

REPUBLIC OF SOUTH AFRICA

**PROTECTION OF
CONSTITUTIONAL DEMOCRACY
AGAINST TERRORIST AND
RELATED ACTIVITIES
AMENDMENT BILL**

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
Bill and prior notice of its introduction published in Government Gazette No. 46649 of 1
July 2022)*
(The English text is the official text of the Bill)

(MINISTER OF POLICE)

[B 15—2022]

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GENERAL 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.

BILL

To amend the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, so as to delete, amend and insert certain definitions for purposes of alignment with international instruments adopted upon the implementation of the Act; to provide for offences related to terrorist training and the joining and establishment of terrorist organisations; to provide for offences related to foreign travel and attempts to leave the Republic under certain circumstances; to provide for offences in respect of the possession and distribution of publications with unlawful terrorism related content; to provide for authorisation to be obtained from the Director of Public Prosecutions in respect of the investigation and prosecution of certain offences; to provide for the issuing of warrants for the search and cordoning off of vehicles, persons and premises; to provide for a direction requiring the disclosure of a decryption key and the effect of a direction to disclose a decryption key; to provide for the removal of, or making inaccessible, publications with unlawful terrorism related content; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 33 of 2004

1. Section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (hereinafter referred to as the “principal Act”), is hereby amended— 5

(a) by the insertion in subsection (1) before the definition of “appropriate government body” of the following definition:

“**‘access’** refers to a person who accesses a computer data storage medium or a computer system as contemplated in section 2(2)(b) of the Cybercrimes Act;” 10

(b) by the insertion in subsection (1) after the definition of “appropriate government body” of the following definitions:

“**‘computer’** means computer as defined in section 1 of the Cybercrimes Act;
‘computer data storage medium’ means computer data storage medium as defined in section 1 of the Cybercrimes Act;
‘computer system’ means computer system as defined in section 1 of the Cybercrimes Act;” 15

- (c) by the substitution in subsection (1) in the definition of “Convention offence” for paragraphs (b) and (c) of the following paragraphs:
- “*(b)* an offence referred to in section 56(1)(h) of the Nuclear Energy Act[, **1999 (Act 46 of 1999)**]; or
- (c)* an offence referred to in section [**2(1) or (2) of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972)**] 133 or 142(6) of the Civil Aviation Act, 2009 (Act No.13 of 2009);”;
- (d) by the insertion in subsection (1) after the definition of “Convention offence” of the following definitions:
- “**‘Criminal Procedure Act’** means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
- ‘critical infrastructure’** means critical infrastructure as defined in section 1 of the Critical Infrastructure Protection Act;
- ‘critical infrastructure complex’** means critical infrastructure complex as defined in section 1 of the Critical Infrastructure Protection Act;
- ‘Critical Infrastructure Protection Act’** means the Critical Infrastructure Protection Act, 2019 (Act No. 8 of 2019);
- ‘Cybercrimes Act’** means the Cybercrimes Act, 2020 (Act No. 19 of 2020);
- ‘data’** means data as defined in section 1 of the Cybercrimes Act;
- ‘Directorate’** means the Directorate for Priority Crime Investigation established by section 17C of the South African Police Service Act;”;
- (e) by the insertion in subsection (1) after the definition of “Director of Public Prosecutions” of the following definition:
- “**‘electronic communications service provider’** means electronic communications service provider as defined in section 1 of the Cybercrimes Act;”;
- (f) by the substitution in subsection (1) for the definition of “entity” of the following definition:
- “**‘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;”;
- (g) by the substitution in subsection (1) for the definition of “explosive” of the following definition:
- “**‘explosive’**, with reference to the definition of ‘explosive or other lethal device’ in this section, and sections 5, 6, 10 and 13, means— **[an explosive referred to in section 1 of the Explosives Act, 2003 (Act No. 15 of 2003);]**
- (a)* a substance, or a mixture of substances, in a solid or liquid state, which is capable of producing an explosion;
- (b)* a pyrotechnic substance in a solid or liquid state, or a mixture of such substances, designed to produce an effect by heat, light, sound, gas or smoke, or a combination of these, as the result of non-detonative self-sustaining exothermic chemical reaction, including pyrotechnic substances which do not evolve gases;
- (c)* any article or device containing one or more substances contemplated in paragraph (a);
- (d)* any plastic explosive; or
- (e)* any other substance or article, which the Minister may from time to time, by notice in the *Gazette*, declare to be an explosive;”;

