STRICTLY CONFIDENTIAL AND LEGALLY PRIVILEGED

Ex parte: **NATIONAL TREASURY**

In re: **CONSTITUTIONALITY OF THE GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL [B18–2022]**

OPINION

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A. Introduction

1. Our consultant is National Treasury. It seeks urgent advice concerning the constitutionality of clauses 10 and 14 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18–2022] ("the Bill").

2. Clause 10 of the Bill imposes a mandatory registration requirement on non-profit organisations ("NPOs"). Currently the registration of NPOs (under the existing national legislation liable to amendment by the Bill)[1] is voluntary.[2] Clause 14 of the Bill intends to amend the current enforcement mechanism of the Act. Currently the Act criminalises non-compliance with specific provisions. Clause 14 intends to amend section 30 of the Act to refer explicitly to *inter alia* the proposed registration requirement contemplated by clause 10.

3. The amendments are intended to address anti-money laundering and terrorist financing risks affecting South Africa.[3] These risks are identified by the Financial Action Task Force ("FATF"). South Africa is a member of the FATF,[4] the inter-governmental body whose recommendations are recognised internationally as setting the global anti-money laundering and counter-terrorist financing standard.[5] The FATF's *Anti-Money Laundering and Counter-Terrorist Financing Measures Mutual Evaluation Report on South Africa* records that "South Africa is exposed to TF [terrorist financing] risks associated with the financing of foreign terrorism, foreign terrorist fighters (FTFs), and

[1] The Nonprofit Organisations Act 71 of 1997 ("the NPO Act").
[2] Section 2(1) of the NPO Act.
[3] See e.g. para 2.5.3 of the explanatory memorandum on the objects of the Bill.
[4] *Kassel v Thompson Reuters (Markets) SA* 2019 (1) SA 251 (GJ) at para 1.
[5] *Annex Distribution (Pty) Ltd v Bank of Baroda* 2018 (1) SA 562 (GP) at para 34.

potential domestic terrorism."[6] The FATF's report reflects that South Africa is non-compliant with recommendations regarding NPOs.[7] This despite the existing NPO Act's "clear policies promoting accountability, integrity and public confidence in the administration and management of all NPOs in South Africa."[8] A particular problem, the FATF's report records repeatedly, is that "the registration of NPOs in South Africa is voluntary".[9] Thus the NPO Act's policy provisions (to which the FATF apparently has no objection) apply not "to all NPOs relevant to [the FATF's recommendation applicable to the NPO sector]".[10]

4. The NPO sector in South Africa is subject to the NPO Act. The Act defines an NPO as "a trust, company or other organisation of persons (a) established for a public purpose; and (b) the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered".[11] The Bill does not change this definition. Hence the NPO Act will remain applicable only to organisations established for a public purpose (and only if such organisation does not distribute its assets among its members).

5. The Act's application is apparently uncontentious. But the Bill is subject to some criticism (included in some of the public comments briefed to us) on the basis of imposing draconian requirements on "knitting clubs, church choirs and community sport clubs"; threatening to "interfere with the religious organisations'

[6] Mutual Evaluation Report (October 2021) p 5 para 2.
[7] Mutual Evaluation Report (October 2021) p 14 table 2 column 2 row 2. See similarly p 176 s.v. "Weighting and conclusion".
[8] Mutual Evaluation Report (October 2021) p 174 s.v. "Criterion 8.2" para (a).
[9] See e.g. Mutual Evaluation Report (October 2021) p 173 s.v. "Recommendation 8 – Non-profit organisations" and p 175 para (d).
[10] Mutual Evaluation Report (October 2021) p 174 s.v. "Criterion 8.2" para (a).
[11] Section 1(1) of the NPO Act s.v. "nonprofit organisation".

doctrines/tenets/beliefs"; allowing the outlawing of allegedly "undesirable" NPOs; and imposing "redundant and onerous" registration requirements.

6. We are asked to assess the constitutionality of the two contentious clauses contained in the Bill on the basis of the above concerns. The briefed material includes a copy of the Bill as published on 18 August 2022 in the Government Gazette; the FATF report already mentioned; some of the submissions received from civil society; and National Treasury's briefing memorandum setting out the issues. The latter requests that the question of clauses 10 and 14's constitutionality be assessed by considering eight identified issues, and by advising on any recommended revisions to be proposed to the Standing Committee on Finance to address any valid constitutional concerns.[12]

7. In the analysis below we address the issues for advice in the sequence set out in the aforementioned memorandum. Subject to certain suggested revisions, we advise, for the reasons provided below, that clauses 10 and 14 of the Bill pass constitutional muster.

B. Analysis

8. The urgency in which we are required to prepare this advice does not allow exhaustive analysis and (especially comparative) legal research. In our view it in any event suffices to address the most pertinent constitutional principles and precedents, particularly since South African Courts have cautioned – especially in the context of the specific rights

[12] We are not asked to advise on the constitutionality of the parliamentary process, which is still pending.

involved in this instance – against unnecessary and unhelpful resort to comparative foreign law.[13]

(1) The Bill's impact on the Bill of Rights

9. The first sub-issue for advice involves the question concerning the impact of clauses 10 and 14 of the Bill on certain fundamental rights entrenched in the Bill of Rights, specifically the right to freedom of association; freedom of religion, belief and opinion; and the rights of cultural, religious and linguistic communities.

