(dA) or 11A(1), commits an offence and on conviction is liable to a fine not exceeding R10 million, or</p>	<ul style="list-style-type: none"> • Since trustees may need to place reliance on information that is provided to them, we submit that section 19 should be amended to provide that a trustee will not be guilty of an offence in terms of section 11A(1) if the trustee can show that the trustee took all reasonable steps to establish the beneficial ownership of the trust. • We note that section 19(2)'s proposed introduction of these new offences (for failure to comply with an administrative obligation embodied in sections 10(2), 11(1)(dA) or 11A(1)) is likely to disincentivise persons to act as trustees. • We note that the reference to "11(1)(dA)" in section 19(2) should rather be to "11(1)(e)". In this regard, please see our comments on the proposed amendments to section 11.

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Bill	TPCA 1988	amendment	comment
		imprisonment for a period not exceeding five years, or to both such fine and imprisonment.	
s 7	s 20	<p>amendment of section 20 as follows:</p> <p>20. Removal of trustee.</p> <p>(1) A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.</p> <p>(2) A trustee may at any time be removed from his office by the Master—</p> <p>(a) if he has been convicted in the Republic or elsewhere of any offence of which dishonesty is an element or of any other offence for which he has been sentenced to imprisonment without the option of a finethe person becomes disqualified to be authorised as a trustee in terms of section 6(1A); or</p> <p>(b) if hethe trustee fails to give security or additional security, as the case may be, to the satisfaction of the Master within two months after having been requested theretoto do so by the Master or within sucha further period asthat is allowed by the Master; or</p> <p>(c) if histhe trustee's estate is sequestrated or liquidated or placed under judicial management; or</p> <p>(d) if hethe trustee has been declared by a competent court to be mentally ill or incapable of managing</p>	<p>In line with the gender-neutral amendments proposed to be made to section 20(2) of the Act by the Omnibus Bill, we submit that:</p> <ul style="list-style-type: none"> section 20(1) should be amended as follows: <p>"A trustee may, on the application of the Master or any person having an interest in the trust property, at any time be removed from his office by the court if the court is satisfied that such removal will be in the interests of the trust and its beneficiaries.";</p> section 20(2) should be amended as follows: <p>"A trustee may at any time be removed from his office by the Master—," and</p> section 20(3) should be amended as follows: <p>"If a trustee authorized to act under section 6(1) is removed from his office or resigns, hethe trustee shall without delay return histhe trustee's written authority to the Master."</p>

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Bill	TPCA 1988	amendment	comment
		<p>histheir own affairs or if hethe trustee is by virtue of the Mental Health Act, 1973 (Act No. 18 of 1973)Mental Health Care Act, 2002 (Act No. 17 of 2002), detained as a patient in an institution or as a State patient; or</p> <p>(e) if hethe trustee fails to perform satisfactorily any duty imposed upon himthe trustee by or under this Act or to comply with <u>the requirements of this Act or</u> any lawful request of the Master.</p> <p>(3) If a trustee authorized to act under section 6(1) is removed from his office or resigns, he shall without delay return his written authority to the Master.</p>	

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Part C: Proposed Amendments to the Nonprofit Organisations Act, 1997

Bill	NOA 1997	amendment	comment
s 8	s 2	<p>amendment of section 2 as follows:</p> <p>2. Objects of Act. The objects of this Act are to encourage and support nonprofit organisations in their contribution to meeting the diverse needs of the population of the Republic by–</p> <ul style="list-style-type: none"> (a) creating an environment in which nonprofit organisations can flourish; (b) establishing an administrative and regulatory framework within which nonprofit organisations can<u>must</u> conduct their affairs; (c) encouraging<u>requiring</u> nonprofit organisations to maintain adequate standards of governance, transparency and accountability and to improve those standards; (d) creating an environment within which the public may have access to information concerning registered nonprofit organisations; and (e) promoting a spirit of co-operation and shared responsibility within government, donors and amongst other interested persons in their dealings with nonprofit organisations. 	<ul style="list-style-type: none"> • Please see our comments on the proposed amendments to section 12 below. • We note that these amendments seem to introduce a more peremptory and prescriptive environment for <u>all</u> nonprofit organisations operating in South Africa.

