South African Institute of Race Relations
The power of ideas

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TO: Standing Committee on Finance, National Assembly

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To whom it may concern,

GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING OF TERRORISM FINANCING) AMENDMENT BILL [B18-2022]

1 Introduction

The Standing Committee on Finance in the National Assembly (**the committee**) has invited public input on the General Laws (Anti-Money Laundering and Combating of Terrorism Financing) Amendment Bill [B18-2022] (**the Amendment Bill**) by 25 October 2022.

This submission is made by the South African Institute of Race Relations NPC (**the IRR**), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

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2 Overview of the Amendment Bill and general comments

Clauses 8 through 14 of the Amendment Bill propose to amend the Nonprofit Organisations Act of 1997 (**the NPO Act**), which is the *lex specialis* of the non-profit organisation (**NPO**) sector in South Africa. The NPO Act does not currently require NPOs to be registered nor to comply with the Act's NPO standards. Compliance is therefore voluntary, and the NPO sector is largely responsible for self-regulation.

The Amendment Bill proposes to make NPO registration and compliance compulsory. It will also regulate, in detail, who may and may not be a director of an NPO. The Amendment Bill is introduced in large part – and with great urgency – due to the central government's desire to avoid South Africa being "greylisted" by the international Financial Action Task Force.

The IRR is glad to have learned that the National Treasury has in principle decided to remove the compulsory registration requirement.[1] This comment nonetheless in the main serves to emphasise the reason why it is important to do so, especially in light of the fact that the Amendment Bill's text remains unchanged at the time of submission. The IRR calls on the Standing Committee to follow the executive department's lead.

Hendricks and Wyngaard note how prior to 1994, civil society in South Africa was subject to various repressive laws and regulations. The Internal Security Act allowed government to simply prohibit certain organisations and the Affected Organisations Act allowed government to prohibit foreign funding of local NPOs. The Fundraising Act obliged civil society to obtain permission from government to solicit or receive donations from the public.[2]

These and other restrictions made it exceedingly difficult, and sometimes impossible in the case of banned organisations, for civil society to play a meaningful constitutional role. The African National Congress and United Democratic Front were the most notable victims of this regime.

[1] https://www.businesslive.co.za/bd/national/2022-10-18-treasury-calls-off-blanket-registration-for-npos/
[2] https://heinonline.org/HOL/LandingPage?handle=hein.journals/ijcsl11&div=6&id=&page=

When South Africa became a constitutional democracy, the rights to free political activity and association were entrenched in the Constitution, precisely because a repeat of pre-1994 laws and regulations was deemed unacceptable and undesirable.

In 1997, however, immediately prior to the adoption of the present NPO Act, government proposed different legislation regulating NPOs in South Africa. Among its proposed provisions were the creation of a statutory body that would, among other things, be empowered to appoint persons onto the governing bodies of NPOs. The reaction from civil society was one of opposition.

The Amendment Bill does not contain a similar provision. However, in light of government's past agenda, and comments made in the interim, which indicates an unfortunate but deep-seated distrust of NPOs and civil formations by government, it is not inconceivable that such proposals will be made in future.

For instance, in April 2016, Minister of State Security David Mahlobo argued that certain non-governmental organisations were intent on destabilising South Africa on behalf of "foreign forces."[3] More recently, Minister of Home Affairs Aaron Motsoaledi said on 28 June 2022 that non-governmental organisations often play a "destructive role" in South Africa when they are "a stumbling block to the implementation of Government's rational and lawful decisions." Civil society being able to take government's policy decisions on review to court "must be nipped in the bud as soon as possible." Motsoaledi worried that certain civil society formations have the aim of assisting "in the dislodgment of government of the day [sic] from power by all means available."[4]

This kind of paranoia by the State – which represents the greatest concentration of power in a given society – against voluntary associations of ordinary people is dangerous. It is therefore important for civil society to defend the principle of its own independence against any talk of watering it down.

Common law and other legislation, like section 4 of the Prevention of Organised Crime Act and section 3 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, already prohibit South African NPOs, registered or not, from engaging in money-laundering or the financing of terrorism. This is true even in the absence of the NPO Act itself.