- (h) by the substitution in subsection (1) for the definition of “explosive or other lethal device” of the following definition:
 “**‘explosive or other lethal device’**, with reference to sections 3, 5, 6, 10 and 13, means—
- (a) an explosive or incendiary weapon or device which is designed or manufactured, or has the capability, to cause death, serious bodily injury or material damage; 5
 - (b) a weapon or device which is designed or manufactured, or has the capability, to cause death, serious bodily injury or material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material; or 10
 - (c) any weapon of mass destruction, as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act[, **1993 (Act No. 87 of 1993)**];” 15
- (i) by the insertion in subsection (1) after the definition of “explosive or other lethal device” of the following definition:
 “**‘Financial Intelligence Centre Act’** means the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001);”
- (j) by the insertion in subsection (1) after the definition of “fixed platform” of the following definitions: 20
- “**‘Hazardous Substances Act’** means the Hazardous Substances Act, 1973 (Act No. 15 of 1973);
- ‘information infrastructure’** means any data, computer data storage medium, computer system or computer program, as defined in the Cybercrimes Act, or any part thereof that is of such a significant economic, public, social or strategic importance that if any service rendered by the information infrastructure is disrupted, destroyed or degraded, it will have a significant effect on—
- (a) the Republic’s ability to function, deliver basic public services or maintain law and order; or 30
 - (b) the environment, the health or safety of the public or any segment of the public, or any other infrastructure that may negatively affect the functions and functioning of the information infrastructure in question;” 35
- (k) by the deletion in subsection (1) in the definition of “instruments dealing with terrorist and related activities” of the word “or” at the end of paragraph (l) and the addition of the following paragraphs: 35
- “(n) the Protocol to the Organisation of African Unity Convention on the Prevention and Combating of Terrorism, adopted at Addis Ababa by the Assembly of the African Union on 8 July 2004; 40
- (o) the International Convention for the Suppression of Acts of Nuclear Terrorism, adopted by the United Nations General Assembly on 13 April 2005;
 - (p) Amendment to the Convention on the Physical Protection of Nuclear Material, adopted by the Parties to the Convention on 8 July 2005; 45
 - (q) the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted by the International Maritime Organisation on 14 October 2005; 50
 - (r) the Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms located on the Continental Shelf, adopted by the International Maritime Organisation on 14 October 2005;
 - (s) the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, concluded at Beijing on 10 September 2010; 55
 - (t) the Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, concluded at Beijing on 10 September 2010; and 60
 - (u) the Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft, concluded at Montreal on 4 April 2014;”;

- (l) by the insertion in subsection (1) after the definition of “National Director” of the following definitions:
- “**‘Non-Proliferation of Weapons of Mass Destruction Act’** means the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993);
- “**‘Nuclear Energy Act’** means the Nuclear Energy Act, 1999 (Act No. 46 of 1999).”; 5
- (m) by the substitution in subsection (1) for the definition of “police official” of the following definition:
- “**‘police official’** means a ‘member’ as defined in section 1 of the South African Police Service Act, 1995 (Act 68 of 1995), and with reference to section 24, includes a member of the South African National Defence Force employed in co-operation with the South African Police Service, in terms of section 201(2)(a) of the Constitution in the prevention and combating of crime, and maintenance and preservation of law and order within the Republic, as contemplated in section 19(1) of the Defence Act, 2002 (Act No. 42 of 2002);”;
- (n) by the substitution in subsection (1) for the definition of “property” of the following definition:
- “**‘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).”; 10 15 20 25
- (o) by the insertion in subsection (1) after the definition of “public transportation system” of the following definition:
- “**‘Regulation of Interception of Communications and Provision of Communication-related Information Act’** means the Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002 (Act No. 70 of 2002).”; 30
- (p) by the substitution in subsection (1) for the definition of “ship” of the following definition:
- “**‘ship’**, with reference to the definition of ‘fixed platform’ in this section and section 10, means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles or other floating craft, but does not include— 35 40
- (a) a warship;
- (b) a ship owned or operated by a State; or
- (c) a ship which has been withdrawn from navigation or laid up.”;
- (q) by the insertion in subsection (1) after the definition of “ship” of the following definitions: 45
- “**‘software or hardware tool’** means a software of hardware tool as defined in section 4(2) of the Cybercrimes Act;
- “**‘South African Police Service Act’** means the South African Police Service Act, 1995 (Act No. 68 of 1995).”;
- (r) by the substitution in subsection (1) for the definition of “terrorist activity” of the following definition: 50
- “**‘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— 55
- (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— 60
- (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; 5
- (iii) endangers the life of, 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; 10
- (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; 15
- (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— 20
- (*aa*) a system used for, or by, an electronic system, including an information system; 25
- (*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; 30
- (*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 35
- (*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]** 40
- (viii) creates a serious public emergency situation or a general insurrection in the Republic[,]; or
- (ix) is the offence of— 45
- (*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; 50
- (*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 a password, access code or similar data or device in terms of section 7 of the Cybercrimes Act; 55
- (*ff*) unlawful use or possession of a software or hardware tool for purposes of committing the offences listed in items (*aa*) to (*ee*); or 60
- (*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).