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Part C: Proposed Amendments to the Nonprofit Organisations Act, 1997

Bill	NOA 1997	amendment	comment
s 9	s 5	<p>amendment of section 5 as follows:</p> <p>5. Functions of Directorate.</p> <p>(1) In addition to any other function determined by the Minister or specified elsewhere in this Act, the Directorate is responsible for—</p> <ul style="list-style-type: none"> (a) facilitating the process for developing and implementing policy; (b) determining and implementing programs, including programs— <ul style="list-style-type: none"> (i) to support nonprofit organisations in their endeavour to register; and (ii) to ensure that the standard of governance within nonprofit organisations is maintained and improved; (c) liaising with other organs of state and interested parties; and (d) facilitating the development and implementation of multi-sectoral and multi-disciplinary programs. <p>(2) <u>In order to promote the achievement of the objects of this Act and to perform its functions and duties, the Directorate may collaborate, co-operate, co-ordinate and enter into arrangements with other organs of state, which may include—</u></p> <ul style="list-style-type: none"> (a) <u>measures to co-ordinate their approach to performing their functions in terms of legislation;</u> (b) <u>entering into a memorandum of understanding, which, among other matters, may provide for—</u> 	

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2022			
Part C: Proposed Amendments to the Nonprofit Organisations Act, 1997			
Bill	NOA 1997	amendment	comment
		<p>(i) <u>the sharing of information between the parties, including—</u> (aa) <u>the types of information to be furnished by each party; or</u> (bb) <u>measures to protect the confidentiality of the information, including limiting access to specified persons or incumbents of specified positions, subject to the provisions of applicable legislation;</u></p> <p>(ii) <u>collaboration, co-operation between the parties, and assisting each other in the performance of their respective duties in terms of legislation, including through the provision of advice and support.</u></p>	
s 10	s 12	<p>amendment of section 12 as follows:</p> <p>12. Requirements for registration.</p> <p>(1)(a) Any<u>A</u> nonprofit organisation that is not an organ of state may apply to the director for registration, including a foreign nonprofit organisation, that intends to operate within the Republic must be registered in terms of this Act before it commences operations, subject to paragraph (b), and in accordance with prescribed registration requirements.</p> <p>(b) <u>A nonprofit organisation that is operating but is not registered in terms of this Act on the date of commencement of this provision, must register within the period determined by the Minister by notice in the Gazette, in accordance with</u></p>	<ul style="list-style-type: none"> The current position is that nonprofit organisations have a choice whether to register as nonprofit organisations under the Act. These amendments now make it mandatory for all nonprofit organisations to register under the Act. It would be helpful to clarify that this registration is required notwithstanding other forms of registration nonprofit organisations may already have or wish to have, eg as non-profit companies under the Companies Act. We submit that it is also essential to clarify that the nonprofit organisation registration under the Act will be in addition to any form of existing registration and that nonprofit organisations will not have to de-register from existing forms of registration. In addition, it is important to clarify whether nonprofit organisations are required to have a constitution in addition to their existing governing documents (ie their memorandum of incorporation or trust deed). On one construction of section 12(1)(c) it appears that nonprofit organisations may choose not to register in terms of the Act but must still comply with the Act whereas section 12(1)(b) makes registration in terms of

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		<p>prescribed transitional arrangements and registration requirements.</p> <p>(c) A nonprofit organisation, whether registered in terms of the Act or not, must comply with the requirements of this Act.</p> <p>(2) Unless the laws in terms of which a nonprofit organisation is established or incorporated make provision for the matters in this subsection, the constitution of a nonprofit organisation that intends to register must–</p> <p>(a) state the organisation's name;</p> <p>(b) state the organisation's main and ancillary objectives;</p> <p>(c) state that the organisation's income and property are not distributable to its members or office-bearers, except as reasonable compensation for services rendered;</p> <p>(d) make provision for the organisation to be a body corporate and have an identity and existence distinct from its members or office-bearers;</p> <p>(e) make provision for the organisation's continued existence notwithstanding changes in the composition of its membership or office-bearers;</p> <p>(f) ensure that the members or office-bearers have no rights in the property or other assets of the organisation solely by virtue of their being members or office-bearers;</p> <p>(g) specify the powers of the organisation;</p> <p>(h) specify the organisational structures and mechanisms for its governance;</p> <p>(i) set out the rules for convening and conducting meetings, including quorums required for and the minutes to be kept of those meetings;</p> <p>(j) determine the manner in which decisions are to be made;</p>	<p>the Act mandatory. If registration is mandatory, which it appears it is, we submit that section 12(1)(c) should be amended to indicate in which circumstances a nonprofit organisation may not be registered – presumably, during the transitional period determined by the Minister within which they must register.</p> <ul style="list-style-type: none"> We note that nonprofit organisations often do not have sufficient means and resources to comply with the various reporting requirements under the different regulatory frameworks that govern nonprofit organisations. This may serve as a deterrent to compliance and give rise to a lack of compliance.