Right to freedom of religion, belief and opinion

10. The right to freedom of religion, belief and opinion is violated when the State puts a person to the choice of either obeying the law of the land or the individual's own convictions.[14] Therefore forcing people to act contrary to their beliefs infringes the right entrenched by section 15 of the Constitution.[15]

11. The representations received and briefed reflect that the reliance on the right to freedom of religion apprehends the adverse *exercise* of powers pursuant to clause 10 of the Bill.

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[13] See e.g. *Wittmann v Deutscher Schulverein, Pretoria* 1999 (1) BCLR 92 (T) at paras 112-115; *Law Society of the Transvaal v Tloubatla* 1999 (11) BCLR 1275 (T) at 1279H.

[14] See e.g. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 35, holding that "[t]he State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful to the law."

[15] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) at para 92; *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) at para 38:

> "the right to freedom of religion at least comprehends: (a) the right to entertain the religious beliefs that one chooses to entertain; (b) the right to announce one's religious beliefs publicly and without fear of reprisal; and (c) the right to manifest such beliefs by worship and practice, teaching and dissemination. Implicit in the right to freedom of religion is the 'absence of coercion or restraint'. Thus 'freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs'."

In principle this is a misdirected constitutional complaint. Empowering provisions must be presumed to be exercised without abusing the power conferred.[16] They must also, on clear Constitutional Court caselaw, be construed in a constitutionally-compliant manner.[17] Clause 10 is not liable to an interpretation which confers a power to "interfere with the religious organisation's doctrines/tenets/beliefs", as each of the churches' representations repeat (strikingly, in identical terms). Clause 10 provides that an NPO "must be registered", and refers to the mandatory and discretionary content of an NPO's constitution. The clause confers no discretionary power on the functionary required to register an NPO.

12. Therefore perhaps a more pertinent constitutional concern is the regulation-making discretion which the clause vests in the Minister.[18] Clause 10 confers on the Minister the power to prescribe "registration requirements", the transition "period" during which an NPO must register under the NPO Act, and also the "transition arrangements".[19] The potential problem with this empowering provision is that it can be contended to confer an unconstrained discretion on the Minister to impose procedural and substantive legal requirements when Parliament itself could legislate sufficiently clearly and comprehensively.[20] Since such concern is readily remedied, the Bill may be protected from such criticism by suitable amendments.

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[16] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at paras 222 and 234; *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) at para 72; *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at paras 116-117.

[17] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) at para 28; *Tshwane City v Link Africa* 2015 (6) SA 440 (CC) at paras 114-115.

[18] Clause 10 refers to a period "determined" by the Minister and to "prescribed" arrangements and requirements. The NPO Act vests regulation-making powers in the Minister of Welfare and Population Development (section 1 s.v. "Minister").

[19] This is the import of the substituted text for section 12(1)(a) and (b).

[20] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at paras 46, 47, 50, 53 and 55. See similarly *South African Reserve Bank v Shuttleworth* 2015 (5) SA 146 (CC) at para 79, reiterating the context-specificity of the principle articulated in *Dawood* and related cases (including *Affordable Medicines Trust v Minister of Health* 2006

13. The NPO Act in its current form already contains transition arrangements and periods enacted by Parliament.[21] They may be applied as required by the Bill to operate also in respect of the amendments it intends to introduce into the Act. Similarly, the Act in its current form has already resulted in regulations prescribed by the Minister. The Bill may refer to these regulations in their current form (or as suitably amended, if required) to apply *mutatis mutandis* to mandatory registrations as contemplated by the Bill.[22] Such reference will effectively provide Parliament's imprimatur on the pre-existing (and presumably satisfactory) regulations, remove any concern as regards uncircumscribed discretionary powers and regulatory risks to constitutional rights, and obviate any delays or complications arising from regulation-making.[23]

14. As regards the Bill's reference to "prescribed registration requirements", they should be deleted for the reasons further addressed below. As we shall show, subject to such deletion the Bill (as read with the remaining provisions of the NPO Act) conduces to ready registration which does not negate the right to freedom of religion, belief and opinion. To the extent that a registration requirement may nonetheless be construed as

(3) SA 247 (CC) at para 34; *Janse van Rensburg NO v Minister of Trade and Industry* 2001 (1) SA 29 (CC) at para 25; and *Justice Alliance of South Africa v President of the Republic of South Africa* 2011 (5) SA 388 (CC) at para 51).

[21] Section 34(2)(b)(i) and section 34(2)(c)(i) of the NPO Act provide respectively for a two-year and two-month period after the commencement of the Act to apply for registration. Section 34(2)(b)(ii) of the NPO Act provides for procedures governing an application for registration.

