



HELENSUZMAN
FOUNDATION

SUBMISSION TO THE STANDING COMMITTEE ON FINANCE

in respect of

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

made by

THE HELEN SUZMAN FOUNDATION

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Introduction

1. The Helen Suzman Foundation (“HSF”) welcomes the opportunity to make submissions to the Standing Committee on Finance (“Committee”) on the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill B18-2022 (“the Bill”). The HSF sees this engagement as a way of fostering critical yet constructive dialogue between civil society and government.
2. The HSF is a non-governmental organisation whose main objective is to promote and defend the values of our constitutional democracy in South Africa, focusing on the rule of law, transparency and accountability. The HSF’s interest in participating in these proceedings, centres on our commitment to the constitutional obligations of achieving equality and advancing human rights and freedoms.
3. In its comments on the proposed Bill to amend the Nonprofit Organisations Act 71 of 1997 (“the Act”), the HSF wishes to contribute to the efficient operation of the Act, as NPOs perform a vital role in the social and political arena in South Africa. Therefore, it is crucial that the relevant governing legislation provides a suitable and practical framework for their functioning.
4. In Part A of this submission, the HSF will provide submissions that set out the constitutional and international law standards required to regulate the non-profit sector. Part B will comment on the Department of Social Development’s (“the Department”) introduction of the Draft Non-Profit Organisation Amendment Bill (“Draft NPO Bill”).¹ Part C will discuss the Department’s ability to administer the proposed amendments. Finally, Part D will draw the Committee’s attention to the practical realities of the NPO sector and its regulation in general.

¹ Department of Social Development, ‘Draft Non-Profit Organisation Amendment Bill’ *Parliamentary Monitoring Group* (19 October 2022) available here <<https://pmg.org.za/call-for-comment/1214/>>.

5. The HSF wishes to register its concern that the proposed amendment is not in line with international standards for regulating NPOs. In this regard, requiring registration with a government body may have the impact of stifling the activities of NPOs. The HSF recommends that a risk-based approach is adopted. Alternatively, if the requirement for registration of all NPOs remains, it is proposed that an independent registration entity is created.
6. In addition, the HSF is apprehensive about the processing of the Bill and the Draft NPO Bill in separate proceedings. Consequently, the HSF advocates that the two Bills be considered together, and the process be combined to be more efficient and effective and to avoid any contradictory outcomes that may arise from the concurrent processes.
7. The HSF understands the urgency of ensuring compliance with the Financial Action Task Force (“FATF”) to avoid “grey-listing”. However, the HSF notes that South Africa’s Mutual Evaluation Report of the Financial Action Task Force’ (“FATF Report”) was published in October 2021, and it is not at all clear why this matter is only now receiving the required attention in Parliament.

Part A: The Legal Position

8. The HSF is aware of the comments made by the National Treasury at the briefing to the Committee held on 18 October 2022.² During the Committee Briefing, the National Treasury indicated that, in relation to the registration of all NPOs, it ‘is undergoing careful consideration to develop drafting refinements to present to the Committee. However, not all NPOs will be required to register’.³

² Finance Standing Committee, ‘General Laws (Anti-Money Laundering and Combating of Terrorism Financing) Amendment Bill: National Treasury’, *Parliamentary Monitoring Group* (18 October 2022) available here <<https://pmg.org.za/committee-meeting/35761/>> (“Committee Briefing”).

³ Committee Briefing.

9. The HSF notes National Treasury’s intention. However, the Bill has not been amended or withdrawn to reflect this intention to remove blanket registration and to follow a risk-based approach. Therefore, the HSF provides comments on the Bill as it currently reads.
10. In addition, the HSF avers that even if National Treasury had manifested its intention of adopting a risk-based approach through an amendment to the Bill, it would be advisable, if not required, to re-publish the amended Bill for public comment given the significant impact upon NPOs and their interest in the matter. Public participation is a constitutional obligation and forms a vital aspect of South Africa’s democracy.
11. The Bill proposes to amend section 12 of the Act by making it *compulsory* for all NPOs (both domestic and foreign) operating within South Africa to register with the Director.⁴ In terms of the Act, the Director is ‘an employee of the national department’ responsible for welfare designated by the Minister and is head of the Directorate for NPOs (“Directorate”).⁵ The Directorate is established by the Minister ‘within the national department’.⁶
12. The purpose of the amendment, according to the Committee, is to ‘give effect to 14 recommendations contained in’ the FATF Report.⁷
13. The FATF is an inter-governmental body tasked with promoting policies that ‘protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction’.⁸ In line with this mandate, the FATF has made policy and regulatory recommendations to advise states on how

⁴ General Laws (Anti-Money Laundering and Combating of Terrorism Financing) Amendment Bill B18-2022 (“Bill”), clause 10.

