# Report of the Portfolio Committee on Police on Public Participation: Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15 – 2022] (National Assembly – sec 75), dated 11 November 2022

The Portfolio Committee on Police (the Committee), having held public hearings on the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15 – 2022], referred to and classified by the Joint Tagging Mechanism (JTM) as a section 75 Bill, reports as follows:

# Introduction

The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15 – 2022] (“Bill”) was introduced to Parliament for processing on 19 July 2022 (ATC No. 105-2022] in terms of Joint Rule 159. It is proposed that the Bill be dealt with in accordance with the procedure outlined in section 75 of the Constitution as is does not affect provinces or amend the Constitution (section 74). The State Law Adviser indicated that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders.

# Purpose of the POCDATARA Bill

In summary, the proposals in the Bill aims to:

1. Amend certain definitions in the principal Act.
2. Insert some new offences related to maritime and aviation security.
3. Address the problem of foreign terrorist fighters.
4. Shift the responsibility for the publication of United Nations Security Council Resolutions in a notice in the *Gazette.*

In more detail. the Bill provides for:

* offences related to terrorist training and the joining and establishment of terrorist organisations;
* offences related to foreign travel and attempts to leave the Republic under certain circumstances;
* offences in respect of the possession and distribution of publications with unlawful terrorism related content;
* authorisation to be obtained from the Director of Public Prosecutions in respect of the investigation and prosecution of certain offences;
* the issuing of warrants for the search and cordoning off of vehicles, persons and premises;
* a direction requiring the disclosure of a decryption key and the effect of a direction to disclose a decryption key;
* the removal of, or making inaccessible, publications with unlawful terrorism related content; and to provide for matters connected therewith.

# Clauses of the Bill

**Clause 1** makes substantive changes to the definitions used in the principle Act, through proposed substitutions, deletions and insertions. For instance, the definitions include that of critical infrastructure as per the Critical Infrastructure Protection Act, 2019; updated definition of explosive or other lethal devices; updated definition of property to include digital representation of perceived value (crypto-currency); and an updated definition of what is considered as terrorist activities.

**Clause 2** proposes to amend section 3 of the principal Act ***(Offences associated or connected with terrorist activities)*** by providing for an offence in respect of entering, departing from, or transiting through or remaining in any country, for purposes of joining or supporting terrorist groups, in other words, to address **“Foreign Terrorist Fighters”**. The clause further seeks to provide that it is an offence to support an entity engaged in terrorist activities.

**Clause 3** proposes the insertion of section 3A in the principal Act, which provides for the prohibition of any publications with terrorist related content.

**Clause 4** proposes the amendment of section 4 of the principal Act ***(Offences associated or connected with financing specified offences)*** by providing that it is an offence to facilitate the retention or control of property on behalf of, or for the benefit of, a specific entity identified by a Resolution of the United Nations Security Council and which is announced by the Minister of Finance in terms of section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by the Director of the Financial Intelligence Centre in terms of section 26A(3) of the Financial Intelligence Centre Act.

**Clause 5** seeks to insert section 4A ***(New: Offences relating to attempt to leave Republic)*** in the principal Act, in order to provide for an offence in respect of an attempt to leave the Republic for the benefit of, at the direction of, or in association with a terrorist group.

**Clause 6** seeks to amend section 5 of the principal Act ***(Offences relating to explosives or other lethal devices)*** by extending the offence related to terrorist bombings from only public places to include private places.

**Clause 7** proposes to amend section 6 of the principal Act ***(Offences relating to hijacking, destroying or endangering safety of a fixed platform)***, by inserting additional offences in accordance with international law.

**Clause 8** proposes to amend the heading to section 7 ***(Offences relating to taking a hostage)*** to read “Offences relating to taking hostage”, thus deleting the word “a” in accordance with legislative drafting practices.

**Clause 9** proposes the amendment of section 9 of the principal Act ***(Offences relating to hijacking an aircraft)*** to provide that it will be an offence to, by any other means**,** seize or exercise control of an aircraft for the purposes listed in section 9. Section 9 currently provides only for the seizure of control of an aircraft through force or intimidation and/or the threat thereof. The proposed insertion expands the methods/circumstances under which an aircraft can be hijacked – by any other means, other than force or intimidation.

**Clause 10** proposes to amend section 10 of the principal Act ***(Offences relating to hijacking a ship or endangering safety of maritime navigation)*** by providing for additional offences in accordance with the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, as amended by the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005.

**Clause 11** proposes to amend section 11 of the principal Act ***(Offences relating to harbouring or concealment of persons committing specified offences)*** by substituting the reference to a specified offence with the offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, any Convention offence, or an offence referred to in section 13 or 14. The proposed amendment is consistent with the amendment proposed in section 13 to section 15 of the principal Act (clauses 14 to 16).

**Clause 12** proposes to amend section 12 of the principal Act ***(Duty to report presence of person suspected of intending to commit of having committed an offence and failure too so report)*** by providing that no duty of secrecy or confidentiality, or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution as defined in the Financial Intelligence Centre Act or any other person.

**Clause 13** seeks to amend section 13 of the principal Act ***(Offences relating to hoaxes)*** by providing that the use of false threats to intimidate the public or to divert police resources in order to enable the commission of a crime is an offence.

**Clause 14** seeks to simplify the language of section 15 of the principal Act ***(Jurisdiction in respect of offences)*** following the Constitutional Court judgment of ***S v Okah*** [2018] ZACC 3. It further amplifies the jurisdictional issues of the principal Act, as well as where a warrant in respect of offences in terms of the principal Act may be obtained under the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

The clause further provides that persons who are not citizens of the Republic, who are not ordinarily resident in the Republic or persons who are stateless, must be advised of their rights to consular assistance from the State, where they are ordinarily resident or of which they are citizens. The clause, in terms of international obligations, provides that the relevant governments must be informed of the arrest of such a person for a Convention offence.