[22] Regulation 1 applies to applications for registration and refers to Form 1. Regulation 1 itself requires no amendment to give effect to mandatory registration applications. Form 1 only requires two amendments. The first amendment is the deletion of the words "Registration is voluntary" in the column headed "Read this first: What is the purpose of this form?". The second amendment is the substitution of the word "must" for the existing word "may" in the subheading "Which organisations may apply for registration?" in the same column.

[23] See e.g. *President of the Republic of South Africa v South African Dental Association* 2015 (4) BCLR 388 (CC), which concerns a situation requiring the Constitutional Court to set aside a presidential proclamation bringing into operation legislative amendments criminalising certain conduct. The presidential proclamation preceded to the promulgation of regulations governing the granting of certificates and applications for such certificates (absent which continued conduct by incumbent practitioners constituted a criminal offence).

limiting the right, such limitation is justified for the reasons to which we revert in addressing the right to freedom of association.

Rights of cultural, religious and linguistic communities

15. The religious and related associational rights comprising the second category of constitutional rights in question are assessed and addressed in dealing with the first and the third category of rights. Insofar as they relate to individual rights to religion, for reasons provided above no infringement arises (and any limitation of the right passes a limitations analysis). Insofar as they concern collective rights, the analysis applicable to the right to freedom of association applies. Therefore, in the light of the latter right's treatment below, a separate analysis is not conducted in the current circumstances.[24]

Right to freedom of association

16. The constitutional right to freedom of association is conferred in unqualified terms.[25] In principle, imposing a (non-negligible) impediment to any exercise of an unqualified right constitutes a limitation of such right.[26]

[24] We note that the intersectionality of rights (a concept particularly applicable to the right of equality) and the buttressing of individual rights by associational rights may bear on the significance of the rights in issue. As regards the former, see e.g. *Mahlangu v Minister of Labour* 2021 (2) SA 54 (CC) at para 73*ff*. As regards the latter, see the evolving argument by Woolman *et al* (eds) *Constitutional Law of South Africa* 2nd ed (Juta & Co Ltd, Cape Town 2013) vol 3 at 44–2.

[25] Section 18 of the Constitution provides: "Everyone has the right to freedom of association."

[26] See e.g. *SATAWU v Garvas* 2013 (1) SA 83 (CC) at para 57 in which Mogoeng CJ held for a majority of the Constitutional Court (in the context of the closely related and similarly formulated right of assembly, entrenched in section 17 of the Constitution) that significantly increasing the costs of organising a protest and the potential inhibition of organising a protest amount to separate limitations of the right to assemble. See similarly *Garvas supra* at paras 47 and 54.

17. The section 18 right specifically concerns the freedom to choose whether or not to associate or dissociate, and with whom.[27] This right, the Constitutional Court held, is subject to a "threshold" recognising societal compulsions integral to the very structure of society and permitting state regulation pursuant to "the complexity and expansive mandate of modern government".[28]

18. Therefore, despite its formulation,[29] the right to freedom of association is apparently not *per se* precluded from being regulated.[30] However, any provision purporting to regulate the right which amounts to prohibiting the exercise of the right necessarily restricts the right and requires justification.[31] And any regulation which increases the costs of exercising the right and has a deterrent effect surpasses mere regulation.[32]

19. We accordingly approach the provisions in question from the departure point that a statutory registration requirement coupled with a prohibition against exercising associational rights prior to registration limit a right conferred in unconditional terms.[33]

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[27] *New Nation Movement NPC supra* at para 58. *Taylor v Kurtstag NO* 2005 (1) SA 362 (W) at 378F-H:

> "The associational right of freedom of religion of s 31 is a manifestation of the right of freedom of association guaranteed under s 18 of the Constitution. The right articulated in s 18 of the Constitution is 'freedom of association', a guarantee of a choice, not an absolute right. The guarantee applies to 'everyone' and, in the context of this matter, as I will show, it applies to both parties. Thus, s 18 of the Constitution guarantees both an individual the right to choose his or her associates, and a group of individuals their rights to choose their associates."

[28] *New Nation Movement NPC v President of the Republic of South Africa* 2020 (6) SA 257 (CC) at para 50, quoting with approval *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545 ([1991] 2 SCR 211) at 321. In *New Nation Movement NPC* the Constitutional Court explicitly adopted what it termed the "*Lavigne* threshold" (*id* at para 53).

[29] *Cf S v Mlungwana* 2019 (1) SACR 429 (CC) at para 43, which deals with section 17 of the Constitution. Section 17 contains no internal modifier of the right other than the stipulation that the right to assemble must be exercised peacefully and unarmed.

[30] *New Nation Movement supra* at paras 50-51

[31] As the High Court recently held in *Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality* 2022 (5) SA 570 (GJ) at para 62 (applying the Constitutional Court's judgment in *Garvas supra*): "In essence then, section 17 can be lawfully regulated. But anything that would *prevent* unarmed persons from assembling peacefully would amount to a limitation of the right in section 17."

[32] *S v Mlungwana supra* at paras 46-47; *Garvas supra* at paras 57-59.