⁵ Nonprofit Organisations Act 71 of 1997 (“Act”), section 8.

⁶ Act, section 4.

⁷ <https://pmg.org.za/call-for-comment/1209/>; Financial Action Task Force, ‘Anti-Money Laundering and Counter-Terrorist Financing Measures: South Africa Mutual Evaluation Report’ (October 2021).

⁸ Financial Action Task Force, ‘International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations’ (2012-2022) (“FATF Recommendations”), 7.

to best protect themselves from the dangers of money laundering and the financing of terrorism (“FATF Recommendations”).

14. The HSF recognises the importance of ensuring that the financing of terrorism is prevented, and that early detection is enhanced. However, the HSF would like to draw the Committee’s attention to the following laws and legal standards that prescribe how NPOs should be regulated.

15. The Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms⁹ (“the Declaration”) recognises the right of individuals, or in association, ‘to form, join and participate in non-governmental organisations, associations or groups’.¹⁰ Article 17 provides that the exercise of this right may only be limited if the limitation is:

‘in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’

16. The right to freedom of association is also guaranteed in our Constitution,¹¹ and various other international and regional instruments.¹² This right is, however, not absolute and limitations are allowed under strict conditions.¹³

17. The United Nations Special Representative of the Secretary-General on Human Rights Defenders has provided various recommendations on the practices that states should

⁹ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: resolution / adopted by the General Assembly, 8 March 1999, A/RES/53/144 (“Declaration”).

¹⁰ Declaration, article 5.

¹¹ Constitution of the Republic of South Africa 1996, section 18.

¹² The Universal Declaration of Human Rights, article 20; the International Covenant on Civil and Political Rights, article 22; and the African Charter on Human and Peoples’ Rights, article 10.

¹³ Constitution, section 36; and International Covenant on Civil and Political Rights, article 22.

adopt in order to conform with the Declaration. In addition, these recommendations have been bolstered in subsequent reports from the Special Representative.¹⁴

18. The HSF believes the following standards to be especially pertinent:

- a. Registration of NPOs should be voluntary.¹⁵
- b. NPOs are only required to have ‘some kind of institutional structure’ and do not have to ‘assume a legal personality’ in order to be protected.¹⁶
- c. The registration body must ‘be independent from the Government and should include representatives of civil society’.¹⁷
- d. Members of the registration body ‘should not be directly appointed by Government, nor at its discretion’.¹⁸
- e. NPOs should be free ‘from undue interference from the State’.¹⁹
- f. Any registration procedure must ‘be prompt and expeditious, easily accessible and inexpensive’.²⁰

19. The above standards are recommended as international best practice, recognising that the requirement of NPO registration with a governmental body may be ‘used

¹⁴ Hina Jilani, ‘Human Rights Defenders: Report of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders’ *UN General Assembly* (6 September 2006) Doc No. A/61/312 (“Jilani Report II”); Margaret Sekaggya, ‘Human Rights Defenders: Report of the Special Rapporteur on the Situation of Human Rights Defenders’ *UN General Assembly* (4 August 2009), Doc No. A/64/226 (“Sekaggya Report”).

¹⁵ Jilani Report I, para 82(a)-(b); Sekaggya Report, paras 59 and 103; UN Office of the High Commissioner for Human Rights, ‘Commentary to the Declaration on the Right and Responsibilities of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms’ (July 2011) (“Declaration Commentary”), pg 39.

¹⁶ Sekaggya Report, para 19-21.

¹⁷ Jilani Report I, para 82(h); Sekaggya Report, para 116; Declaration Commentary, pg 39.

¹⁸ Jilani Report I, para 82(h); Declaration Commentary, pg 39.