**Clause 15** seeks to amend section 16 of the principal Act ***(Consent of National Director to institute proceedings and reporting obligations)*** and provides that the prosecution for an offence under section 13 may be instituted without the written authority of the National Director and may be authorised by the relevant Director of Public Prosecutions.

**Clause 16** proposes the substitution in section 17 of the principal Act ***(Evidential matters and exclusions)*** for the reference to the Department of Foreign Affairs with the Department responsible for International Relations and Cooperation. In 2009, the Department of Foreign Affairs was renamed the Department of International Relations and Cooperation.

**Clause 17** aligns the sentencing, as laid down in section 18 of the principal Act ***(Penalties)***, with the severity of the offence, especially in relation to the financing of terrorism, increasing the length of imprisonment by the various courts, including the High Court, magistrates court or regional court. It also provides for sentences in respect of the offences listed in sections 3A(3) and (4), 4A and 24B(13).

**Clause 18** proposes to substitute section 23 of the principal Act as a consequence of the proposed repeal of section 25 *(see below relating to publication and Parliamentary supervision)* and expands on the ambit of, and what may be contained in:

* a freezing order
* the making of ancillary orders
* the publication of orders
* the appointment of a *curator ad litem*
* interim orders

**Clause 19** proposes to amend section 24 of the principal Act ***(Cordoning off, stop and search of vehicle and person)*** by providing for the inclusion of premises which may be cordoned off and searched in accordance with a warrant which may be issued by a judge i.e.no longer only vehicles and persons. The section header will read “Cordoning off, stop and search of vehicle, person and premises”.

**Clause 20** proposes the insertion of section 24A in the principal Act, which provides for the application for a decryption direction by an officer of the Directorate in terms of section 21 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002).

The clause further proposes the insertion of section 24B in the principal Act, which provides that a member of the Directorate may apply to a competent court for an order to disable access to an internet or social media site with unlawful terrorism related content.

**Clause 21** proposes the repeal of sections 25 and 26 of the principal Act in respect of **Parliamentary supervision**. It is proposed that the publication of Resolutions of the United Nations Security Council relating to sanctions imposed on entities linked to terrorism and announced by notice in the *Gazette* should be performed by the Minister of Finance in terms of the Financial Intelligence Centre Act **(no longer by the President for Parliamentary consideration).** Amendments to such announcement may be made by the Director of the Financial Intelligence Centre. The proposal will ensure that all United Nations Security Council sanctions are being dealt with by the Financial Intelligence Centre and through the same processes.

**Clause 22** proposes amendments to section 27 of the principal Act ***(Amendment and repeal of laws and transitional provisions)*** by providing that any proclamations issued under section 25(1), before the commencement of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, 2022, remain valid and have the same force and effect as a notice announced by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given under section 26A(3) by the Director of the Financial Intelligence Centre. Clause 22 also seeks to amend the principal Act to provide that any action taken in pursuance of a Proclamation issued under section 25(1), before the commencement of the Protection of Constitutional Democracy against Terrorist and related Activities Amendment Act, 2022, remains valid.

**Clause 23** proposes amendments to the **Preamble** of the principal Act to reflect South Africa's changed status in respect of having become a Party to certain counter-terrorism international instruments, including international instruments concluded after the adoption of the principal Act, but not yet in force.

**Clause 24** proposes amendments to the **arrangement of sections** of the principal Act. This refers to the changes in section headings of the principal Act, new insertions and the substitution of sections in the principal Act.

**Clause 25** proposed a full substitution of the Schedule to the principal Act.

**Clause 26** provides for the short title and commencement of the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Act, 2022.

1. **Costing**

The Financial Intelligence Centre has indicated that the transfer of the function relating to the announcement and notification of United Nations Security Council Resolutions will have a minimal effect on the finances of the Financial Intelligence Centre.

# Public Participation Process and public hearings

The initial call for public submissions was opened on 05 August 2022 and closed on 19 August 2022. Parliament published the call for submissions in all official languages in national and regional newspapers. After initial public hearings, the Committee extended the public participation period to 18 October 2022. In total, the Bill was open for public comment for 10 weeks.

The Portfolio Committee on Police received seven public submissions on the POCDATARA Bill, including the following:

1. Afriforum (Hurter Spies Attorneys made the submission on behalf of Afriforum).
2. The Banking Association South Africa (BASA);
3. The International Committee of the Red Cross (ICRC);
4. The Sussex Terrorism and Extremism Research Network (STERN);
5. Mr. C Nel;
6. Fish Hoek Valley Ratepayers and Residents Association;
7. Dear South Africa. The campaign from Dear South Africa gathered 25, 652 comments; and
8. Freedom of Religion SA NPC (For SA).

An invitation was extended to all organisations and individuals that made a submission, but not all accepted. On 07 September 2022, the Committee received oral presentations on the submissions from Afriforum, the ICRC and STERN. On 14 September 2022, the Civilian Secretariat for Police Service responded to public submissions. On 26 October 2022, the Committee received an oral presentation from Mr Rob Hutchinson representing *Dear South Africa*. During this meeting, the Civilian Secretariat for Police Service also responded to comments made by the Fish Hoek Valley Ratepayers and Residents Association.

## Clause-by-clause summary of public submissions

The table below provides a clause-by-clause summary of the written submissions received on the Bill.