[33] See in the context of the right of association pertaining to labour rights (specifically entrenched in section 23 of the Constitution) Manamela "The Social Responsibility of South African Trade Unions: A Labour Law Perspective" *LL.D Thesis* (UNISA, 2015) at 78:

Therefore the second stage of the two-tier test for constitutional compliance under the Bill of Rights arises.[34] It inquires whether the limitation (infringement) of the right is justifiable (pursuant to a limitation analysis under section 36 of the Constitution).[35]

20. Thus the second issue identified in our instructions is reached.

(2) <u>Balancing the Bill's protection against abuse with the Bill of Right's protection of entrenched rights</u>

21. The balancing to which the second issue for specific consideration refers concerns the constitutional rights identified above *vis-à-vis* the need to protect NPOs from abuse by terrorist financing activities. The NPO Act itself recognises the State's responsibility towards NPOs.[36] And academic commentators also acknowledge the risk of NPOs being "captured", and the need for their protection.[37] But the balancing required from a constitutional perspective extends beyond the particular NPO or NPOs concerned, and even beyond the entire NPO sector.

"It should be noted that in the above provisions there is no mention of registration. This implies that nothing stops unregistered trade unions from existing and functioning. Consequently, unregistered trade unions have an unrestricted right to exist, function and pursue their activities, as the Constitution itself does not require trade unions to register in order to carry out their activities. The Constitution therefore supports trade unions and their functioning without imposing any restrictions or hurdles; however, national legislation, such as the LRA may impose restrictions on unregistered trade unions as is discussed below."

[34] *Bwanya v The Master of the High Court* 2022 (3) SA 250 (CC) at para 162.

[35] In *Garvas supra* at para 59 the Constitutional Court itself applied the same approach to the closely-related right to assembly, holding that a statutory prescript resulting in a reluctance to exercise a right imposes a limitation on that right – "[b]ut [that] this is better dealt with in the section concerned with the extent of the limitation in the justification analysis" to which the judgment thereupon turned.

[36] See e.g. sections 2 and 3 of the NPO Act, which *inter alia* impose a positive obligation on Government "to promote, support and enhance the capacity of nonprofit organisations to perform their functions."

[37] Currie *et al* (eds) *The Bill of Rights Handbook* 6th ed (Juta & Co Ltd, Cape Town 2013) at 400. For the same academic commentator's treatment of the same topic, see also Woolman *op cit* at 44–14. The Constitutional Court referred to this concern in *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* 2020 (6) BCLR 725 (CC) at para 33, citing a subsequent service issue of Woolman.

22. The constitutional balancing of the Bill's protective measures with the Bill of Rights' protected rights requires a section 36 limitations analysis.[38] Such analysis concerns the constitutional rights of the entire South African society, and not only members of associations subject to registration or their sectarian concerns.[39] It involves a complex and normative balancing exercise, and even the open-ended list of constitutional considerations codified in section 36 itself cannot be applied mechanically.[40]

Nature of the right

23. The importance of the right to freedom of association has been recognised by the Constitutional Court.[41] Academic commentators explain the importance and nature of the right extensively, referring to the right as a "cornerstone of a democratic society", its relation to *ubuntu* and its interconnectedness with other fundamental rights.[42]

24. Yet the right to associate also harbours "freedom's greatest enemy".[43] The power brought about by mobilising a crowd acting in an association has not only pro-democratic consequences.[44] It can also adversely affect the constitutional order, and even facilitate "conspiracies to overthrow the constitutional order".[45] Hence the

[38] *Christian Education supra* at para 31.
[39] See *Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality* 2022 (5) SA 570 (GJ) at para 47. The High Court rejected an argument by Government based on the administrative impediment imposed on exercising the right to assemble, contending the restriction to be facilitative or protective of the right. The High Court held that the State had a duty to protect the right, and that this did not come with strings attached (in that instance an administrative fee) for the rightbearer.
[40] *S v Manamela* 2000 (3) SA 1 (CC) at para 32.
[41] *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe)* 2020 (6) BCLR 725 (CC) at para 32.
[42] Cheadle *et al* (eds) *South African Constitutional Law: The Bill of Rights* (LexisNexis, Durban 2022) SI 33 at 13–1-3. See similarly Currie *op cit* at 397.
[43] Cheadle *op cit* at 13-10.
[44] Currie *op cit* at 403: "Associations have their dark sides. They may pursue ends that threaten the well-being of society or some of the individuals therein."
[45] Cheadle *op cit* at 13-3.

"jurisprudential debate" concerning the right's remit revolves around "the appropriate limitations on this right".[46]

25. Thus the recognised importance of the right in no way precludes its limitation or presupposes the result of a limitations analysis.

Importance of the purpose of the limitation

26. The purpose of the limitation imposed by the Bill is to give effect to anti-money laundering and counter-terrorist financing standards recognised internationally.

27. As the OAU Convention on the Prevention and Combating of Terrorism confirms, the elimination of the twin tyrannies, *terrorism* and *money-laundering*, is an inter-country, cross-continent, and international imperative of profound importance.[47] The International Convention for the Suppression of the Financing of Terrorism confirms

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[46] *Ibid*.