¹⁹ Sekaggya Report, para 25.

²⁰ Jilani Report I, para 82(c); Sekaggya Report, para 110.

arbitrarily or restrictively to void legal protection for those human rights NGOs that are most critical of the Government'.²¹

20. The HSF submits that the Committee should pay heed to the concerns raised by the Office of the High Commissioner for Human Rights ("OHCHR"), which has noted that NPO laws and registration requirements are 'becoming increasingly politicised by Governments' and are increasingly being used in a manner to stifle or control the activities of NPOs.²²

21. The HSF acknowledges that the FATF Recommendations provide that 'NPOs *could* be required to license or register' ²³ (emphasis added). However, the FATF itself recognises that any measures applied by a state must conform with the state's international human rights law obligations.²⁴

22. In addition to requiring compliance with international standards, the FATF Recommendations specifically mandate a risk-based approach. ²⁵ As NPOs will present varying levels of risk for terrorism financing, the FATF itself provides that a "one-size-fits-all" approach for monitoring (which includes registration) of NPOs is not in line with its recommendations.²⁶ Instead the FATF Recommendations require that the state should be in a position to 'demonstrate that risk-based measures apply to NPOs at risk of terrorist financing abuse'.²⁷

²¹ Hina Jilani, 'Human Rights Defenders: Report of the Special Representative of the Secretary-General on Human Rights Defenders' *Commission on Human Rights* (23 January 2006), Doc No E/CN.4/2006/95 ("Jilani Report III"), para 51.

²² Declaration Commentary, pg 37-9.

²³ FATF Recommendations, recommendation 8 para 6(b)(i).

²⁴ FATF Recommendations, recommendation 8 para 2.

²⁵ FATF Recommendations, recommendation 8 paras 1-2, 4(a), 5, 6(b).

²⁶ FATF Recommendations, recommendation 8 paras 2, 4(a) and 6(b).

²⁷ FATF Recommendations, recommendation 8 para 6(b).

23. The current proposed amendment in the Bill requires every NPO to register, no matter its size, purpose, or the risk it presents in respect of possible terrorism financing. This is inconsistent with the approach recommended by the FATF.
24. Therefore, any proposed amendments to the Act should be considered in terms of what the FATF Recommendations require, read together with the relevant constitutional and international law obligations. At the very least, this entails considering the three points laid out below.
25. First, the Committee needs to consider whether amending the Act to require the registration of all NPOs is compliant with international law. In addition, the Committee must consider whether an independent regulatory registration body should not be created if it persists with requiring registration.
26. Secondly, the Committee must consider whether the proposed amendment is actually able to achieve what the FATF recommends.
27. Finally, the Committee must ask whether the amendment meets the limitation clause set out in section 36 of our Constitution and article 22 of the International Covenant on Civil and Political Rights, in that there are no less restrictive means available to achieve its purpose, i.e. a risk-based approach.

Part B: The Draft Non-Profit Organisation Amendment Bill

28. The HSF notes that the Department has introduced the Draft NPO Bill for public comment. The HSF would like to draw the Committee's attention to two pertinent points in this regard.
29. First, it is unclear how the proposed amendments in the Bill and the Draft NPO Bill can be read together as they offer contradictory amendments to section 12 of the Act. The Bill requires a blanket registration for all NPOs, whereas the Draft NPO Bill only

requires registration in terms of certain classes of NPOs. The HSF will make submissions on the Draft NPO Bill by the stated deadline.

30. Secondly, the HSF submits that it is odd and potentially counter-productive that a more integrated process to manage the Bills has not been designed. They are introduced by separate departments, and the Bills and comments received in respect of each will be processed by different committees.

31. This concurrent approach to amending the Act cannot be considered efficacious or strategic. Therefore, the HSF submits that an integrated approach should be adopted for the Bills' consideration and processing.

Part C: The Department of Social Development

32. In the third part of this submission, the HSF contends that even if the Department were to remain the regulatory body of registered NPOs, despite it being contrary to international standards, the problem the amendment seeks to resolve will remain.