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		<p>(k) provide that the organisation's financial transactions must be conducted by means of a banking account;</p> <p>(l) determine a date for the end of the organisation's financial year;</p> <p>(m) set out a procedure for changing the constitution;</p> <p>(n) set out a procedure by which the organisation may be wound up or dissolved; and</p> <p>(o) provide that, when the organisation is being wound up or dissolved, any asset remaining after all its liabilities have been met, must be transferred to another nonprofit organisation having similar objectives.</p> <p>(3) The constitution of a nonprofit organisation that intends to register, may make provision for matters relevant to conducting its affairs, including matters that—</p> <p>(a) specify qualifications for and admission to membership of the organisation;</p> <p>(b) determine the circumstances in which a member will no longer be entitled to the benefits of membership;</p> <p>(c) provide for termination of membership;</p> <p>(d) provide for appeals against loss of the benefits of membership or against termination of membership and specify the procedure for those appeals and determine the body to which those appeals may be made;</p> <p>(e) provide for membership fees and matters determining membership fees and other payments by members;</p> <p>(f) provide that members or office-bearers do not become liable for any of the obligations and liabilities of the organisation solely by virtue of their status as members or office-bearers of the organisation;</p>	

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		<p>(g) provide for the appointment of office-bearers and define their respective functions;</p> <p>(h) set out a procedure for nominating, electing or appointing office-bearers;</p> <p>(i) determine the circumstances and manner in which office-bearers may be removed from office and provide for appeals against such removal and specify procedures for those appeals and determine a body to which those appeals can be made;</p> <p>(j) provide that its office-bearers are not personally liable for any loss suffered by any person as a result of an act or omission which occurs in good faith while the office-bearer is performing functions for or on behalf of the organisation;</p> <p>(k) provide for making investments;</p> <p>(l) determine the purposes for which the funds of the organisation may be used; and</p> <p>(m) provide for acquiring and controlling assets.</p>	
s 11	s 18	<p>amendment of section 18 as follows:</p> <p>18. Duty to provide reports and information.</p> <p>(1) Every registered nonprofit organisation must, in writing, provide the director with–</p> <p>(a) a narrative report of its activities in the prescribed manner together with its financial statements and the accounting officer's report as contemplated in section 17(1) and (2), within nine months after the end of its financial year;</p>	<ul style="list-style-type: none"> We submit that the proposed new section 18(1)(bA) should be amended to read as follows: <ul style="list-style-type: none"> "prescribed information about the<u>its</u> office-bearers, control structure, governance, management, administration and operations of nonprofit organisations,". We submit that subsection (1A) should be amended to read as follows: <ul style="list-style-type: none"> "The prescribed requirements referred to in paragraph (bA) of subsection (1) must be prescribed after having consulted<u>consultation with</u> the Minister of Finance and the Financial Intelligence Centre,

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		<p>(b) the names and physical, business and residential addresses of its office-bearers within one month after any appointment or election of its office-bearers even if their appointment or election did not result in any changes to its office-bearers;</p> <p>(bA) prescribed information about the office-bearers, control structure, governance, management, administration and operations of nonprofit organisations;</p> <p>(c) a physical address in the Republic for the service of documents as contemplated in section 16(2);</p> <p>(d) notice of any change of address within one month before a new address for service of documents will take effect; and</p> <p>(e) such other information as may be prescribed.</p> <p>(1A) The prescribed requirements referred to in paragraph (bA) of subsection (1) must be prescribed after having consulted the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p> <p>(2) The director may cause any document or a narrative, financial or other report that is submitted to the director to be scrutinised, or, by means of a notice, require a registered nonprofit organisation to submit any information or document reasonably required in order to enable the director to determine whether the organisation is complying with—</p> <p>(a) the material provisions of its constitution;</p> <p>(b) any condition or term of any benefit or allowance conferred on the organisation in terms of section 11; or</p>	<p>established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).".</p>