[47] See e.g. recitals 8-12 of the preamble, recognising that

> "… the lives of innocent women and children are most adversely affected by terrorism;
> … terrorism constitutes a serious violation of human rights and, in particular, the rights to physical integrity, life, freedom and security, and impedes socio-economic development through destabilisation of States;
> … terrorism cannot be justified under any circumstances and, consequently, should be combated in all its forms and manifestations, including those in which States are involved directly or indirectly, without regard to its origin, causes and objectives";
> there are "growing links between terrorism and organized crime, including the illicit traffic of arms, drugs and money-laundering"; and
> the international community is "determined to eliminate terrorism in all its forms and manifestations".

See also article 4(2), which requires the adoption of "any legitimate measures aimed at preventing and combating terrorists acts", and "in particular" to

> "promote the exchange of information and expertise on terrorist acts and establish data bases for the collection and analysis of information and data on terrorist elements, groups, movements and organisations" (article 4(2)(e)); and
> "take all necessary measures to prevent the establishment of terrorist support networks in any form whatsoever" (article 4(2)(f)).

the same. The latter convention specifically confirms the UN General Assembly's 1996 resolution requiring

> "all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organisations, whether such financing is direct or indirect through organisations which also have or claim to have charitable, social or cultural goals … including the exploitation of persons for purposes of funding terrorist activities … and to intensify the exchange of information concerning international movements of such funds".

28. South Africa itself is afflicted by the "rapid growth" of *inter alia* "money-laundering … nationally and internationally"; the deleterious effect of money-laundering "on the rights of the people as enshrined in the Bill of Rights"; the danger that "money-laundering … present[s] … to public order and safety and economic stability" and its "potential to inflict social damage"; and recognises the reality that "South African common law and statutory law fail to deal effectively with … money laundering … and also fail to keep pace with international measures aimed at dealing effectively with … money-laundering".[48]

29. Thus the importance of the purpose of the limitation is undeniable.

Nature and extent of limitation

30. The *nature* of the limitation imposed by the Bill is registration. Registration is to be juxtaposed with other typical forms of limiting freedoms of association (which include outright prohibition; barriers to or qualification on membership; restrictions on internal

[48] Preamble to the Prevention of Organised Crime Act 121 of 1998.

or external decisions an association may make, or prescriptive decision-making methods; imposing funding requirements or restrictions, or penalising membership *per se*).[49] A registration limitation is accepted under German law (to which the South African right to freedom of association is comparable)[50] as "normal" and even necessary to integrate the right into the rest of the legal system.[51]

31. The *extent* of the registration limitation in question is twofold. First, prior to registration the association may not commence its operations.[52] Second, a violation of the registration requirement is sanctioned by a fine or imprisonment.[53] Imposing such sanctions axiomatically exacerbates the *impact* of the limitation, if it is brought to bear. But the extent of the operation of the limitation nonetheless remains confined. This is, on the one hand, because the limitation applies only to NPOs as defined in the Act. Accordingly an NPO which does not pursue a public purpose is not affected at all. On the other hand, even to the extent that the registration requirement does apply, it is not unduly onerous (as we shall show in addressing issues 5 and 6 below, demonstrating that registration should be received relatively automatically on application).

32. Therefore, as in *Garvas*, the potential chilling effect on the exercise of the right "should not be overstated".[54] The limitation in question does not negate the right, but only subjects its exercise to conditions.[55]

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[49] Cheadle *op cit* at 3–10.
[50] *Ibid*.
[51] *Ibid*.
[52] Clause 10(a) of the Bill, which introduces this prohibition into the text it intends to substitute for section 12(1)(a) of the Act.
[53] Section 30 of the Act, read with clause 14 of the Bill (which amends section 29 of the Act, to which section 30 of the Act cross-refers).
[54] *Garvas supra* at para 69.
[55] *Ibid*.

Balance between limitation and its purpose, and less restrictive means to achieve the purpose

33. *Garvas* is also analogous in its approach to the fourth and fifth factors identified in section 36(1) of the Constitution. The Constitutional Court dealt with these factors jointly.[56] In *Garvas* the purpose of the limitation was to protect the rights of individuals whose property is damaged during demonstrations deteriorating into riots.[57] In the current instance the purpose of the limitation is to give effect to national and international commitments to protect individuals and democracy itself against terrorist attacks and money-laundering intended to finance terrorism.[58]

34. First principle dictates that the purpose of the limitation cannot reasonably be served by the less restrictive means constituting the current *status quo*: rendering registration of NPOs voluntary.[59] It is probably precisely the type of NPO whose registration is

[56] *Id* at paras 80-83.
[57] *Id* at para 80.
[58] National Treasury instructions are as follows:

> "mandatory registration of all NPOs was identified as a means of laying the basis for ['implement(ing) policy recommendations to improve the oversight of the NPO sector'] and ['apply(ing) controls of the NPO Act (particularly in relation to governance and oversight) to all NPOs, not just NPOs that register voluntarily']. This would enable the oversight and controls of NPOs, such as ensuring that necessary information regarding the office-bearers and the ownership and control structure of NPOs in the register that the Director of Nonprofit Organisations must keep. These are important prerequisites to assess whether a nonprofit organisation might potentially be misused for terrorism financing purposes. Currently, the lack of this type of information being available in respect of a substantial proportion of NPOs, because registration under the Act is currently voluntary, means that it is only possible to appropriately assess whether NPOs might potentially be misused for terrorism financing purposes in respect of known (registered) NPOs."