The Amendment Bill is therefore not necessary to prohibit NPOs from engaging in money-laundering or the financing of terrorism because existing legislation already caters to this requirement. If South Africa is to be greylisted, in other words, it will not be because the NPO space is somehow free to launder money or finance terror.

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[3] https://www.news24.com/News24/some-ngos-are-security-agents-of-foreign-forces-mahlobo-20160426

[4] http://www.dha.gov.za/index.php/statements-speeches/1567-statement-of-home-affairs-minister-dr-aaron-motsoaledi-on-court-action-launched-by-the-helen-suzman-foundation-on-the-decision-not-to-extend-exemptions-granted-to-zimbabwean-nationals

An independent civil society is a crucial pillar of South Africa's constitutional democracy. This independence ought not be lost by way of omnibus amendment legislation that focuses on a different matter entirely.

It is furthermore likely that, should the Amendment Bill be adopted with the compulsory registration requirement, it will be unenforceable, and therefore only detrimental to those few NPOs that government decides to enforce it upon. By 2020 there were 228,822 registered NPOs in South Africa, of which more than half (58.44%) were apparently not complying with relevant legislation. It is likely that many hundreds of thousands more unregistered NPOs are in fact in operation.

The Department of Social Development does not possess the resources to enforce a substantive set of regulatory standards upon such a diverse assortment of organisations, nor should it seek to. If it attempts to, however, it will come down to selective enforcement, which harms the Rule of Law doctrine at the centre of South Africa's constitutional democracy.

While the law under consideration purports to only regulate NPOs, one must bear in mind that civil society consists of everything that is not part of government. This includes charities, private universities, and watchdog associations. Even many for-profit businesses have non-profit ventures.

None of these formations of civil society must be placed in straightjackets.

3 Public participation process

The IRR was heartened to be notified that the committee had repudiated the National Treasury's attempt to substantively skip the public participation process with its rushed timeline for public comment on the Amendment Bill, between 28 September and 10 October 2022. The committee's steadfast refusal to submit to the executive's supposed urgency and to insist upon more time for civic participation is to be commended.

Nonetheless, the IRR remains concerned that even with the extension of the period for public comment to 25 October, it remained shorter than comment periods on other legislative proposals – usually one full month. Since the Amendment Bill is an omnibus bill – it is effectively five amendment bills packaged into one – it would be appropriate for the comment period on the bill to be five times as long as an ordinary period. That would make the appropriate period, in this case, five months. The IRR, in its 10 October letter to the committee, however, requested only an additional two months.

Despite the extension, therefore, the IRR once more calls on the committee to extend the comment period, to the end of November 2022. This will give civil society formations that have not had enough time to comment, or have not been informed of the Amendment Bill, to participate as well.

4 Impact assessment

Since September 2015, all new legislation in South Africa has had to be subjected to a socio-economic impact assessment (SEIA) before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim of this new system is to ensure that both the intended and potentially unintended or unforeseen costs and consequences of regulations and legislation for the economy are understood and indicated to the public.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has been proposed, an initial assessment must be conducted to identify various alternatives to the legislation and compare their respective costs and benefits. Thereafter, consultation with appropriate interested parties is required, alongside continued revision of the assessment as the regulation or legislation evolves.

The final impact assessment must follow. This detailed assessment must set out the effects and costs of compliance, implementation, and its introduction's anticipated outcome. This final assessment, with its comprehensive assessment of likely economic and other costs, must be attached to a bill when it is made available for public input.

According to the Guidelines, it is particularly important that the final SEIAS report should "identify" and caution against proposed legislation where "the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration."

Given the immense role that NPOs in the charity sector play in the socio-economic well-being of millions of South Africans, it would be untenable to argue that the Amendment Bill's adoption would not have socio-economic consequences. It is therefore clear that a SEIA had to be conducted on both the intended and potentially unforeseen consequences that the legislation's adoption would have.

For instance, might the requirement for registration and eventual compliance with bureaucratic demands from the NPO Directorate cause certain NPOs to close down? This question is unanswered.

As no SEIA accompanied the Amendment Bill's publication – likely due to the urgency with which it was proposed – South Africans have little to go on when it comes to evaluating whether the legislation is beneficial or harmful. They and the IRR can only speculate, and regrettably, as far as the NPO provisions in the Amendment Bill are concerned, the consequences of this legislation's adoption could be dire.