***Explanatory note:***

* *Words in bold type in square brackets indicate omissions from existing enactments.*
* *Words underlined with a solid line indicate insertions in existing enactments.*

### Clauses 1: Definitions

| **CLAUSE 1** | **ORGANISATION** | **COMMENTS AND RESPONSES**  |
| --- | --- | --- |
| **“Property”****'property'** means money or any other movable, immovable, corporeal or incorporeal thing, and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof, or any digital representation of perceived value, such as a crypto-currency, that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012);" | **Afriforum** | The section was already overbroad and vague. The expansion thereof has exacerbated the problem. **Response by the Department:**The definition has been aligned with the definitions of the same concept in the Prevention of Organised Crime Act (POC Act) and the Financial Intelligence Centre Act (FIC Act), as these Acts have to be implemented in conjunction with each other to address illicit financial flows related to terrorism. |
| **BASA** | 1) The definition of ‘property’ in the form prior to its proposed amendments, is already all-encompassing definition and would include any digital representation of perceived value, which would include i.e. crypto assets, fiat currency and securities. 2) The term ‘money’ in its broadest sense would include any tangible or intangible thing that functions as a means of exchange or debt settlement, a measure of value, a unit of account or as a store of value, and accordingly would include - a) Cash or currency, being physical coins and notes, as contemplated in the South African Reserve Bank Act of 1989 (‘SARB Act’). b) A credit against an account held at a bank and which is convertible to cash or currency by the bank on demand. c) Electronic money or e-money, as contemplated in the SARB’s position paper on electronic money, which is defined as *"Monetary value represented by a claim on the issuer. This money is stored electronically and issued on receipt of funds, is generally accepted as a means of payment by persons other than the issuer and is redeemable for physical cash or a deposit into a bank account on demand.”* d) Virtual or digital currency (e.g. Ripple). In the SARB’s position paper on Virtual Currencies, it is defined as *"a digital representation of value that can be digitally traded and functions as a medium of exchange, a unit of account and/or a store of value, but does not have legal tender status."* 1. 3) If there is concern as to whether virtual or digital currency constitutes ‘money’, and hence the proposed inclusion of the following in the definition of property, which defines ‘digital representation of perceived value’, as being *‘that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012);"*

**Proposal:** BASA proposes the deletion of the words set out below: *'property' means money or any other movable, immovable, corporeal or incorporeal thing, and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof, ~~or any digital representation of perceived value, such as a crypto-currency, that can be traded or transferred electronically within a community of users of the internet who consider it as a medium of exchange, unit of account, or store of value and use it for payment or investment purposes, but does not include a digital representation of a fiat currency or a security as defined in the Financial Markets Act, 2012 (Act No. 19 of 2012);";~~* 1. b) As an alternative if not in support of the above, cross reference the definition of crypto-asset as proposed in Schedule 1 to the FIC Act (which is currently under review).
2. 4) In relation to the definition of crypto asset (mentioned above), noting that within the next 12 – 18 months a crypto asset is contemplated as being declared a financial product, consideration to be given to deleting the following wording from the said definition ‘or a security as defined in the Financial Markets Act’ to refer to a financial product under FAIS? (Excluding crypto assets now, anticipating its declaration as a financial asset.

**Response by the Department:**Crypto assets are neither money, movable or immovable property or a corporeal thing. It is therefore important to create legal certainty that crypto assets are included in the concept of property in the principal Act.The definition will be amended to include “crypto asset” and a new definition of “crypto asset” will be inserted in the Bill. |
| **“Terrorist activity”****'terrorist activity'**, with reference to this section and sections 2, 3 and 17(2), means any act – *(a)* **[any act]** committed in or outside the Republic, which— (i) involves the systematic, repeated or arbitrary use of violence by any means or method; (ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing or exposing the public or any part of it to— *(aa)* any dangerous, hazardous, radioactive or harmful substance or organism; *(bb)* any toxic chemical; **[or]** *(cc)* any microbial or other biological agent or toxin; or *(dd)* any weapon of mass destruction in terms section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, including those with dual-purpose capabilities as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, or any substance, mixture of substances, product