# Report of the Portfolio Committee on Police on the Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15 – 2022] (National Assembly – Section 75), Dated 18 November 2022

The Portfolio Committee on Police (the Committee), having considered 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 the Bill with amendments [B15A-2022].

# 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.*

During a compliance visit by United Nations Counter-Terrorism Executive Directorate (UNCTED) to South Africa in 2018, the need to make provision in respect of Foreign Terrorist Fighters in the principal Act was expressed by the UNCTED. This included:

* The disparity between the sentencing regime in terms of which a more severe penalty may be imposed in respect of money laundering as opposed to terrorist financing;
* The lack of any reference to administrative sanctions for violating asset-freezing orders issued pursuant to section 23; and
* Clarification of the applicability of the *aut dedere aut judicare* principle with respect to all terrorism-related offences, particularly those contained in the principal Act.

Particular provisions have been inserted to cater for foreign terrorist fighters, to address the sentencing of the financing of terrorism, and the extension of the Extradition Act, 1962 (Act No. 67 of 1962), as required by the report of the UNCTED.

In addition to the UNCTED, the POCDATARA Bill addresses the findings made by the 2019 mutual evaluation conducted by the Financial Action Task Force (FATF) of its Anti-Money Laundering and Combating of the Financing of Terrorism (AML/CFT) system. South Africa rated poorly in the Mutual Evaluation Report (MER) published in October 2021 in that it:

* Failed in 20 of the 40 FATF core standards/recommendations (Technical Compliance)
* Failed in all 11 effectiveness measures (Immediate Outcomes), scoring moderate and low effectiveness

To address the technical compliance deficiencies, the POCDATARA Bill and General Laws (Anti-Money Laundering and Combatting Terrorism Financing) Amendment Bill, 2022 (B18-2022) were submitted to Parliament for processing.

The POCDATARA Bill addresses two deficiencies (Recommendations 5 and 6) and is a fundamental component to avoid being grey listed and it is critical to address technical compliance deficiencies (updating of legislation) and effectiveness of system to address risk of money-laundering. The deficiencies relate largely to Terrorist Financing (TF), sanctions related to terrorism and TF, freezing orders and the publication of notices by the UN Security Council.

# MEETINGS OF THE COMMITTEE

The Portfolio Committee on Police had 10 scheduled meetings on the POCDATARA Bill, held on:

* 31 August 2022;
* 07, 14, 21 and 28 September 2022;
* 26 October 2022; and
* 02, 11 16 and 18 November 2022.

# AMENDED CLAUSES OF THE BILL

* **CLAUSE 1**

On page 3, after line 17, to insert the following definition:

" **‘crypto asset’** means a digital representation of perceived value 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);".

On page 3, from line 39, to omit "by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given under" and to substitute with "referred to in" and in line 41, to omit "by the Director referred to in section 1".

On page 5, from line 20, to omit the definition of "**property**"and to substitute the following definition:

"**'property'** means any—

*(a*) money **[or any other]**;

*(b)* movable property**[,]**;

*(c)* immovable property**[,]**;

*(d)* corporeal thing **[or]**;

*(e)* incorporeal thing**[,]**; or

*(f)* crypto asset,

and includes any rights, privileges, claims and securities and any interest therein and all proceeds thereof;".

On page 7, after line 33, to add the following paragraph:

"*(t)* by the substitution for subsection (5) of the following subsection:

'(5) Notwithstanding any provision in any other law, **[and subject to subsection (4),]** a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defence in respect of an offence of which the definition of terrorist activity forms an integral part.' ".

* **CLAUSE 2**

On page 8, from line 9, to omit "training includes, but is not limited to," and to substitute with "training, whether in person, online or in any other manner, includes".

On page 8, in line 23, after "she" to insert "provides or".

* **CLAUSE 3**

Clause deleted.

* **CLAUSE 4**

On page 9, from line 51, to omit "by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or" and from line 53, to omit "given by the Director of the Financial Intelligence Centre under" and to substitute with "referred to in".

On page 10, from line 13, to omit "by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or" and from line 15, to omit "given by the Director of the Financial Intelligence Centre under" and to substitute with "referred to in".

On page 10, from line 37, to omit "by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or" and from line 39, to omit "given by the Director of the Financial Intelligence Centre under" and to substitute with "referred to in".

* **CLAUSE 17**

On page 15, from line 38, to delete paragraph *(d)*.

On page 15, in line 49, to omit "24B(12) or (13)" and to substitute with "24A(10) or (11)".

* **CLAUSE 18**

On page 16, from line 30, to omit "by the Minister of Finance, under section 26A(1) of the Financial Intelligence Centre Act, or" and from line 31, to omit "given by the Director of the Financial Intelligence Centre under" and to substitute with "referred to in".

* **CLAUSE 20**

On page 17, in line 36, to omit "sections 24A and 24B" and to substitute with "section 24A".

On page 17, from line 38, to omit section 24A.

On page 18, from line 1, to omit section 24B and to substitute the following section:

"**Order to take-down or disable access to terrorism publications**

**24A.** (1) A member of the Directorate, of or above the rank of Brigadier, may apply to a High Court, by way of an *ex parte* application to a judge in chambers, for the issuing of an order in terms of which an electronic communications service provider, whose electronic communications service is used to host a terrorism publication, is directed to take-down or disable access to such a publication.