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		<p>(c) its obligations in terms of this section, section 17 and any other provision of this Act.</p> <p>(3) A registered nonprofit organisation must submit the information or document contemplated in subsection (2) within one month after receipt of the notice.</p> <p>(4) If the accounting officer of a registered nonprofit organisation becomes aware of any instance in which the organisation has failed to comply with the financial provisions of this Act or its constitution, the accounting officer must notify the director of the occurrence—</p> <p>(a) within one month after becoming aware of it; and</p> <p>(b) in writing with sufficient detail to describe the nature of the noncompliance.</p> <p>(5) The duty imposed on an accounting officer in terms of subsection (4) supersedes the duty of confidentiality owed to the organisation by the accounting officer.</p>	
s 12	s 24	<p>amendment of section 24 as follows:</p> <p>24. Register of nonprofit organisations.</p> <p>(1) The director must keep a register in the prescribed form of—</p> <p>(a) all nonprofit organisations that have been registered;</p> <p>(b) all nonprofit organisations whose registrations have been cancelled; and</p> <p>(c) all nonprofit organisations that have voluntarily deregistered or have been wound up or dissolved; and</p>	<ul style="list-style-type: none"> • In view of the fact that the prescribed information contemplated by section 24(1)(d) is likely to include personal information and confidential information, we submit that the persons to be prescribed should be limited to office-bearers, accountable institutions that require specific prescribed information and regulatory authorities. • We also caution that nonprofit organisations and the director may be required to disclose personal information of office-bearers and others where the disclosure of this information may be prohibited under foreign legislation. • We note that section 24(1)(d) should conclude with a full stop rather than a semi-colon. • We submit that subsection (4) should be amended to read as follows:

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		<p>(d) prescribed information about the office-bearers, control structure, governance, management, administration and operations of nonprofit organisations;</p> <p>(2) Within two months after the end of each financial year, the director must publish in the <i>Gazette</i> and at least one other widely circulated means of communication, the names of–</p> <p>(a) all nonprofit organisations that are registered;</p> <p>(b) all nonprofit organisations whose registrations were cancelled during the previous financial year; and</p> <p>(c) all nonprofit organisations which deregistered voluntarily, have been wound up or dissolved during the previous financial year.</p> <p>(3) Subsection (2) does not preclude the director from publishing the names of the organisations contemplated in that section in any widely circulated means of communication, as and when considered appropriate.</p> <p>(4) A nonprofit organisation must make the information referred to in section 18(1)(bA), and the director must provide access to the information in the register referred to in subsection (1)(d), available to any person as prescribed.</p> <p>(5) The prescribed requirements referred to in subsections (1)(d) and (4) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</p>	<p>"A nonprofit organisation must make the information referred to in section 18(1)(bA), and the director must provide access to make the information in the register referred to in subsection (1)(d), available to any person as prescribed."</p>