Amendment of section 3 of Act 33 of 2004

2. Section 3 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for paragraph (b) of the following paragraph:
- “(b) enters, departs from, transits through or remains in any country; or”;
- (b) by the substitution in subsection (1) for the words following paragraph (c) of the following words:
- “for the benefit of, at the direction of, or in association with any entity engaging in a terrorist activity, and who knows or ought reasonably to have known or suspected, that such act was done for the purpose of joining, supporting or in any other manner enhancing the ability of such entity to engage in a terrorist activity, is guilty of the offence associated with a terrorist activity.”;
- (c) by the substitution in subsection (2) for paragraph (a) of the following paragraph:
- “(a) provides or offers to provide any—
- (i) weapon; or
 - (ii) software or hardware tool,
- to any other person for use by or for the benefit of an entity;”;
- (d) by the substitution in subsection (2) for paragraph (d) of the following paragraph:
- “(d) recruits any entity, or compels, intimidates, forces, coerces, induces or causes any person, including a vulnerable person, to join an entity;”;

- (e) by the substitution in subsection (2) for the words following paragraph (f) of the following words:
 “connected with the engagement in a terrorist activity, and who knows or ought reasonably to have known or suspected that such weapons, software or hardware tools, soliciting, training, recruitment, joining, document or thing is so connected, is guilty of an offence connected with terrorist activities.”; and
- (f) by the addition of the following subsections:
 “(3) For the purposes of this section, training includes, but is not limited to, training in any of the following skills:
 (a) The making, handling or use of any explosive or other lethal device, or any poisonous or noxious substance, including any substance, mixture of substance, product or material contemplated in section 2(1) of the Hazardous Substances Act;
 (b) the use of any method or technique for doing anything else that is capable of being done—
 (i) for the purposes of terrorism; or
 (ii) in connection with the commission or preparation of a terrorist activity or a Convention offence; or
 (c) the design or adaptation for the purposes of terrorism of any method or technique for doing anything in connection with the commission or preparation of a terrorist activity or Convention offence.
 (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.
 (5) It is an offence to—
 (a) establish any entity engaging in or planning to engage in a terrorist activity, or to support such an entity; or
 (b) belong to or become a member of an entity contemplated in paragraph (a).”.

Insertion of section 3A in Act 33 of 2004

3. The following section is hereby inserted in the principal Act after section 3:

“Prohibition of publication with unlawful terrorism related content

- 3A.** (1) For the purposes of this section and section 24B, “unlawful terrorism related content” means content which—
- (a) is intended to directly or indirectly encourage or otherwise induce the commission, preparation or instigation of any offence under this Act;
 (b) is intended to provide assistance in the commission or preparation of any offence under this Act; or
 (c) when contained in a statement, article or record—
 (i) at the time it was published or caused to be published, is intended to be understood by any person to whom it has or may become available, as a direct or indirect inducement to commit, prepare or instigate any offence under this Act;
 (ii) is reckless as to whether any person will be directly or indirectly induced to commit, prepare or instigate any offence under this Act; or
 (iii) contains information which—
 (aa) is intended to be useful to any one or more of those persons in the commission or preparation of an offence under this Act; and
 (bb) is in a form or context which is likely to be perceived by any person as being wholly or mainly for the purpose referred to in item (aa).
- (2) A person commits an offence if he or she, in respect of a publication with unlawful terrorism related content—
 (a) publishes, distributes or circulates such a publication;
 (b) gives, sells or lends such a publication;

- (c) offers such a publication for sale or loan;
 - (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;
 - (e) transmits the contents of such a publication electronically;
 - (f) has such a publication in his or her possession for any purpose contemplated in paragraphs (a) to (e).
- (3) It is an offence to publish a statement which has unlawful terrorism-related content where that statement is published or caused to be published in the course of, or in connection with, the provision or use of a service provided electronically.
- (4) For the purposes of subsections (2) and (3), references to the electronic publication with unlawful terrorism related content includes such publication on the internet and social media platforms.
- (5) A person charged with committing an offence under this section and section 3(2)(e) may raise as a defence—
- (a) 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
 - (b) the person’s action or possession was for the purposes of—
 - (i) carrying out work as a journalist; or
 - (ii) academic research.”.