(2) An application referred to in subsection (1)—

*(a)* must be in writing;

*(b)* must—

(i)identify the applicant;

(ii) identify the electronic communications service provider to whom the order is to be addressed;

(iii) identify the electronic communications service of the electronic communications service provider that is used to host the terrorism publication;

(iv) be accompanied by an electronic copy of the terrorism publication;

(v)provide a description of the terrorism publication which must, where the publication in question is in the form of a speech, text, video or other visual representation, include a printed copy of the relevant content that will be relied upon to motivate that the publication is a terrorism publication;

(vi) indicate the reasons why the publication must be considered to be a terrorism publication; and

(vii)contain full particulars of all the facts and circumstances alleged in support of the application; and

*(c)* may be accompanied by—

(i) affidavits of persons who have knowledge of the matter concerned; or

(ii) other information relevant to the application.

(3)The High Court must, as soon as reasonably possible, consider an application submitted to it in terms of subsection (1) and may, for that purpose, consider any such additional evidence it deems ﬁt, including oral evidence or evidence by affidavit, which must form part of the record of proceedings.

(4) If the High Court is satisﬁed that the electronic communications service of the electronic communications service provider is used to host a terrorism publication, the court may, subject to such conditions as the court may deem fit to impose, issue the order applied for in terms of subsection (1).

(5) An order issued under subsection (4) must—

*(a)* identify the electronic communications service provider to whom the order must be addressed;

*(b)* identify the applicant;

*(c)* identify and describe the terrorism publication;

*(d)* identify the electronic communications service of the electronic communications service provider that is used to host the terrorism publication;

*(e)* give reasons for the decision or finding of the court that the publication is a terrorism publication;

*(f)* order the electronic communications service provider to take-down or disable access to the terrorism publication within the period determined in the order from the date of service upon the electronic communications service provider; and

*(g)* specify any condition imposed by the court.

(6) *(a)* Except in a case where the High Court determines otherwise, an order under subsection (1) and a copy of the application contemplated in subsection (1) must be served upon an electronic communications service provider by a peace officer, as defined in section 1 of the Criminal Procedure Act, in accordance with the applicable rules of court.

*(b)* Where the High Court is satisfied that service cannot be effected in any manner referred to in paragraph *(a)*, the court may make an order allowing service to be effected in a manner specified in such order.

(7) An electronic communications service provider may, within 14 calendar days after the order has been served, apply to the relevant High Court for the setting aside or amendment of the order referred to in subsection (4).

(8) The High Court must, as soon as is reasonably possible, consider an application submitted to it in terms of subsection (7) and may, for that purpose, consider such additional evidence as it deems ﬁt, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(9) The High court may, for purposes of subsection (3) and (8), subpoena, or cause to be subpoenaed, any person as a witness at such proceedings, or to provide any book, document or object, if the evidence of that person, or book, document or object, appears to the court essential to the just decision of the case.

(10) Any person who is subpoenaed in terms of subsection (9) to attend proceedings and who fails to—

*(a)* attend or to remain in attendance;

*(b)* appear at the place and on the date and at the time to which the proceedings in question may be adjourned;

*(c)* remain in attendance at those proceedings as so adjourned; or

*(d)* produce any book, document or object speciﬁed in the subpoena,

is guilty of an offence.

(11) Any electronic communications service provider who fails to comply with an order referred to in subsection (1), is guilty of an offence.

(12) The provisions in respect of appeal and review as provided for in the Superior Courts Act, 2013 (Act No. 10 of 2013), apply to proceedings in terms of this section.

(13) For purposes of this section—

*(a)* **"host a terrorism publication"** means—

(i) to store a terrorism publication on the electronic communications network of an electronic communications service provider as part of providing an electronic communications service where it can be viewed, listened to, copied or downloaded; or

(ii) to provide a link to the terrorism publication that has been stored on an electronic communication network of an electronic communications service provider, where it can be viewed, copied or downloaded;

*(b)* **"take-down"** means to delete or otherwise remove a terrorism publication stored on an electronic communications network; and

*(c)* **"terrorism publication"** means an electronic communication in the form of a speech, text, video or other visual representation that―

(i) threatens the public or segments of the public with the conduct in paragraph *(a)* of the definition of "terrorist activity", or threatens the commission of an offence in sections 5, 6, 7, 8, 9 or 10; or

(ii) incites others to commit the offences referred to in subparagraph (i).".

* **CLAUSE 22**

On page 19, from line 30, to omit "announced by the Minister of Finance under section 26A(1) of the Financial Intelligence Centre Act, or in a notice given by the Director of the Financial Intelligence Centre under" and to substitute with "referred to in".

* **CLAUSE 24**

On page 20, from line 43, to omit paragraph *(a)*.

On page 21, in line 5 to omit "24A. Application for decryption direction".

On page 21, in line 6, to omit "24B. Order to disable access to internet or social media site" and to substitute with "24A. Order to take-down or disable access to terrorism publications".

* **SCHEDULE**
* On page 22, in line 39, to omit "3A,".
* On page 23, from line 9, to delete paragraph *(c)*.
* On page 24, in line 4, to omit "or 3A".
* On page 24, in line 16, to omit "3A,".
* On page 24, in line 26, to omit "3A,".
* On page 25, in line 14, to omit "or 3A".

# 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.

The Committee’s report on public hearings was published on 11 November 2022 (ATC No 180-2022) for notice in the National Assembly.

# 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 CONSIDERED.**