or material contemplated in section 2(1) of the Hazardous Substances Act; (iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons; (iiiA) is calculated to overthrow the government of the Republic or any other government; (iv) causes serious risk to the health or safety of the public or any segment of the public;(v) causes the destruction of or substantial damage to any property, natural resource, or the environmental or cultural heritage, whether public or private; (vA) causes the destruction of or substantial damage or interference to an information infrastructure or any part thereof; (vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to— *(aa)* a system used for, or by, an electronic system, including an information system; *(bb) a telecommunication service or system;* *(cc) a banking or financial service or financial system;* *(dd)* a system used for the delivery of essential government services; *(ee)* a system used for, or by, an essential public utility or transport provider; *(ff)* an essential or critical infrastructure **[facility]**, information infrastructure, or a critical infrastructure complex; or *(gg)* any essential service designated as such in terms of the Labour Relations Act, 1995 (Act No. 66 of 1995), or essential emergency services, such as police, medical or civil defence services; (vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; **[or]** (viii) creates a serious public emergency situation or a general insurrection in the Republic **[,]**; or (ix) is the offence of— *(aa)* unlawful access in terms of section 2 of the Cybercrimes Act; *(bb)* unlawful interception of data in terms of section 3 of the Cybercrimes Act; *(cc)* unlawful interference with data or a computer program in terms of section 5 of the Cybercrimes Act; *(dd)* unlawful interference with a computer data storage medium or a computer system in terms of section 6 of the Cybercrimes Act; *(ee)* unlawful acquisition, possession, provision, receipt or use of password, access code or similar data or device in terms of section 7 of the Cybercrimes Act; *(ff)* unlawful use or possession of a software or hardware tool for purposes of committing the offences listed in items *(aa)* to *(ee)*; or*(gg)* cyber extortion in terms of section 10 of the Cybercrimes Act, which is committed with the intention to facilitate or to commit an act referred to in subparagraphs (i) to (viii) of this paragraph, whether the harm contemplated in **[paragraphs]** subparagraphs **[*(a)*]**(i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to **[(viii)]** (ix) was committed by way of any means or method; and *(b)* which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to— (i) threaten the unity and territorial integrity of the Republic; (ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; **[or]** (iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or an international organisation or body or intergovernmental organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles **[,]**; or (iv) further the objectives of an entity engaged in terrorist activity, whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic; **[and** ***(c)* which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking;]**''; and *(s)* by the deletion of subsection (4). | **Afriforum** | The addition of 1(b)(iv), to wit, “can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to… further the objectives of an entity engaged in terrorist activity”, further complicates an already notoriously contested definition. ‘Reasonably be regarded’ unacceptably introduces negligence as a form of *mens rea* for committing terrorist offences. This is legally imprecise for purposes of criminal law and is a common issue with anti-terrorism legislation globally. **Response by the Department:**The wording of “reasonably be regarded” has been part of the principal Act since its adoption in 2004 and it refers to an act which is intended or can be reasonably regarded as intended. It has not been introduced only now. Granted that there is no globally accepted definition of terrorism. SALRC has recommended definition of “terrorist activity” as opposed to definition of “terrorism”. Same model followed elsewhere, e.g Canada. |
| **For SA** | The organisation raised concern about the broadness of the definition. It is proposed that the specific criteria for either a “serious public emergency” or a “general insurrection” be included. **Response:** Serious public emergency is defined in South African law and need not be included in the Bill.  |
| **STERN**  | Three parts to the definition of ‘terrorist activity’: (1) act, (2) intimidation/fear, (3) motive. The amendment proposes to add the following to the definition of terrorist activity: (c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause of undertaking; **Proposal:** The reference to terrorist motive in the definition of terrorist activity should be removed based on the following: * International instruments and UN Security Council resolutions generally do not require a special terrorist motive, which may be difficult to prove.
* Criminal law does not normally require proof or motive.
* Distinction is more theoretical than empirical
* Cases such as narcoterrorism show limits of ideological motive.
* Most groups in Africa today are hybrid.