Amendment of section 4 of Act 33 of 2004

4. Section 4 of the principal Act is hereby amended—

- (a) by the substitution in subsection (1) for paragraph (i) of the following paragraph:
 - “(i) solicits or facilitates the acquisition, collection, use or provision of property, or the provision of any financial or other service, or the provision of economic support,”;
- (b) by the deletion in subsection (1)(i) of the word “or” at the end of subparagraph (ii);
- (c) by the insertion in subsection (1)(i) after subparagraph (ii) of the following subparagraph:
 - “(iiA) for the benefit of, or on behalf of, or at the direction of, or under the control of, a specific entity identified in an order made under section 23; or”;
- (d) by the substitution in subsection (1)(i) for subparagraph (iii) of the following subparagraph:
 - “(iii) for the benefit of a specific entity identified **[in a notice issued by the President under section 25]** pursuant to a Resolution of the United Nations Security Council relating to the identification of entities—
 - (aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitate the commission of any terrorist and related activity; or
 - (bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities,
 and which are 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 section 26A(3) of the Financial Intelligence Centre Act,”;
- (e) by the deletion in subsection (2)(a) of the word “or” at the end of subparagraph (ii);
- (f) by the insertion in subsection (2)(a) after subparagraph (ii) of the following subparagraph:
 - “(iiA) for the benefit of, or on behalf of, or at the direction of, or under the control of, a specific entity identified in an order made under section 23; or”;

- (g) by the substitution in subsection (2)(a) for subparagraph (iii) of the following subparagraph:
- “(iii) for the benefit of a specific entity identified [**in a notice issued by the President under section 25**] pursuant to a Resolution of the United Nations Security Council relating to the identification of entities—
- (aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitates the commission of any terrorist and related activity; or
- (bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities, and which are 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 section 26A(3) of the Financial Intelligence Centre Act; or”;
- (h) by the substitution in subsection (3) for paragraph (a) of the following paragraph:
- “(a) facilitating the retention or control of such property by or on behalf of, or for the benefit of—
- (i) an entity which commits or attempts to commit or facilitates the commission of a specified offence; [**or**]
- (iA) a specific entity identified in an order made under section 23; or
- (ii) a specific entity identified [**in a notice issued by the President under section 25**] pursuant to a Resolution of the United Nations Security Council relating to the identification of entities—
- (aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitates the commission of any terrorist and related activity; or
- (bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities, and 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 section 26A(3) of the Financial Intelligence Centre Act;”.

Insertion of section 4A in Act 33 of 2004

5. The following section is hereby inserted in the principal Act after section 4:

“Offence relating to attempt to leave Republic

4A. Any person who directly or indirectly, by any means or method, attempts to leave the Republic for the purpose of committing an act or omission outside the Republic that, if committed in the Republic, would be an offence under this or any other Act for the benefit of, at the direction of, or in association with a terrorist group, is guilty of an offence.”.

Amendment of section 5 of Act 33 of 2004

6. Section 5 of the principal Act is hereby amended by the substitution for the words preceding paragraph (a) of the following words:

“Any person who intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of private or public use, a state or government facility, a public transport facility, a public transportation system, or an infrastructure facility, with the purpose, amongst others, of causing—”.

Amendment of section 6 of Act 33 of 2004

7. Section 6 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“Offences relating to hijacking, destroying or endangering safety of [a] fixed platform”; and

(b) by the addition of the following subsection, the existing section becoming subsection (1):

“(2) Any person who, for the purpose of intimidating a population, or to compel a government or an international organisation to do or to abstain or refrain from doing any act intentionally—

(a) uses against or on a fixed platform or discharges from a fixed platform any explosive or other lethal device in a manner that causes or is likely to cause death or serious injury or damage;

(b) discharges from a fixed platform, oil, liquefied natural gas, or another hazardous, poisonous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

(c) uses any other means to disable, damage or render useless a fixed platform,

is guilty of an offence.”.

Amendment of section 7 of Act 33 of 2004

8. Section 7 of the principal Act is hereby amended by the substitution for the heading of the following heading:

“Offences relating to taking [a] hostage”.

Amendment of section 9 of Act 33 of 2004

9. Section 9 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“Offences relating to hijacking [an] aircraft”; and

(b) by the substitution for the words preceding paragraph (a) of the following words:

“Any person who intentionally, by force or threat thereof, or by any other form of intimidation, or any other means, seizes or exercises control of an aircraft and with the purpose of—”.