[59] The criterion is and remains reasonableness. As the Constitutional Court held in *S v Mamabolo* 2001 (3) SA 409 (CC) at para 49:

> "Where s 36(1)(e) speaks of less restrictive means it does not postulate an unattainable norm of perfection. The standard is reasonableness. And, in any event, in theory less restrictive means can almost invariably be imagined without necessarily precluding a finding of justification under the section. It is but one of the enumerated considerations which have to be weighed in conjunction with one another, and with any others that may be relevant."

required for purposes of serving anti-terrorism measures that will invariably *not* register voluntarily.[60] The only alternative to voluntary registration is mandatory registration.

35. Registration, in turn, is at least reasonably required (if not an absolute precondition) for the necessary risk-assessment.[61] This is because registration is the means through which Government is informed of the nature of NPOs. The nature of an NPO, in its turn, enables an appreciation of the vulnerabilities to which an NPOs is exposed from a terrorist-financing perspective. It is by garnering information concerning such exposure, vulnerability and risks that Government is enabled to acquit itself of its responsibility to the South African society, the donor community, and international peers by implementing mitigation, remedial and cooperative measures.

36. Based on the above, in our view the same conclusion reached by the Constitutional Court in *Garvas* applies equally in the current context: the limitation of the right (in this case the right to freedom of association)[62] is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[63]

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[60] It is not necessary to establish this proposition more definitively. Such onus as section 36 imposes on Government is not an onus in the strict or ordinary sense (*Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC) at para 34). It suffices for purposes of a limitations analysis that the Legislature's choice be based on reasonable inferences not necessarily supported by empirical data, and it is not required to prove empirically that a policy directed to a particular concern would be effective; if Government's concerns are sufficiently important, the risks sufficiently high, and an appropriate connection exists between means and ends, then this may suffice to justify action taken to address Government's legitimate concerns (*id* at para 35).

[61] The correct approach is not to adopt a "strict scrutiny" test to ascertain whether the State can or has established the necessity of the impugned measure (*Christian Education supra* at para 29).

[62] In our view the same applies to the right to freedom of religion, belief and opinion. The latter right formed the subject-matter of the limitations analysis conducted by the Constitutional Court in *Christian Education* (cited and applied above).

[63] *Garvas supra* at para 84.

(3) Circumscribing the powers under the Act

37. The third issue which we are asked "in particular to consider" is whether a mandatory registration requirement would necessarily violate the constitutional rights in issue if "appropriate controls on the ability of the Directorate of NPOs to refuse registration, use … information ..., [or] regulate the activities of NPOs" were imposed.

38. For the reasons provided in addressing the first issue for specific consideration (and to be amplified in addressing the fifth to eighth issues below), any discretionary power conferred by the Bill should indeed be circumscribed by the Legislature as appropriate in the Bill itself. Under the NPO Act, registration may only be refused if a requirement for registration imposed by Parliament is not satisfied by an NPO. An NPO's activities is not subject to regulation other than as allowed under the Act, as appropriately amended by the Bill itself. A power to grant an application for registration does not include a power to regulate the conduct of the applicant for registration.[64] Such power cannot be conferred by regulations prescribed under national legislation, and cannot be claimed by an administrator acting under subordinate legislation.[65]

39. As regards the use to which information may be put, this should be subject to the Protection of Personal Information Act,[66] and the Promotion of Access to Information Act,[67] as apparently contemplated (albeit in a different context) by clauses 34 and 35 of the Bill.

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[64] Baxter *Administrative Law* (Juta & Co Ltd, Cape Town 1984) at 406.
[65] *South African Reserve Bank v Shuttleworth supra* at para 116.
[66] Act 4 of 2013.
[67] Act 2 of 2000.

(4) <u>Differentiating between classes of NPOs in imposing registration requirements</u>

40. The NPO Act itself already distinguishes between different classes of NPOs.[68] As mentioned, it governs only NPOs which are "established for a public purpose; and the income and property of which are not distributable to its members or office-bearers except as reasonable compensation for services rendered."[69]

41. Additional bases for differentiation are likely to fall within prohibited grounds listed in section 9 of the Constitution (which entrenches the right to equality).[70] Alternatively, any additional differentiation may unduly risk rendering the registration requirement ineffective and contrary to its purpose.[71] This would not only impede the purpose of implementing the FATF's recommendation,[72] which does not differentiate between