**Response by the Department:**Proposed the removal of ‘motive’ which is already removed.  |
| **Fish Hoek Valley Ratepayers and Residents Association**  | The Commentator is of the opinion that Municipal Mayors in terms of their work in relation to sewage treatment or water plants, Labour Unions in unsupported strike action disrupting essential services and even the President or Health Minister in declaring a State of Disaster during the Covid Lockdowns, would be seen as committing terrorist activities that would cause major economic loss.**Response from the Department:** The examples mentioned by the Commentator will not fall within the ambit of the definition of ‘terrorist activity’, because it lacks the intent to cause harm. When one combines the activities and the intent in the examples mentioned by the Commentator, it falls outside the ambit of the POCDATARA Act. |
| **Dear South Africa** | 8.76% of the total submissions (2, 246 submissions) were against the Bill based on the definition of ‘terrorist activity’.  |
| **“Electronic communications service provider”****'electronic communications service provider'** means electronic communications service provider as defined in section 1 of the Cybercrimes Act; | **BASA** | 1) Clarify if section 1(e) is limited to ‘independent’ service providers that operate such service as an only (sole) service – an independent Mobile Network Operator, or also applicable where this is provided as a service offering by another type of business, e.g., in collaboration with a primary 'electronic communications service provider’? 2) Clarify what is considered “who is deemed to be licensed”. Does this extend to a telecommunications service provided which comprises of a Mobile Virtual Network Operator (MVNO), which is characterised as a mobile virtual network operator that **does not operate under its own license** and does not have the infrastructure to provide mobile services to its customers. Instead, it leases wireless capacity from pre-existing Mobile Network Operator (MNO). 3) The clarity on this item will impact on comments below as this definition links to additional provisions of the Amendment Bill, to wit proposed section 3A that creates offences in relation to 'electronic communications service provider’. **Response by the Department:**The definition applies to a person who provides an electronic communications service in terms of an individual license, a class license, a license exemption and in terms of any other law that deems such a person to be licensed to provide an electronic communications service. The expression "deemed to be licensed” refers to an electronic communications service provider contemplated in the ECA or a person who is deemed to be licensed in terms of any other law to provide an electronic communications service. Whether the definition of electronic communications service provider extends to a so called "mobile virtual network operator" will be determined whether such a person is licensed, exempted to be licensed or deemed to be licensed. |
| **“Entity”** '' **'entity'**, with reference to sections 3, 4, and 14 (in so far as it relates to the aforementioned sections), 22**[,]** and 23 **[and 25]**, means a natural person, or a group of two or more natural persons (whether acting in the furtherance of a common purpose or conspiracy or not), or a syndicate, gang, agency, trust, partnership, fund or other unincorporated association or organisation, or any incorporated association or organisation or other legal person, and includes, where appropriate, a cell, unit, section, subgroup or branch thereof or any combination thereof, and also any entity referred to in a Resolution of the United Nations Security Council and announced in a notice by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act;'' | **BASA** | BASA suggests that it must be clear that an “entity” that has subsequently been removed from a Resolution of the United Nations Security Council (deleted section 25) and from a notice announced by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act 38 of 2001 (the FIC Act), or from a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act will not be considered an “entity”. 2) Per paragraph 2.4 of the Memorandum on the Objects of POCDATARA Amendment Bill, all UN Security Council Resolutions, which include financial sanctions, must be published by the Minister of Finance in accordance with section 26A(1) of the FIC Act. BASA is in agreement with the above interpretation and requirements of section 26A(1). Therefore, the Minister does not have a discretion to publish or not publish. 3) Noting the above requirement, any UN Security Council Resolution, as amended (by the removal and/ or insertion of ‘entity’ (as defined) names, would also be required to be published in terms of section 26A(1). 4) In light of the above, it is unclear as to the purpose of section 26A(3)(a) – (b), as any such notice contemplated in these sections may only be done pursuant to a notice as gazetted under section 26A(1). The intention hereof would never be for the purposes of amending an initial UN Security Council Resolution only – as subsequent UN Security Council Resolutions would be issued amending (adding or removing) sanctions and / or ‘entities’ in or from the UNSC Resolution. 5) Furthermore, noting the concern expressed in the Memorandum, regarding the delay in publication of notifications of entities listed in the UN Security Council Resolution by the President in terms of POCDATARA, a similar concern is noted in relation to the publication by the Minister of Finance as contemplated in section 26A(1) of the FIC Act. Noting that ‘entities’/ accountable institutions should not be prejudiced by the delay in publication in instances where sanctions and/ or entities have been amended. **Proposal:** BASA suggests that the following wording be considered: “entity”, with reference to sections 3, 4, and 14 (in so far as it relates to the aforementioned sections), 22, and 23 and 25, means a natural person, or a group of two or more natural persons (whether acting in the furtherance of a common purpose or conspiracy or not), or a syndicate, gang, agency, trust, partnership, fund or other unincorporated association or organisation, or any incorporated association or organisation or other legal person, and includes, where appropriate, a cell, unit, section, sub-group or branch thereof or any combination thereof, and also any entity referred to in a Resolution of the United Nations Security Council and announced in a notice by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, **[and]** or in a notice given under section 26A(3) by the Director referred to in section 1 of the Financial Intelligence Centre Act. Alternatively, BASA suggests the deletion of the words: “in a notice given under section 26A(3) by the Director referred to in section 1 of Financial Intelligence Centre Act.” **Response by the Department:**Application of the provisions of the FIC Act relating to targeted financial sanctions to an entity, is determined by details of the notices that the Director: FIC issues and includes a notice by the Director that a designation by the UNSC no longer applies to an entity, in other words has been de-listed as an entity by the UNSC. It has been noted that there is a conflict between Clause 25 of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, *that seeks to delete the fact that the Minister of Finance will announce the adoption of Resolutions by the UNSC in the* Gazette*, and now provides that the Director: FIC will publish such notice in the* Gazette*,* with the POCDATARA Bill where there are still references to notices under s26A(1) of the FIC. The relevant clauses in the Bill will be amended to align the 2 pieces of legislation. |
| **Proposed retention on section 1(4)***S1(4) reads: Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, self-determination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1).* | **ICRC**  | An International Humanitarian Law (IHL) saving clause separates the law applicable to the conduct that occurs in peace time from the conduct that occurs during an armed conflict:* If the conduct qualified as ‘terrorist’ occurs in peace time, IHL would not apply.
* If the conduct occurs within the context of an international or a non-international armed conflict, it will not be governed by the counter-terrorism legislation and IHL will govern the situation as the *lex specialis.*
* Inclusion of an IHL Saving clause is consistent with South Africa’s obligations under international law.
* Allows national liberation movements not to be classified as “terrorist groups” under domestic counter-terrorism legislation.
* Similar IHL Saving clauses are included in counter-terrorism legislation of Ethiopia, Chad, the United Kingdom, Ireland, New Zealand and Canada.
* Also recommended by AU Model Anti-Terrorism law and UNSC Resolution 2462 (2019).

