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## **Private Members Proposal to amend The Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004**

### **1. Summary**

The aim of the private members' legislative proposal, is to amend various sections of The Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004 (the Act) to include the theft of copper cables, which is responsible for considerable economic loss, in the definition section of the Act. Moreover, the legislative proposal seeks to provide for punitive measures for those who directly or indirectly benefit from the sale of copper cable, namely scrap metal dealers.

### **2. Key Issues**

In considering the private members' proposal, certain issues arise. Firstly, the proposer wishes to extend the definition of terrorist activities to include the theft of copper cables the resultant economic loss to the economy of South Africa. The proposed amendment specifically mentions situations where the action (the theft) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system...whether public or private, including, but not limited to "a system used for the delivery of essential electricity services". It is very important for the Committee to, in considering the proposal, to pay specific attention to an existing clause in the Act that refers to "a system used for, or by, an essential public utility or transport provider."<sup>1</sup> This could be construed to refer to the electricity utility, Eskom and as such, would render encompass the members proposal, insofar as the proposed amendment of Section 1 (a) (vi) (cc) is concerned.

The second key issue that emerges is the extension of the category dealing with offences associated with or connected with terrorist activities. The proposal seeks to incorporate in section 3, persons who provide, participates in or receives any financial benefit from terrorist activities. The proposed amendment of section 3 should be read with the proposed amendment of section 1. The proposed amendment of section 3 is intended to act as a deterrent to scrap metal dealers who benefit from the sale of illegal copper.

Finally, the proposer wishes to extend the intention of a terrorist activity to include possible financial loss by the country when copper is stolen.

It would be important for the Committee to not only look to the proposed amendments of the relevant sections, but also look at the powers of the National Director of Public Prosecution which are extended when investigating and prosecuting crimes of terrorism. These extended powers would also be applicable to theft of copper cables.

<sup>1</sup> Section 1 (a) (vi) (ff) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, No. 33 of 2004.



### **3. Key Questions**

- How does the proposer address the issue of the extension of the powers of the National Director of Public Prosecutions in relation to the crime of theft?

### **4. Key documents with which the Committee should engage**

- The Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 33 of 2004.
- The Constitution of the Republic of South Africa Act, 108 of 1996.
- The 1994 United Nations Convention for the Prevention and Combating of Terrorism (which South Africa has ratified via the Organisation of African Unity)

### **5. Interested or Concerned Parties**

- The Department of Public Enterprises
- Eskom
- Telkom
- The National Energy Regulator
- The South African Chamber of Commerce
- The Department of Trade and Industry
- The Institute for Security Studies
- The South African Police Service
- The Department of Justice and Constitutional Development
- The National Prosecuting Authority
- The National Intelligence Agency

## **Private Members' Legislative Proposal to Enact an Expunction of Criminal Records from Apartheid Laws Act.**

### **1. Summary**

The Private Members' Legislative Proposal seems aims to enact the Expunction of Criminal Records from Apartheid Laws Act that seeks to expunge the criminal records of those South Africans who were convicted in terms of laws of the Apartheid Regime, like the Immorality Act.

Whilst these Apartheid Laws are no longer recognized as laws under the new democratic dispensation, the criminal records emanating from convictions under these laws are still applicable and are taken into account when these individuals apply for visas to other countries. For this purpose it is necessary to have these convictions expunged.



The legislative proposal provides a definition for Apartheid Law, which it defines as "any law, act, ordinance, regulations, decree or by-law enacted prior to 27 April 1994 by South Africa, or the former Transkei, Bophuthatswana, Venda or Ciskei that created an offence which would not have been an offence in an open and democratic society based on human dignity, equity and freedom<sup>2</sup>."

The legislative proposal proposes that criminal records emanating from any Apartheid Law must apply in a prescribed way to have his or her criminal record arising from this conviction expunged from the register of criminal convictions. It is assumed that a person applying to have his or her criminal record expunged should make such application to the President of the Republic of South Africa for a presidential pardon. If such an application is not successful, that person may appeal to the Criminal Records Board, which is established in terms of the proposal, to have that decision reviewed. It is once again assumed that if the Criminal Records Board directs that a criminal record be expunged from the register of criminal convictions, the decision of the President will be overturned.

The proposal further sets out how the Criminal Records Board should be set up and who may take up office as part of the Board. These persons include a Judge, the Director or Deputy Director of Public Prosecutions, a member of the South African Police Service, a member of the South African Human Rights Commission and three persons not in the full time employ of State.

Finally, the proposal acknowledges that there will be financial implications for the State that relate particularly to the researching, designing and implementing the amendments to relevant legislative measures. Furthermore, the State will also incur certain costs relating to the setting up of procedures for members of the public to apply to have their criminal records reviewed.

## **2. Key Issues**

The proposal seeks to expunge the criminal records of all those crimes that were committed under the laws of Apartheid that would never have been considered crimes under the current democratic dispensation. These laws include the Immorality Act, the Group Areas Act and pass laws.

To deal with crimes committed during the Apartheid Regime, the Truth and Reconciliation Commission was established to deal with issues relating to gross human rights violations committed during Apartheid, amnesty and reparations.

The South African Truth and Reconciliation Commission was a court-like body assembled in South Africa at the end of Apartheid. The TRC was established in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995 (The Act) and was mandated to bear witness to, record and in some cases grant amnesty to the perpetrators of crimes relating to human rights violations, reparation and rehabilitation.<sup>3</sup>

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<sup>2</sup> Private Members' Legislative Proposal submitted by Honourable Member James Selfe, pg. 3.