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Bill	NOA 1997	amendment	comment
s 13	Ch 3A	<p>insertion of Chapter 3A:</p> <p align="center"><u>CHAPTER 3A</u></p> <p align="center"><u>OFFICE-BEARERS OF NONPROFIT ORGANISATIONS</u></p> <p><u>25A. Disqualification and removal of office-bearers.</u></p> <p>(1) <u>A person is disqualified from being an office-bearer of a nonprofit organisation if the person—</u></p> <p>(a) <u>is an unrehabilitated insolvent;</u></p> <p>(b) <u>has been prohibited by a court to be a director of a company, or has been declared by a court to be delinquent in terms of section 162 of the Companies Act, 2008 (Act No. 72 of 2008), or section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984);</u></p> <p>(c) <u>is prohibited in terms of any law to be a director of a company;</u></p> <p>(d) <u>has been removed from an office of trust, on the grounds of misconduct involving dishonesty;</u></p> <p>(e) <u>has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the amount prescribed in terms of section 69 of the Companies Act, 2008, for theft, fraud, forgery, perjury or an offence—</u></p> <p>(i) <u>involving fraud, misrepresentation or dishonesty, money laundering, terrorist financing or proliferation financing activities as defined in</u></p>	<ul style="list-style-type: none"> • We note that the number of the Companies Act, 2008 referenced in section 25A(1)(b) should be "71" rather than "72". • We submit that the legislator may wish to consider clarifying whether the phrase "the amount prescribed in terms of section 69 of the Companies Act, 2008", contained in section 25A(1)(e), should be replaced with the phrase "the prescribed amount". In this regard, please see the wording of section 6(1A)(e) of the Trust Property Control Act. • We note that the citation of legislation referenced in section 25A(1)(e)(ii) and section 25A(1)(e)(iii) should be consistent with the convention used in the Act, ie: <ul style="list-style-type: none"> ○ as regards section 25A(1)(e)(ii) (which also contains a dittographic error): <p align="center">"in connection with the promotion, formation or management of a company, or in connection with any act contemplated in in section 69(2) or (5) of the Companies Act, 2008 (<u>Act No. 71 of 2008</u>); or"; and</p> ○ as regards section 25A(1)(e)(iii): <p align="center">"under this Act, the Companies Act, 2008 (<u>Act No. 71 of 2008</u>), the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984 (<u>Act No. 69 of 1984</u>), the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001 (<u>Act No. 38 of 2001</u>), the Financial Markets Act, 2012 (Act No. 19 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011); or".</p>

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		<p>section 1(1) of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);</p> <p>(ii) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in in section 69(2) or (5) of the Companies Act, 2008; or</p> <p>(iii) under this Act, the Companies Act, 2008, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, 1998 (Act No. 89 of 1998), the Financial Intelligence Centre Act, 2001, the Financial Markets Act, 2012 (Act No. 19 of 2012), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), or the Tax Administration Act, 2011 (Act No. 28 of 2011); or</p> <p>(f) is an unemancipated minor, or is under a similar legal disability.</p> <p>(2) A person who is disqualified, as set out in this section, may not–</p> <p>(a) be appointed or elected as an office-bearer of a nonprofit organisation, or consent to being appointed or elected as an office-bearer; or</p> <p>(b) act as an office-bearer of a nonprofit organisation.</p> <p>(3) A disqualification in terms of subsection (1)(d) or (e) ends at the later of–</p>	<ul style="list-style-type: none"> • We submit that the phrase "the end of" should be inserted at the beginning of subsection (3)(b), as follows: <ul style="list-style-type: none"> "(3) A disqualification in terms of subsection (1A)(d) or (e) ends at the later of– <ul style="list-style-type: none"> (a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or (b) the end of one or more extensions, as determined by a court from time to time, on application by the Master in terms of subsection (1C)." • We submit that a reference to subsection (1)(d) should be inserted after the reference to subsection (1)(c) in subsection (5), as follows: <ul style="list-style-type: none"> "(5) A court may exempt a person from the application of any provision of subsection (1)(a), (c), (d) or (e)." • We submit that subsection (9) should be amended in the manner indicated below since a nonprofit organisation under the Act may be a separate legal person (eg a non-profit company) or may not be a separate legal person (eg a trust), as the case may be: <ul style="list-style-type: none"> "(9) AThe office-bearers of a nonprofit organisation may not knowingly permit a disqualified person to serve or act as an office-bearer of the nonprofit organisation." • We submit that subsection (10) should be amended in the manner indicated below since the Act refers to disqualification rather than to ineligibility: <ul style="list-style-type: none"> "(10) A person who becomes ineligible or is disqualified while serving as an office-bearer of a nonprofit organisation ceases to be entitled to continue to act as an office-bearer immediately."