**Response from the Department:** The Terror Financing provisions in the Bill are derived from the Convention for the Suppression of the Financing of Terrorism (TF). The crime only applies to financing terrorist entities and activities. The ICRC renders humanitarian assistance to victims of armed conflicts, and these cannot remotely fall within the ambit of the TF. Open ended reference to humanitarian organisations would open the door to terrorist entities impersonating such organisations. Immunities recognized for the ICRC in terms of international law, exempt if from having to testify in criminal proceedings of tribunals and domestic courts. Treatment of victims would constitute proof that they were in fact victims of war crime sought to be prosecuted. Giving evidence of such, the ICRC would either not be allowed into conflict zones or being itself targeted. Immunity exists, due to the interests of alleviating human suffering that out way the giving of evidence. This is entirely different from exempting the ICRC from the provisions of a criminal offence. There is therefore no necessity for an exemption as per the ICRC submission. The National Director for Public Prosecutions must authorize all TF prosecutions and it is therefore sufficient safeguard. |

### Clauses 2 and 3: Offences associated or connected with terrorist activities

| **CLAUSE** | **ORGANISATION** | **COMMENTS AND RESPONSES** |
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| **Clause 2**Clause 2 proposes to amend section 3 of the principal Act ***(Offences associated or connected with terrorist activities)*** by providing for an offence in respect of entering, departing from, or transiting through or remaining in any country, for purposes of joining or supporting terrorist groups, in other words, to address **“Foreign Terrorist Fighters”**. The clause further seeks to provide that it is an offence to support an entity engaged in terrorist activities.  | **STERN** | The amendment proposes to add the following regarding training for terrorist-related activities: (4) A person commits an offence if he or she receives training and is aware that such training is, wholly or partly, provided for purposes connected with the commission or preparation of terrorist activities or Convention offences. **Proposal:** The section should clarify that terrorist training itself is an offence. In the current format, the law can be interpreted to mean that only training for a specific act is criminalised – places the burden on prosecutors to provide that a specific terrorist activity was planned. **Response by the Department:**The Department accepts these comments and the necessary amendments to s3 and s3(4) will be effected, to provide for online training to be included; and not only the receipt of training, but providing training |
| **Fish Hoek Valley Ratepayers and Residents Association**  | Refers to clause 2(b) that seeks the substitution of section 3(1)(c) in the principal Act and insertion of the words **“joining, supporting or in any other manner”** in the section. These words should be defined.The insertion of section 3 (3) by clause 2(f) and inclusion of “other lethal device” by implication means that training in the use handguns and rifles, may be seen as terrorist activities.**Response by the Department:** The concepts of joining and supporting an entity engaging in terrorist activity, were inserted to strengthen the section and the words must be understood in line with their ordinary meaning and need not be defined in the legislation |
| **Clause 3****Insertion of 3A** Clause 3 proposes the insertion of section 3A in the principal Act, which provides for the prohibition of any publications with terrorist related content. | **Afriforum** | * Unjustifiably violates rights to freedom of expression, association, and conscience.
* Vulnerable to disproportionate, arbitrary, discretionary abuse.
* Overbroad definition and form of intent violates principle of legality.

**Response by the Department:**The media and in particular electronic media and platforms are extensively being used to recruit persons to join terrorist organisations or to commit terrorist acts, and it’s therefore necessary to address it in the Bill. Any prosecution in terms of these provisions may only be instituted with the written authorization of the National Director of Public Prosecutions. The section 3A is based on provisions in Chapter 11 in the United Kingdom Terrorism Act, 2006. Any person charged with committing an offence under this section, may raise a defence i.to. s3A(5). Defences may include: That the person did not know that the document contained information related to terrorism. The person’s possession was for purposes of carrying out work as a journalist, or Academic research. |
| **STERN** | Section 3(2)*(e)* may raise as a defence based on: * the fact that at the time of the person’s action or possession, the person did not know, and had no reason to believe, that the document or record in question contained, or was likely to contain, information of a kind likely to be useful to a person preparing to engage in a terrorist activity; or
* the person’s action or possession was for the purposes of -
* carrying out work as a journalist; or
* academic research.

**Proposal:** May want to adjust the language of legitimate defence to broaden it to “exercising a profession in the public interest such as”. |
| **ICRC** | * Absence of a clause within POCDATRA to exempt from criminalisation exclusively humanitarian action carried out by humanitarian and impartial organizations is concerning.
* The wording of the Bill currently may unintentionally criminalise the provision of humanitarian assistance:
* Section3(2)(b) of POCDATRA could potentially criminalise provision of medical assistance to wounded people in areas controlled by a Non-State Armed Group.
* Section3(2)(c) of POCDATRA could potentially criminalise IHL trainings to members of a group classified as a terrorist.
 |
| **For SA** | The organisation submitted that this poses a threat to the right to freedom of expression and that the limited grounds for defence do not offer sufficient protection to ensure that constitutionally protected speech is not limited. It is further argued that the State failed to conduct an analysis that the Bill meets the test laid down in section 36 of the Constitution related to the limitation of constitutional rights. For SA proposes that the section (clause) should be scrapped or the prohibition be amended to refer to “propaganda for war”. **Response by the Department:**Freedom of religion, expression and association are rights that are protected in terms of the Constitution of the Republic of South Africa. In terms of section 36 of the Constitution, any limitation of these rights must be justified to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: 1. the nature of the right;
2. the importance of the purpose of the limitation;
3. the nature and extent of the limitation;
4. the relation between the limitation and its purpose; and
5. less restrictive means to achieve the purpose.

See the judgments of ***MAGAJANE v CHAIRPERSON, NORTH WEST GAMBLING BOARD AND OTHERS*** 2006 (2) SACR 447 (CC); ***MISTRY v INTERIM MEDICAL AND DENTAL COUNCIL OF SOUTH AFRICA AND OTHERS*** 1998 (4) SA 1127 (CC) and ***INVESTIGATING DIRECTORATE: SERIOUS ECONOMIC OFFENCES AND OTHERS v HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS; IN RE HYUNDAI MOTOR DISTRIBUTORS (PTY) LTD AND OTHERS v SMIT NO AND OTHERS*** 2000 (2) SACR 349 (CC), regarding the limitation of the right to privacy in respect of criminal offences. See ***ECONOMIC FREEDOM FIGHTERS AND OTHERS V MINISTER OF JUSTICE AND CORRECTIONAL SERVICES AND OTHERS*** (Case CCT 201/19), regarding freedom of expression in respect of criminal offences.  |
| **BASA** | 1) Section 3A(2)(d) is very onerous, especially for electronic communications service providers – the offence lies in “enables them to obtain, read, listen to, or look at such a publication” whereas such a provider may only provide the access mechanism but has no control over what content is accessed through its service. If the provider for example, enables broad internet access, and the user then chose to search and access prohibited material, the provider will be on the wrong side of the law – this is too wide a provision, especially in view of sub-section (4). 2) Given the nature of the services of accountable institution/s (see above), this could be directly applicable to them and impact business operations as it would potentially require content screening. This could have massive impact; may require additional due diligence/screening; changes to processes, etc. **Proposal by BASA:**1) It is proposed that the content of the proposed section 3A(2)(d) which states *‘provides a service to others that enables them to obtain, read, listen to, or look at such a publication, or to acquire it by means of a gift, sale or loan*, be deleted. 2) In the absence of its deletion, we propose the following amendment – *(d) provides a service to others that enables them to ~~obtain, read, listen to, or look at such a publication, or to~~ acquire it by means of a gift, sale or loan.* 3) In the event that section 3A(2)(d) is not deleted, it is recommended that a new provision be drafted or amendment be made to draft section 3A(5) to allow the defence contemplated in section 3A(5)(a) to apply in relation to section 3A(2)(d) as well. **Response by the Department:**The comments are accepted, but there is no necessity to amend the defence clause 3A(5), as the defences applicable in the clause finds application to the entire section 3A, and therefore includes s3A(2)(d). |