5 Commentary on notable provisions

The IRR's comment herewith presented extends only to those provisions in the Bill that could prove dangerous to the independence of civil society.

All these notable provisions either directly or indirectly infringe on various protected constitutional rights, including the right to privacy (section 14 of the Constitution), the right to freedom of association (section 18), the right to free political activity (section 19), and the right to property (section 25). Constitutional rights aside, the Amendment Bill holds the added risk of replacing a Rule of Law oriented dispensation (required by section 1(c) of the Constitution) with one that operates on executive whims and discretion.

Clause 8 provides that, going forward, NPOs are required to conduct their affairs in line with the standards found in the Act and the policy and regulations that might flow from it.

Had the clause simply noted that NPOs must maintain adequate standards, it would have been unobjectionable. However, a political and regulatory discretion, which will change alongside the political pressures and interpretations of the relevant functionaries, is apparent, and its presence would be detrimental to the independence of the NPO sector.

The IRR believes that this clause ought to be removed from the Amendment Bill.

Clause 10 provides that NPOs must register in terms of the NPO Act before they may conduct their business and adds that even those that are not registered are nonetheless deemed subject to the Act's standards.

An intervention of this nature has the relationship between political authorities and NPOs as non-governmental organisations fundamentally backward. While the Rule of Law as a constitutional doctrine requires that all formations, including civil society and government, must be subject to the same law, it is out of bounds for government to suppose that it may (*de novo*) regulate those independent civil society organs entrusted with ensuring its own (government's) transparency and law-abidance.

Corruption and transparency watchdogs – NPOs – have played a crucial role since the dawn of constitutional democracy in South Africa because they are not perceived to or required to be subject to political oversight or control. It is government that must be subject to independent civil society oversight, not the other way around.

Civil society formations like NPOs are already subject to the common law and laws of general application that regulate financial crimes. Specialised legislation aimed at regulating NPOs in particular is a threat to South Africa's constitutional democracy.

The IRR believes that this clause ought to be removed from the Amendment Bill.

Clause 11 bestows upon government the discretion to require NPOs to submit "information about [their] office-bearers, control structure, governance, management, administration and operations." It further requires government to prescribe this required information "after having consulted the Minister of Finance and the Financial Intelligence Centre."

For the same reasons discussed above regarding the imperative of the independence of civil society, so too would this provision be unacceptable. The governance, management, and operations of NPOs are no business of government, whereas the governance, management, and operations of government are the business of civil society. Civil society cannot be sustainably independent of political interference when NPOs are required to submit information of this nature to political authorities.

Stated differently, it would have been, rightly, completely unacceptable to revolutionary organisations like the African National Congress and United Democratic Front, during the 1980s, to have submitted information about their staff, structures, governance, and operations to the South African government. What was good for the ANC and UDF then remains good and necessary for non-governmental formations today.

The IRR believes that this clause ought to be removed from the Amendment Bill.

Clause 12 *inter alia* requires NPOs to submit certain information about their staff, structures, and governance to the NPO Directorate and to "any person as prescribed."

The IRR believes that this clause ought to be removed from the Amendment Bill.

Clause 13 inserts a new chapter into the NPO Act which regulates the disqualification and removal of NPO office-bearers.

While much of this provision appears on the face of it benign, it would be unacceptable to allow government such a direct say in who may or may not occupy senior positions in organisations that are required to be independent of the State. If this is allowed on the strength of the present proposed provisions, nothing stops government in future, for instance, from adding additional grounds for disqualification.

The IRR believes that this clause ought to be removed from the Amendment Bill.

Clause 14 provides that it will be an offence not to register an NPO (clause 10 as discussed above) or to fail to provide the NPO Directorate with information about the NPO (clauses 11 and 12 as discussed above).

The IRR believes that this clause ought to be removed from the Amendment Bill.

6 Recommendations

The comment period on the Amendment Bill must be extended to the end of November 2022.

A socio-economic impact assessment process must be followed on the totality of the Amendment Bill.

Clauses 8 and 10-14 of the Amendment Bill must be removed.