[68] Thus the purely-financial basis on which Cameron J (as he then was) classified the pension fund in question in *Oostelike Gauteng Diensteraad v Transvaal Munisipale Pensioenfonds* 1997 (8) BCLR 1066 (T) at 1077H for purposes of applying the right to freedom of association is already codified in the NPO Act itself.
[69] Section 1 of the Act s.v. "nonprofit organisation".
[70] Prohibited grounds of particular relevance in the current context include religion, conscience, belief, culture, language and birth (section 9(3) of the Constitution). The State may not unfairly discriminate either directly or indirectly on any section 9(3) ground, and any discrimination on such basis is unfair unless the State establishes that the discrimination is fair (section 9(5) of the Constitution). In *Christian Education supra* at para 42 the Constitutional Court concluded that creating exemptions to accommodate religious communities (for purposes of permitting particular religious practices) is not unfair to others. This does not apply to the current situation. The registration requirement does not preclude a particular religious practice, since association *sans* registration is not a religious ritual, rite or requirement. The contrary applies to corporal punishment, as the Constitutional Court apparently accepted in *Christian Education* (see e.g. paras 3-5 and 32).
[71] Categories on which associations may notionally be distinguished for purposes of analysis apparently include the following: political associations; intimate associations; cultural associations; economic associations; empowering associations; small social associations; security forces; religious associations; voluntary associations; and sexual associations (Currie *op cit* at 406-419).
[72] As Currie *op cit* at 415 observes (in the context of the rights of religious associations, with specific reference to the Constitutional Court's judgment in *Prince v President, Cape Law Society supra*), meaningful exemptions cannot readily be created without compromising the effectiveness of a regime intended to counteract narcotics trafficking. (See similarly *Christian Education supra*, which concerns a comprehensive statutory scheme intended to eliminate certain methods of corrective discipline.) In our view the same applies to terrorist financing and money-laundering: a comprehensive statutory scheme intended to eliminate it must operate without undue dilution. Indeed, "the link between culture, social capital and hard capital throws up a most complex set of problems" with which the law governing associations must deal without outlawing community funding outright (Woolman *op cit* at 44–55).

categories of NPOs.[73] It would also adversely impact on a limitation analysis (which itself refers to the founding value of equality).[74]

42. Therefore, in our view, construing extra classes of NPOs for purposes of creating exceptions from any mandatory registration requirement is inadvisable.

(5) <u>Discretionary denial of registration to compliant NPOs</u>

43. The fifth issue for specific consideration as identified in our instructions concerns the current provisions of the NPO Act (as it stands prior to the intended amendment by the Bill). The issue involves the question whether the NPO Act currently authorises the Director of Nonprofit Organisations, an official appointed by the Minister of Welfare and Population Development, to refuse registration to a compliant NPO applying for registration.

44. Applying the well-established principles governing statutory interpretation.[75] the NPO Act is quite clear. No discretion exists. The Director "must" register an NPO if the Director is satisfied that the NPO applying for registration complies with the requirements for registration.[76]

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[73] See *Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality* 2022 (5) SA 570 (GJ) at para 50, in which it was held that a discount provided on registration fees negated their purpose: funding the services. What this demonstrates is that attempts to render limitations "not draconian" may blunt them and defeat an attempt to justify their imposition. This does *not* mean that any waiver of discount on administration fees are necessarily destructive of a limitations analysis. In a case where administration fees are not imposed, or where the purpose of the fee is not to fund services provided in the exercise of the right, or where the fee is not intended to create a disincentive or invite a cost-benefit analysis by the right-bearer, a limitation analysis is not adversely affected by waiving or discounting administrative fees.

[74] Section 36(1) of the Constitution.

[75] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18, confirmed by the Constitutional Court in *inter alia University of Johannesburg v Auckland Park Theological Seminary* 2021 (6) SA 1 (CC) paras 65-66.

[76] Section 13(2)(b) of the NPO Act.

45. The *substantive* requirements for registration are set out in section 12 of the NPO Act. They refer to certain statements, provisions, safeguards, specifications, rules, procedures, and arrangements (concerning financial transacting, financial year-end, amendment, dissolution and succession) which must be recorded in a NPO's constitution.[77] The *formal* requirements for registration are contained in section 13 of the NPO Act. They involve the submission of an application in the prescribed form, accompanied by two copies of the NPO's constitution, and including such further information as may be required to enable the Director to determine whether the substantive requirements are met.[78]

46. Whether these requirements are met constitutes an objective jurisdictional fact.[79] Thus the Director does not exercise a subjective discretion,[80] but makes a facial desktop determination as regards the contents of the constitution of an applicant.[81] In doing so the Director exercises a power coupled with a duty.[82] Therefore if the requirements are

[77] Section 12(2)(a)-(o) of the NPO Act.
[78] Section 13(1)(a)-(c) of the NPO Act.
[79] See e.g. *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) para 20, holding that even a value judgment (concerning the question whether a candidate is a fit and proper person) involves an objective jurisdictional fact. Under the NPO Act no value judgment, least of all as regards the NPO or its office-bearers being fit and proper, is involved.
[80] See *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 171.
[81] *Thint (Pty) Ltd v National Director of Public Prosecutions* 2009 (1) SA 1 (CC) at para 92 fn 65, demonstrating that subjective jurisdictional facts are conferred by empowering provisions affording an authority a discretion to determine (i.e. "reasonable grounds for believing") that a certain state of affairs (e.g. the commission of an offence) exists.
[82] *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at para 73, where the Constitutional Court interpreted the word "may" as meaning "must", and held that this imposed a power coupled with a duty. In the current statutory context the same conclusion applies *a fortiori*. This is, firstly, since the text in question is in the imperative ("must"). Secondly, such construction furthers the right to freedom of association and is therefore to be preferred (*Van Rooyen v The State* 2002 (5) SA 246 (CC) at paras 180-182; *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 89).