### Clauses 4 to 10: Convention Offences

| **CLAUSE** | **ORGANISATION** | **COMMENTS AND RESPONSES** |
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| **Clause 4** Clause 4 proposes the amendment of section 4 of the principal Act ***(Offences associated or connected with financing specified offences)*** by providing that it is an offence to facilitate the retention or control of property on behalf of, or for the benefit of, a specific entity identified by a Resolution of the United Nations Security Council and which is announced by the Minister of Finance in terms of section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by the Director of the Financial Intelligence Centre in terms of section 26A(3) of the Financial Intelligence Centre Act.  | **BASA**  | Please see comment above related to the definition of “entity”.  |
| **Clause 5: Insertion of 4A** Clause 5 seeks to insert section 4A ***(New: Offences relating to attempt to leave Republic)*** in the principal Act, in order to provide for an offence in respect of an attempt to leave the Republic for the benefit of, at the direction of, or in association with a terrorist group.  | **Afriforum** | Unjustifiable violation of freedom of movement and unnecessary duplication of pre-existing offence captured in other legislation. **Response by the Department:**Purpose of the insertion is to provide legal certainty that South African law criminalizes situation where persons abuse freedom of movement and utilize South African territory as a springboard to join foreign terrorist organisations. |

### Clause 12: Duty to report

| **CLAUSE** | **ORGANISATION** | **COMMENTS AND RESPONSES** |
| --- | --- | --- |
| **Clause 12**Clause 12 proposes to amend section 12 of the principal Act ***(Duty to report presence of person suspected of intending to commit of having committed an offence and failure too so report)*** by providing that no duty of secrecy or confidentiality, or any other restriction on the disclosure of information, whether imposed by legislation or arising from the common law or agreement, affects compliance by an accountable institution, supervisory body, reporting institution as defined in the Financial Intelligence Centre Act or any other person. In terms of common law, the clause proposes the right to legal professional privilege as between attorney and client in respect of communications made in confidence betweenthe attorney and client for the purposes of legal advice or litigation which is pending or which has commenced; or a third party and an attorney for the purposes of litigation which is pending or has commenced. | **BASA** | Whilst there is no hierarchy in legislation, section 12(9) by creating the obligation to comply with this section, notwithstanding an obligation imposed by legislation creates a hierarchy without substantiation, therefore. In relation to reference to “reporting institutions”, note that once the amendments to Schedule 1 to the FIC Act are effective, the reference to “reporting institution” may/ will be no longer applicable. **Proposal:** BASA proposes that section 12(9) be reworded as follows: “For the purposes of this Act, no duty of secrecy or confidentiality or any other restriction on the disclosure of information, may affect the duty of compliance with this section by an accountable institution, supervisory body or reporting institution as defined in section 1 of the Financial Intelligence Centre Act, or any other person.” **Response by the Department:**The Department disagrees that the addition of section 12(9) creates a hierarchy of reporting obligations. The proposed section 12(9), is derived from a similar provision in s37(1) of the Financial Intelligence Centre Act, 2001. There is no reason why the reporting duty and the exclusion of privilege in the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, should differ from that in the Financial Intelligence Centre Act, 2001. |
| **Clause 14** seeks to simplify the language of section 15 of the principal Act ***(Jurisdiction in respect of offences)*** following the Constitutional Court judgment of ***S v Okah*** [2018] ZACC 3. It further amplifies the jurisdictional issues of the principal Act, as well as where a warrant in respect of offences in terms of the principal Act may be obtained under the Criminal Procedure Act, 1977 (Act No. 51 of 1977). The clause further provides that persons who are not citizens of the Republic, who are not ordinarily resident in the Republic or persons who are stateless, must be advised of their rights to consular assistance from the State, where they are ordinarily resident or of which they are citizens. The clause, in terms of international obligations, provides that the relevant governments must be informed of the arrest of such a person for a Convention offence. | **STERN**  | Amendments to clarify the law’s jurisdiction, are welcomed. As noted in the Constitutional Court’s judgement in S v Okah [2018] ZACC 33, some of the language around the law’s jurisdiction is unclear. The difficulty of both the Supreme Court of Appeal4 and the Constitutional Court’s interpretation of the language in POCDATARA in the Okah case shows the importance of specificity and clarity in drafting legislation.**Response by the Department:** These proposals regarding jurisdiction in the Bill, is supported by STERN. |

### Clauses 18 to 20: Investigating powers and freezing orders

| **CLAUSE** | **ORGANISATION** | **COMMENTS AND RESPONSES** |
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| **Clause 18**Clause 18 proposes to substitute section 23 of the principal Act as a consequence of the proposed repeal of section 25 *(see below relating to publication and Parliamentary supervision)* and expands on the ambit of, and what may be contained in:* a freezing order
* the making of ancillary orders
* the publication of orders
* the appointment of a *curator ad litem*
* interim orders
 | **Afriforum** | * ‘Reasonably be regarded’ introduces a form of negligence as sufficient ‘*mens rea’* for criminal liability.
* Overextends the power of police officials.
* Likely to lead to complex litigation.
* Soon to be dealt with in specialist amendments to FICA.