Amendment of section 10 of Act 33 of 2004

10. Section 10 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading:

“Offences relating to hijacking [a] ship or endangering safety of maritime navigation”; and

(b) by the addition of the following subsections, the existing section becoming subsection (1):

“(2) For purposes of this section—

(a) “radioactive material” means radioactive material as defined in section 1 of the Nuclear Energy Act, and a Group IV hazardous substance as defined in section 1 of the Hazardous Substances Act;

(b) “source material” means source material as defined in section 1 of the Nuclear Energy Act; and

(c) “special nuclear material” means special nuclear material as defined in section 1 of the Nuclear Energy Act.

(3) Any person who unlawfully and intentionally performs any of the following acts commits an offence:

(a) Intimidating a population, or compelling a government or an international organisation, to do or to abstain from doing any act by—

(i) using against or on a ship, or discharges from a ship any explosive, radioactive material or weapon of mass destruction as defined in the Non-Proliferation of Weapons of Mass

- Destruction Act, or a hazardous substance referred to in section 2 of the Hazardous Substances Act, in a manner that causes or is likely to cause death or serious injury or damage;
- (ii) discharging from a ship, oil, liquefied natural gas, or poisonous or noxious substance, in such quantity or concentration that causes or is likely to cause death or serious injury or damage;
 - (iii) using a ship in a manner that causes death or serious injury or damage;
 - (iv) threatening to commit an offence as contemplated in subparagraph (i) or (ii); or
 - (v) using any other means to interfere with the safe navigation of a ship, including interference with the navigation or information system thereof; or
- (b) transporting on board a ship—
- (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organisation to do or to abstain or refrain from doing any act;
 - (ii) any weapon of mass destruction, as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, knowing it to be such a weapon;
 - (iii) any source material, special nuclear material, equipment, or material especially designed or prepared for the processing, use or production of special nuclear material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement; or
 - (iv) any equipment, materials, software, or related technology that significantly contributes to the design, manufacture or delivery of a weapon of mass destruction, as defined in section 1 of the Non-Proliferation of Weapons of Mass Destruction Act, with the intention that it will be used for such purpose.
- (4) For the purposes of this section—
- (a) it is not an offence to transport an item, material, software or related technology referred to in subsection (3)(b)(ii) or (iv), if such item, material, software or related technology is transported subject to control in accordance with section 13 of the Non-Proliferation of Weapons of Mass Destruction Act; and
 - (b) it is not an offence to transport an item or material referred to in subsection (3)(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where—
 - (i) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to the Republic's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons; and
 - (ii) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a *State Party to the Treaty on the Non-Proliferation of Nuclear Weapons* and the holding of such weapon or device is not contrary to the Republic's obligations under that Treaty.
- (5) Any person who unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence in terms of this section and intending to assist that person to evade criminal prosecution, is guilty of an offence.”.

Substitution of section 11 of Act 33 of 2004

11. The following section is hereby substituted for section 11 of the principal Act:

“Offences relating to harbouring or concealment of persons committing specified offences

11. Any person who harbours or conceals any person, whom he or she knows, or ought reasonably to have known or suspected, to be a person who has committed **[a specified offence, as referred to in paragraph (a) of the definition of “specified offence”]** 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, or who is likely to commit such an offence, is guilty of an offence.”.

Amendment of section 12 of Act 33 of 2004

12. Section 12 of the principal Act is hereby amended—

(a) by the substitution for the heading of the following heading: 15

“Duty to report presence of person suspected of intending to commit or having committed [an] offence and failure to so report”; and

(b) by the addition of the following subsections:

“(9) For the purposes of this Act, 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 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. 20

(10) Subsection (9) does not apply to the common law right to legal professional privilege as between an attorney and the attorney’s client in respect of communications made in confidence between— 25

(a) the attorney and the attorney’s client for the purposes of legal advice or litigation which is pending or which has commenced; or

(b) a third party and an attorney for the purposes of litigation which is pending or has commenced.”. 30

Amendment of section 13 of Act 33 of 2004

13. Section 13 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph: 35

“(a) Any person who, with the intention of inducing in a person anywhere in the world a false belief that **[a substance, thing or device is, or contains, or is likely to be, or contains a noxious substance or thing or an explosive or other lethal device—**

(i) places that substance, thing or device in any place; or 40

(ii) sends that substance, thing or device from one place to another, by post, rail or any other means whatsoever] an offence under sections 2 and 3, and sections 5 to 10 will be committed, is guilty of an offence.”; and

(b) by the addition to subsection (1) of the following paragraphs: 45

“(c) Any person who directly or indirectly communicates any information which he or she knows, or ought reasonably to have known or suspected, or believes to be false and which involves threats of violence or of any other offence that will be committed at any place with a view to intimidate any person to avoid certain places or to divert police resources in order to commit a crime under this Act, is guilty of an offence. 50

(d) If any police resources have been diverted as a result of a crime committed under paragraph (c), the offender is liable for any costs proven by the State in that regard. 55

(e) Upon conviction of an offence under paragraph (c), the court may order the accused, in addition to any fine or imprisonment imposed by the court, to pay the costs related to such diversion of resources.”.