met, it is mandatory to approve an application for registration.[83] Conversely, no discretion is conferred to approve a non-compliant application.[84]

(6) Mandatory registration of compliant NPOs applying for registration

47. The sixth issue identified in our brief is described as "related" to the fifth. It is "whether the Directorate for NPOs is required to register every NPO that complies with the provisions of the Act". For the reasons provided above, the answer is affirmative.

(7) Validity of concerns relating to discretionary refusals

48. The penultimate issue for specific consideration is whether, in view of the preceding two conclusions, concerns regarding the registration of NPOs are "invalid" (since no discretionary power exists). For the reasons provided above, the NPO Act as it currently stands clearly confers no discretionary power to grant or refuse registration. If the requirements are met, an application for registration must be granted; conversely, an application for registration must be refused (if the requirements are not satisfied).

49. However, the concerns expressed thus far in the representations included in our brief pertain *to the Bill*, not to the NPO Act as it currently stands. As mentioned, the Bill introduces a reference to "prescribed registration requirements", the determination of a period in which an application for registration must be lodged, and a prescribed transition regime. These are all discretionary powers conferred on the Minister for

[83] See e.g. Baxter *op cit* at 408 and the authorities there collected (including *Licence Officer, Pretoria v Kliris* 1980 (3) SA 674 (T) and other cases concerning applications for registration or licenses).
[84] Section 13(6) of the NPO Act, which provides that if a non-compliant application has been received and the defect notified to the applicant by the Director has not been removed, then the application must be refused.

Welfare and Population Development. To the extent that the Minister might purport to devolve a discretion on the Director to grant or refuse registration, such regulation would be *ultra vires* the NPO Act and invalid. The representations therefore correctly do not (and indeed cannot in anticipation) criticise the *regulations* envisaged by the Bill as raising any constitutional concern. But the Bill itself may yet elicit a legitimate concern based on the *Dawood* principle, unless discretionary regulation-making powers are appropriately defined (thereby reducing the ambit for any "discretionary" refusals – which would be *ultra vires* the NPO Act).

(8) Desirability of definitively limiting remit for refusing registration

50. It follows from the above that the final issue for specific consideration is also answered in the affirmative. It is indeed "desirable to clarify limitations on the powers of the Directorate for Nonprofit Organisations to refuse applications for registration or to deregister NPOs", despite the NPO Act as it stands already clearly imposing a mandatory (or "purely mechanical") power to register or deregister. This desirability does not originate from the NPO Act itself. It arises from the Bill, which introduces the regulation-making powers (which, in turn, potentially expand the scope for the purported conferral or exercise of a discretion not contemplated in the NPO Act as it currently stands).

51. The Bill's objective is to enable Government to garner knowledge of NPOs for purposes of risk assessment. This is to be done by expanding the complement of registered NPOs. Expansive inclusion of registered NPOs is not achieved by imposing additional

substantive *registration* requirements.[85] If requirements are increased, then registration will be reduced (because applications for registration must be refused if additional conditions of registration are not met).

52. Therefore, from the perspective of serving a legitimate government purpose, satisfying a limitations analysis, and compliance with the principle of legality (to which the *Dawood* principle relates), it is not only desirable but required to erase references to "prescribed registration requirements" in clause 10 of the Bill. This is to be done by excising the words "and in accordance with prescribed registration requirements" and "and registration requirements" where they occur in clause 10 of the Bill.[86]

C. <u>Conclusion</u>

53. For the reasons provided above, subject to

(a) the deletion of references to "registration requirements" being "prescribed";

(b) Parliament itself likewise opting for the period in which application for registration must be made; and

(c) a transition regime similar to the existing one contained in the NPO Act being adopted by Parliament,

[85] Significantly, having referred specifically to the NPO Act, the FATF report did not propose an amendment to the NPO Act to introduce further registration requirements. It referred favourably to the NPO Act itself, but expressed concern over the voluntary nature of registrations under it.

[86] Lines 25-26 and lines 30-31 on p 7 of the Bill [B18–2022]. We are not asked specifically to advise on the constitutionality of clause 11 of the Bill. It, too, refers to *prescribed* "information" and "requirements". Subject to an appropriate qualification rendering information (and requirements pertaining thereto) subject to PAIA and POPIA, it does not appear to us that any constitutional concern arises in this regard.

clauses 10 and 14 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18–2022] in our assessment pass substantive constitutional muster.

54. Should any further issue arise for clarification or advice, we shall be glad to make ourselves available to be of assistance.

We advise accordingly.

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1 November 2022