**Response by the Department:**The amendment relating to the penalties for terrorist financing offences is necessary to establish parity with equally serious offences of the Prevention of Organized Crime Act, such as the offence of money laundering. |
| **BASA** | See comment above relating to the definition of an ‘entity’.  |
| **Fish Hoek Valley Ratepayers and Residents Association**  | The Bill’s amendment of section 23 in relation to Freezing Orders is troublesome and the conditions under which the High Court can assume control over property must be specified.**Response from the Department:** The High Court may make an order under section 23 only if the state’s application shows that the conditions that are described in subsection 23(2) are met. The grounds for making a freezing order are therefore clear. The terms of such an order are also clear and provided for in subsection 23(1). The condition for any further orders that the High Court may make relating to the control of, and care for, property that is subject to the freezing order, is that such orders are strictly limited to what is appropriate for the proper, fair and effective execution of the freezing order. These are spelt out in detail in subsection 23(4). No further conditions are therefore required to assist the Court in making an order that strikes a balance between the objectives of freezing property that is implicated in the financing of terrorist activities or organisations and fairness to whomever may have an interest in property that is subject to a freezing order. |
| **Clause 20** Clause 20 proposes the insertion of section 24A in the principal Act, which provides for the application for a decryption direction by an officer of the Directorate in terms of section 21 of the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002). The clause further proposes the insertion of section 24B in the principal Act, which provides that a member of the Directorate may apply to a competent court for an order to disable access to an internet or social media site with unlawful terrorism related content. | **Afriforum**  | * Potential for abuse as seen with RICA legislation.
* Potentially unjustifiable violation of the right to privacy, given nebulous definition of ‘terrorist activity’ and relaxed burden of proof.
* Impractical as it duplicates similar but tempered processes already tested and accepted by judiciary.
* Likely to lead to litigation.

**Response by the Department:**Section 24A is only to be applied once the State has, in terms of the law seized computer equipment where there is already a suspicion that a crime had been committed and it is necessary to obtain a decryption order. Such a decryption order can only be obtained through a designated judge in terms of RICA.It is appreciated that the effectivity of the section is limited, but it is not always the dark web that is used in the recruitment of terrorists. Furthermore, if South Africa does not provide for this it may lead to abuse from South Africa through internet service providers to recruit terrorists.Section 24A will be revisited to specifically deal with decryption assistance and passwords or other access technology restrictions on electronic communications devices – Reference to United Kingdom laws (UK Terrorism Act, 2006). |
|  | **Fish Hoek Valley Ratepayers and Residents Association** | The insertion of section 24B is problematic as the demand for a decryption key for detecting any crime falls on the side of discovery and poor investigative work. There is an invasion of privacy. |

### Clause 21: Resolutions of UN Security Council

| **CLAUSE** | **ORGANISATION** | **COMMENTS AND RESPONSES** |
| --- | --- | --- |
| **Clause 21**Deletion of sections 25 and 26 | **Afriforum** | * Repeal of S26 is an unjustifiable violation of separation of powers doctrine.
* S26A of Financial Intelligence Centre Act makes no provision for tabling of announcement/designation in Parliament.

*Note: As stated in the analysis of the Bill, Parliament does not have the power to amend resolutions of the UN Security Council.*  |

### Dear South Africa

The organisation, Dear South Africa, ran a campaign on the POCDATARA Amendment Bill. As part of the campaign, a total of 25, 652 comments were received by the Portfolio Committee on Police. Of the total number of comments, 95.82% (24, 580) do not support the Bill, 3.8% (976) do not support the Bill fully, and 0.37% (96) supported the Bill. The top reason for not supporting the Bill was “the Bill in its entirety” (52.35% or 13, 429 comments), followed by “freedom of expression and association” (27.92% or 7, 163 comments), “definition of terrorist activity” (8.76% or 2, 246 comments), and “definition of terrorist” (5.23% or 1, 342 comments).

As per the presentation given by Mr Rob Hutchinson representing Dear South Africa, the following may be noted in terms of the collective submissions:

Of the submissions supporting the Bill, the participants who submitted valid comments are mostly in full support of the Bill, with majority expressing concerns over the possible greylisting of South Africa by the Financial Action Task Force. Some participants are concerned over the growing threat of terrorism, both domestic and from abroad, with concerns over the transparency of non-profit organisations.

Of the submissions that do not support the Bill fully, comments from participants in this category express concerns over an encroachment on constitutional rights due to the vague and unclear definitions of terrorist and terrorist activities. Many express a need for the amendment to curb extremist action, damage to state resources or infrastructure, corrupt activities and politically-motivated agendas that promote violence and destruction. However, a strong concern remains on the loose and vague definitions within the Bill which are open to interpretation and abuse. Concerns are also raised over the ability to enforce laws and mentions are made of existing laws and legislation which are more than adequate and proven to be effective.

Of the submissions that do not support the Bill, the vast majority of participants are concerned over the erosion of the Constitution of South Africa and, most notably, the Bill of Rights. Emphasis was placed on the threat to freedom of expression, freedom of association, freedom of religion, and to South Africa’s democracy due to unclear and vague definitions of terrorism and terrorist activities. Concerns are raised over the amendments being abused to stifle criticism of the government or its policies and proposals – essential to a functional democracy. Further concern ranges from the silencing of political opponents through to misinterpretation of the definitions by authorities – with remarks around moving back to Apartheid-era laws and legislation.

# Conclusion

Parliament’s Portfolio Committee on Police is satisfied with the positive and detailed discussions that took place during public hearings. The Committee expresses its gratitude to the organisations and individuals that made submissions on the POCDATARA Bill and reiterates the importance of public participation when Parliament deals with legislation.

**Report to be noted.**