Amendment of section 15 of Act 33 of 2004

14. Section 15 of the principal Act is hereby amended— 5
- (a) by the substitution in subsection (1) for the words preceding paragraph (a) of the following words: 5
- “A court of the Republic has jurisdiction and the Directorate may, upon information about the commission of any offence mentioned in this subsection, initiate an investigation, or the National Director may institute a prosecution in respect of [any specified offence as defined in paragraph (a) of the definition of “specified offence”] 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, if—”; 10 15
- (b) by the insertion after subsection (2) of the following subsection: 15
- “(2A) Any person referred to in subsection (2) may be arrested to appear in court pending a determination on the issue of extradition.”;
- (c) by the deletion in subsection (3) of the word “or” at the end of paragraph (a);
- (d) by the addition to subsection (3) of the following paragraphs: 20
- “(c) at the place where the accused was arrested or charged in the Republic;
- (d) at the place where the victim resided; or
- (e) at the place where the police registered the complaint, whichever is the most applicable to the facts of the particular case.”; 25
- (e) by the insertion after subsection (3) of the following subsection: 25
- “(3A) Where it is not possible to obtain a warrant of arrest for an accused on the grounds provided for in section 43(1)(b) of the Criminal Procedure Act, the magistrate of the district where the police registered the complaint may issue the warrant.”; 30
- (f) by the substitution for subsection (6) of the following subsection: 30
- “(6) Where it appears on reasonable grounds from the investigation referred to in subsection (5) that extradition or criminal proceedings may be instituted against such person, that person may be arrested as contemplated in section 40(1) of the Criminal Procedure Act[, 1977 (Act No. 51 of 1977)], in order to ensure his or her presence at such proceedings.”; and 35
- (g) by the addition of the following subsections: 35
- “(10) When a person who is—
- (a) not a citizen of the Republic; 40
- (b) not habitually resident in the Republic; or
- (c) a stateless person,
- is arrested by a member of the South African Police Service or the National Commissioner or the National Head of the Directorate for an alleged contravention of a Convention Offence, the Secretary-General of the United Nations or the government or governments with established jurisdiction must immediately be notified, through the diplomatic channel, of the arrest. 45
- (11) The National Commissioner or the National Head of the Directorate may consider to inform any other interested government about a person in custody and the circumstances which warranted that person’s arrest. 50
- (12) A person referred to in subsection (10) must as soon as possible, upon arrest, be informed of his or her rights to— 55
- (a) request that the relevant government be informed of his or her arrest;
- (b) have access to communicate with a consular representative of the relevant government; and
- (c) expect that any communication addressed to the relevant consular post about the arrested person is forwarded by the relevant authorities without delay.”. 60

Amendment of section 16 of Act 33 of 2004

15. Section 16 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No prosecution under Chapter 2 may be instituted without the written authority of the National Director, except in the case of a prosecution under section 13 which is not linked to any other offence under this Act, in which case the written authority of the relevant Director of Public Prosecutions must be obtained before the institution of a prosecution.” 5

Amendment of section 17 of Act 33 of 2004

16. Section 17 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) If in any proceedings in a court of law any question arises as to whether or not any person is an internationally protected person, or is pursuant to international law entitled to special protection from any attack on his or her person, freedom or dignity, a certificate under the hand or issued under the authority of the Director General of the Department [of Foreign Affairs] responsible for International Relations and Cooperation, stating any fact relating to that question, is *prima facie* evidence of that fact.” 15

Amendment of section 18 of Act 33 of 2004

17. Section 18 of the principal Act is hereby amended— 20

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

“(c) section 4 or 4A, is liable—

- (i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine not exceeding R100 million or to imprisonment for a period not exceeding [15] 30 years; 25
- (ii) in the case of a sentence to be imposed by any magistrate’s court, to a fine not exceeding R250 000,00, or to imprisonment for a period not exceeding five years;”;

(b) by the substitution in subsection (1)(d) for the words preceding subparagraph (i) of the following words: 30

“section 13(1)(a), [or] (b) or (c) is liable—”;

(c) by the substitution in subsection (1)(d) for subparagraph (i) of the following subparagraph:

“(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding [10] 15 years;”;

(d) by the substitution in subsection (1)(e) for the words preceding subparagraph (i) of the following words:

“section 3A(2) or (3), or 12(2), is liable—”;

(e) by the substitution in subsection (1)(e) for subparagraph (i) of the following subparagraph:

“(i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to imprisonment for a period not exceeding [five] 15 years;”;

(f) by the deletion in subsection (1) of the full stop at the end of paragraph (f) and the insertion of a semi-colon and the word “and”; and

(g) by the addition to subsection (1) of the following paragraph:

“(g) section 24B(12) or (13), is liable to a fine or imprisonment not exceeding one year, or to both such fine and imprisonment.” 50

Substitution of section 23 of Act 33 of 2004

18. The following section is hereby substituted for section 23 of the principal Act:

“Freezing order

23. (1) A High Court may, on *ex parte* application by the National Director to a judge in chambers, subject to such conditions and exceptions as may be specified in the order, make an order—
- (a) prohibiting any person from engaging in any conduct, or dealing in any manner with any property owned or controlled by or on behalf of, or at the direction of, or otherwise associated with an entity referred to in subsection (2), and may include an order to freeze any such property;
 - (b) obliging any person to cease any conduct in respect of any property referred to in paragraph (a); or
 - (c) prohibiting any person from performing any act contemplated in section 4 for the benefit of, or on behalf of, or at the direction of, or under the control of, an entity referred to in subsection (2).
- (2) An order referred to in subsection (1) may be made in respect of—
- (a) any entity, where there are reasonable grounds to believe that the entity has committed, or attempted to commit, participated in or facilitated the commission of a specified offence; or
 - (b) a specific entity identified in a notice pursuant to a Resolution of the United Nations Security Council relating to the identification of entities—
 - (i) that has committed, or attempted to commit, any terrorist and related activity, or participates in or facilitates the commission of any terrorist and related activity; or
 - (ii) against which Member States of the United Nations must take the actions specified in the Resolution in order to combat or prevent terrorist and related activities,
 and that are 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 section 26A(3) of the Financial Intelligence Centre Act.
- (3) A High Court may make an interim order under subsection (1) pending its final determination of an application for such an order.
- (4) A High Court making an order under subsection (1) may make any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order, including—
- (a) appointing a *curator bonis*, subject to the directions of that High Court, to do any one or more of the following on behalf of a person affected by that order:
 - (i) To assume control over the property;
 - (ii) to take care of the said property;
 - (iii) to administer the said property and to perform any act necessary for that purpose;
 - (iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
 - (v) to dispose of property if it is not economically viable to administer it or for any other reason it is not economically possible to assume control and take care thereof;
 - (b) ordering any person holding property, subject to an order referred to in subsection (1), to immediately surrender any such property into the custody of the *curator bonis*; and
 - (c) relating to the payment of the fees and expenditure of the *curator bonis*.
- (5) The National Director must—
- (a) by publication in a national newspaper and the *Gazette*, give notice that an order under subsection (1) has been made; and

- (b) maintain on the internet website of the National Prosecuting Authority, a record of all orders made under subsection (1).
- (6) No action, whether criminal or civil, lies against any person complying in good faith with an order made under subsection (1).”.

Amendment of section 24 of Act 33 of 2004

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19. Section 24 of the principal Act is hereby amended—

- (a) by the substitution for the heading of the following heading:
“Cordoning off, stop and search of vehicle [and], person and premises”;
- (b) by the substitution for subsection (1) of the following subsection: 10
 “(1) If, on written request under oath to a judge in chambers by a police official of or above the rank of [**director**] Brigadier, it appears to the judge that it is necessary in order to prevent any terrorist or related activity, the judge may issue a warrant for the cordoning off, and stopping and searching of vehicles, [**and**] persons and premises, with a view to preventing such terrorist or related activity, in a specified area, and such warrant applies for the period specified therein, which period may not exceed 10 days.”; 15
- (c) by the substitution for subsection (2) of the following subsection: 20
 “(2) Under [**such**] a warrant obtained in terms of subsection (1), any police official who identifies himself or herself as such, may cordon off the specified area for the period specified in the warrant and stop and search any vehicle, [**or**] person or premises in that area, for articles or things which could be used or have been used for or in connection with the preparation for or the commission or instigation of any terrorist or related activity.”; and 25
- (d) by the substitution for subsections (3) and (4) of the following subsections, respectively: 30
 “(3) The police official may seize any article or thing contemplated in subsection (2), and Chapter 2 of the Criminal Procedure Act[, **1977 (Act No. 51 of 1977)**,] applies with the necessary changes required by the context in respect of any such article or thing.
 (4) Section 29 of the Criminal Procedure Act[, **1977 (Act No. 51 of 1977)**,] applies in respect of the powers conferred upon police officials in terms of this section.”. 35