<sup>3</sup> [http://en.wikipedia.org/w/index.php?title=Truth and Reconciliation Commission %](http://en.wikipedia.org/w/index.php?title=Truth_and_Reconciliation_Commission)





As has already been stated, the TRC was established in terms of the Promotion of National Unity and Reconciliation Act, and dealt with cases that concerned gross human rights violations. Specifically, the Act refers to 'gross violations of human rights' as:

*"The violation of human rights through:*

- (a) the killing, abduction, torture or severe ill-treatment of any person; or*
- (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by a person acting with a political motive."<sup>4</sup>*

The TRC however only dealt with crimes that were committed with a political motive and with crimes that are still considered as crimes under the current democratic dispensation. It is therefore important that the Committee draw a distinction between crimes of Apartheid (that refer to gross human rights violations) and Apartheid crimes (that refer to crimes that were crimes under Apartheid Laws that would not be considered crimes under the current democratic dispensation).

The legislation referred to in the legislative proposal relate to legislation that assisted the Apartheid government to entrench segregation of different races and cement the power and the dominance by the minority in South Africa. The majority of these legislative measures were enacted after 1948 and marked the institutionalization of Apartheid in the country. These laws include:

- Prohibition of Mixed Marriages Act, Act No 55 of 1949
- Immorality Amendment Act, Act No 21 of 1950; amended in 1957 (Act 23)
- Population Registration Act, Act No 30 of 1950
- Group Areas Act, Act No 41 of 1950
- Suppression of Communism Act, Act No 44 of 1950
- Bantu Building Workers Act, Act No 27 of 1951
- Separate Representation of Voters Act, Act No 46 of 1951
- Prevention of Illegal Squatting Act, Act No 52 of 1951
- Bantu Authorities Act, Act No 68 of 1951
- Natives Laws Amendment Act of 1952
- Natives (Abolition of Passes and Co-ordination of Documents) Act, Act No 67 of 1952
- Native Labour (Settlement of Disputes) Act of 1953
- Bantu Education Act, Act No 47 of 1953
- Reservation of Separate Amenities Act, Act No 49 of 1953
- Natives Resettlement Act, Act No 19 of 1954
- Group Areas Development Act, Act No 69 of 1955
- Natives (Prohibition of Interdicts) Act, Act No 64 of 1956
- Bantu Investment Corporation Act, Act No 34 of 1959

<sup>4</sup> Promotion of National Unity and Reconciliation Act 34 of 1995.



- Extension of University Education Act, Act 45 of 1959
- Promotion of Bantu Self-Government Act, Act No 46 of 1959
- Coloured Persons Communal Reserves Act, Act No 3 of 1961
- Preservation of Coloured Areas Act, Act No 31 of 1961
- Urban Bantu Councils Act, Act No 79 of 1961
- Terrorism Act, Act No 83 of 1967
- Bantu Homelands Citizens Act of 1970

Whilst these pieces of legislation no longer have a place in the current democratic and constitutional dispensation, it is necessary to have regard for convictions in terms of the above mentioned crimes. This is particularly important in light of the obstacles that South Africans who have been convicted in terms of the abovementioned crimes have to face, in particular visa requirements and job applications.

On 21 November 2007, President Thabo Mbeki charged Parliament with the task of setting up a Reference group that would consider requests for Presidential pardons from people who were convicted for offences they claim were politically motivated, and were not denied amnesty.<sup>5</sup> However, the crimes referred to by the President, does not refer to those crimes referred to in the private members' proposal. The Committee would therefore need to give consideration to whether it is desirable to have the crimes referred to in the private members' legislative proposal, pardoned by the President.

In terms of the proposal, reference is made to the Criminal Records Board and the role that this body would play in the expunction of criminal records resulting from Apartheid Crimes. An important consideration for the Committee is the provision that grants the Criminal Records Board the power to direct that criminal records be expunged if the President has denied an application for a Presidential Pardon. This provision provides, on the face of it, for a tenuous relationship between the President and the Criminal Records Board.

### 3. Key Questions

- Would individuals with criminal records emanating from Apartheid Crimes need to first apply for a Presidential Pardons before making application to the Criminal Records Board?
- Has the proposer ascertained how many people have been convicted in terms of Apartheid Crimes?
- Have these Apartheid Crimes been repealed, and if so, what is the effect of those repeal on criminal records? In other words, do those repeals have a retroactive effect of erasing criminal records?
- What would the relationship be between the President of the Republic of South Africa and the Criminal Records Board given the assumed ability of the Criminal Records Boards ability to direct the expunction of criminal records?

<sup>5</sup> <http://www.thepresidency.gov.za/president/sp/2007/sp11211540.htm>



- Would members of the Criminal Records Board be compensated? And if so, how?
- What effect would the expunction of criminal records have on nation building and national reconciliation?
- What review procedures would there be for those individuals whose applications to the Criminal Records Board have not been successful?

#### **4. Key Documents with which the Committee should engage**

- The Constitution of the Republic of South Africa, Act 108 of 1996.
- The Promotion of National Unity and Reconciliation Act of 1995.
- The Indemnity Act, 35 of 1990.
- The Further Indemnity Act, 15 of 1992.
- The Correctional Services Act, 111 of 1998.
- President of the Republic of South Africa v Hugo.

#### **5. Interested/Concerned Parties**

- The Department of Justice and Constitutional Development
- The Presidency
- The South African Human Rights Commission
- The Khulumani Group
- The Department of Correctional Services
- The Department of Safety and Security
- The National Prosecuting Authority