33. The Act requires that registration applications must be considered within two months from the date of application.²⁸ However, according to the Department's own website, the average time taken for processing registration applications is 110 days if done *via* the postal service and 126 days if done over the internet.²⁹ In addition, there are currently 5205 applications still being processed.³⁰ The fact that the Department is still prepared to use the postal service is, on its own, a sign that it is far removed from the realities of everyday life in South Africa, as no one (in our experience) uses the postal service for sending post at all any longer. In addition, how registration done

²⁸ NPO Act, section 13(2).

²⁹ Department of Social Development < <http://www.npo.gov.za>>.

³⁰ Department of Social Development < <http://www.npo.gov.za>>.

via the internet is a more protracted process than that via the postal service is not at all clear to us.

34. The Department, therefore, demonstrates a lack of capacity to process the applications timeously. This situation will only worsen if the proposed amendment requiring *all* NPOs to register is passed as currently formulated.

35. The lack of capacity is recognised in the FATF Report, which states that 'South Africa also has no capacity to monitor or investigate NPOs identified to be a risk of [terrorism financing] abuse'.³¹

36. Similarly, the FATF Report indicates that even with the NPOs currently registered, the Department does not monitor or investigate the financing of terrorism even though the required documentation to do so is already provided.³²

37. The HSF notes the response provided during the Committee Briefing that problems of capacity within the Department to implement the suggested registration amendment will be addressed through the budget process. The HSF asserts that given the current budgetary constraints this is not achievable.

38. Therefore, the HSF submits that there is no indication of how the Department will be able to remedy this situation when all NPOs will be required to register - given that it is currently unable to do so with much fewer registered NPOs.

³¹ FATF Report, pg 176.

³² FATF Report, pg 174.

Part D: The Relevant Context

39. The aspects dealt with above deal with the legal and institutional issues. Still, there are a number of issues that are very relevant in this context which are addressed in practice, quite outside any of the provisions of the Act.
40. In the first instance, as part of their due diligence process, many donors to NPOs require that the NPO in question must be registered as an NPO. We would assume that most donors would require this, but we do not have any statistics available in this context. In addition, many (if not most) donors would want to benefit from any deductions which the tax regime may make available for their NPO contributions. In order to enable this, an NPO has to be registered with SARS as a Public Benefit Organisation.
41. Secondly, banks require the registration details of an NPO if it applies to open a bank account, once again, as part of the bank's own due diligence.
42. Taking the requirements of donors and banks together, it is assumed that NPOs of any substance are effectively forced to register not only with the Department but also with SARS. In these circumstances, it is difficult to see how the inclusion of a legislative obligation to register will affect the situation in a material manner. The FATF itself states that '[s]pecific licensing or registration requirements for counter terrorist financing purposes are not necessary. For example, in some countries, NPOs are already registered with tax authorities and monitored in the context of qualifying for favourable tax treatment (such as tax credits or tax exemptions)'.³³
43. Against this background, it becomes even more obvious that a risk-based approach must be applied to NPOs, instead of insisting on a one-size-fits-all extensive registration requirements

³³ FATF Recommendations, Recommendation 8, paragraph 6(b)(i).

Conclusion

44. The HSF welcomes the opportunity to engage with the Committee in this regard. The HSF's comments are made with the purpose of enhancing the security and independence of NPOs operating within South Africa and, at the same time, of making the monitoring framework more effective where it relates to financial criminal activities.
45. It must be emphasised that NPOs play a vital role in South Africa. Regulation must be narrowly tailored to combat real risk and not be unduly cumbersome or hindering of NPO activity.
46. Therefore, the HSF wishes to register its concern with the proposed amendment to the Act as it is not in line with international standards for the regulation of NPOs and, in any event, will not be effective on its own. In this regard, requiring registration with a government body will not lead to more effective monitoring, given the lack of capacity within the Department. It may, in addition, carry the potential danger of unnecessary government interference in the activities of NPOs.
47. The HSF, therefore, recommends that a risk-based approach is adopted. Alternatively, if the registration of all NPOs is legislated, an independent registration entity should be created, but that will entail the creation of yet another regulatory body with additional requirements for funding and resources.
48. Finally, the HSF is apprehensive about the processing of the Bill and the Draft NPO Bill in separate proceedings. Consequently, the HSF advocates that the two Bills be considered together, and the process be combined to be more efficient and effective and prevent any contradictory outcomes that may arise from the concurrent processes.