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		<p>(a) <u>five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or</u></p> <p>(b) <u>one or more extensions, as determined by a court from time to time, on application by the Directorate in terms of subsection (4).</u></p> <p>(4) <u>At any time before the expiry of a person's disqualification in terms of subsection (1)(d) or (e)–</u></p> <p>(a) <u>the Directorate may apply to a court for an extension contemplated in subsection (3)(b); and</u></p> <p>(b) <u>the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.</u></p> <p>(5) <u>A court may exempt a person from the application of any provision of subsection (1)(a), (c) or (e).</u></p> <p>(6) <u>The Registrar of the Court must, upon–</u></p> <p>(a) <u>the issue of a sequestration order;</u></p> <p>(b) <u>the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty; or</u></p> <p>(c) <u>a conviction for an offence referred to in subsection (1)(e),</u></p> <p><u>send a copy of the relevant order or particulars of the conviction, as the case may be, to the Directorate.</u></p>	<ul style="list-style-type: none"> • We submit that subsection (11) should be amended in the manner indicated below to include the additional ground for removal from office contemplated in the Trust Property Control Act: <ul style="list-style-type: none"> (11) An office-bearer of a nonprofit organisation may at any time be removed from office by the director if– <ul style="list-style-type: none"> (a) the person becomes disqualified to be an office-bearer in terms of subsection (1); (b) the office-bearer's estate is sequestrated or liquidated or placed under judicial management; or (c) <u>the office-bearer has been declared by a competent court to be mentally ill or incapable of managing the office-bearer's own affairs or if the office-bearer is, by virtue of the Mental Health Care Act, 2002 (Act No. 17 of 2002), detained as a patient in an institution or as a State patient; or</u> (e)(d) the office-bearer fails to perform satisfactorily any duty imposed upon the office-bearer by or under this Act or to comply with the requirements of this Act or any lawful request of the director."

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		<p>(7) <u>The Directorate must notify each nonprofit organisation which has an office-bearer to whom the order or conviction relates, of the order or conviction.</u></p> <p>(8)(a) <u>The Directorate must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as an office-bearer, in terms of an order of a court pursuant to this Act or any other law.</u></p> <p>(b) <u>The prescribed requirements referred to paragraph (a) must be prescribed after consultation with the Minister of Finance and the Financial Intelligence Centre, established by section 2 of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001).</u></p> <p>(9) <u>A nonprofit organisation may not knowingly permit a disqualified person to serve or act as an office-bearer.</u></p> <p>(10) <u>A person who becomes ineligible or disqualified while serving as an office-bearer of a nonprofit organisation ceases to be entitled to continue to act as an office-bearer immediately.</u></p> <p>(11) <u>An office-bearer of a nonprofit organisation may at any time be removed from office by the director if–</u></p> <p>(a) <u>the person becomes disqualified to be an office-bearer in terms of subsection (1);</u></p> <p>(b) <u>the office-bearer's estate is sequestrated or liquidated or placed under judicial management; or</u></p> <p>(c) <u>the office-bearer fails to perform satisfactorily any duty imposed upon the office-bearer by or under this Act or to comply with the requirements of this Act or any lawful request of the director.</u></p>	

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s 14	s 29	<p>amendment of section 29 as follows:</p> <p>29. Offences.</p> <p>(1) It is an offence to cause a nonprofit organisation, when it is being wound up or dissolved, to transfer its remaining assets otherwise than in the manner contemplated in section 12(2)(o).</p> <p>(2) It is an offence for persons, bodies or organisations–</p> <p>(a) to represent themselves as being validly registered in terms of this Act unless they are so registered;</p> <p>(b) to make use of a registration number, a registration certificate or any information contained in the registration certificate if they have not been registered in terms of this Act; or</p> <p>(c) to make material false representations in any document or a narrative, financial or other report submitted to the director; <u>or</u></p> <p>(d) <u>to fail to perform any duty imposed or requirement in terms of section 12 or 18(1)(bA);</u></p> <p>(3) In any criminal proceedings in respect of an offence created in terms of this Act–</p> <p>(a) a certified copy of the registration certificate or extract of the register is admissible evidence and, in the absence of evidence to the contrary, is sufficient proof that an organisation is registered or has been registered, as the case may be; and</p> <p>(b) an affidavit from the director stating that an organisation has not been registered in terms of this</p>	<ul style="list-style-type: none"> • We submit that the proposed new section 29(2)(d) should be amended to read as follows: "to fail to perform any duty, imposed or <u>comply with any</u> requirement, <u>imposed</u> in terms of section 12 or 18(1)(bA);". • We note, with reference to our comment above, that this subsection should conclude with a full stop rather than a semi-colon. • We note that the new offences proposed by the Omnibus Bill have the potential to serve to deter persons from acting as office-bearers of nonprofit organisations.

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		Act, is sufficient proof of this fact in the absence of evidence to the contrary.	