Insertion of sections 24A and 24B in Act 33 of 2004

20. The following sections are hereby inserted in the principal Act after section 24:

“Application for decryption direction

24A. An officer in the Directorate, who is commissioned as an officer in terms of section 33 of the South African Police Service Act, who by means of the lawful exercise in terms of and in accordance with a statutory power, seizes, detains, inspects, searches or otherwise comes into the possession of any information, document, computer software, hardware or electronic storage instrument or equipment which requires a decryption key, as defined in section 1 of the Regulation of Interception of Communications and Provision of Communication-related Information Act— 40
 (a) in order to decrypt the contents thereof and to gain access thereto; and 45
 (b) such decryption key is in the possession of any person, such an officer may, if the imposition of a decryption direction is required for the purpose of preventing or detecting any crime committed under this Act, apply for a decryption direction in terms of section 21 of the Regulation of Interception and Provision of Communication-related Information Act. 50

Order to disable access to internet or social media site

24B. (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 an order against an electronic communications service provider to remove or disable access to a publication on an internet or social media site with unlawful terrorism-related content, within the period determined in the order from the date that such order is served upon the electronic communications service provider. 5

(2) An application brought in terms of subsection (1) must be in writing and must— 10

(a) comprise the following:

- (i) The identity of the applicant;
- (ii) the details of the electronic communications service provider which provides or hosts the internet service or social media site on which the publication with unlawful terrorism related content had been posted; and 15
- (iii) an electronic copy of or description of the publication with the alleged unlawful terrorism related content;

(b) specify why the publication is regarded as a publication with unlawful terrorism related content as defined in section 3A(1); and 20

(c) set out the possible offences which may result from providing access to a publication with unlawful terrorism related content.

(3) The 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 additional evidence it deems fit, including oral evidence or evidence by affidavit, which must form part of the record of proceedings. 25

(4) If the court is satisfied that there is *prima facie* evidence that an electronic communications service provider provides access to an internet or social media site with unlawful terrorism-related content which may constitute an offence as contemplated in section 3A(3), the court may issue the order applied for in terms of subsection (1). 30

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

(a) indicate that, in the opinion of the court, the relevant publication constitutes unlawful terrorism-related content; 35

(b) require the relevant electronic communications service provider to secure that the publication with unlawful terrorism related content, so far as it is so related, is not available to the public or is modified so as to no longer be so related;

(c) warn the relevant electronic communications service provider that a failure to comply with the order within the period specified therein will result in the relevant publication being regarded as having its endorsement; and 40

(d) explain how, under section 3A(3), the relevant electronic communications service provider may become criminally liable by virtue of its failure to comply with the order. 45

(6) Except in a case where the court determines otherwise, an order under subsection (1) may be served upon an electronic communications service provider by a law enforcement officer in accordance with the applicable rules of court. 50

(7) Where the court is satisfied that service cannot be effected in any manner prescribed in the rules of court, the court may make an order allowing service to be effected in a manner specified in such order.

(8) An order under subsection (1) is of force and effect from the time it is issued by the court and has been served upon the relevant electronic communications service provider. 55

(9) An electronic communications service provider may, within 30 calendar days after the order has been served, apply to the relevant court for the setting aside or amendment of the order referred to in subsection (1).

(10) The court must, as soon as is reasonably possible, consider an application submitted to it in terms of subsection (9) and may, for that purpose, consider such additional evidence as it deems fit, including oral 60

evidence or evidence by affidavit, which shall form part of the record of the proceedings.

(11) The court may, for purposes of subsection (10), 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.

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

(13) Any person who is subpoenaed in terms of subsection (11) 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.

(14) The provisions in respect of appeal and review as provided for in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and the Superior Courts Act, 2013 (Act No. 10 of 2013), apply to proceedings in terms of this section.”.

Repeal of sections 25 and 26 of Act 33 of 2004

21. Sections 25 and 26 of the principal Act are hereby repealed.

Amendment of section 27 of Act 33 of 2004

22. Section 27 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsections:

“(1A) Any 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 and has 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 by the Director of the Financial Intelligence Centre under section 26A(3) of the Financial Intelligence Centre Act.

(1B) 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.”.

Amendment to Preamble of Act 33 of 2004

23. The Preamble of the principal Act is hereby amended—

(a) by the deletion in the sixth paragraph of the word “and” at the end of paragraph (h);

(b) by the addition to the sixth paragraph of the following paragraphs:

“(j) the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention)*, adopted at Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005;

(k) the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (SUA Protocol)*, adopted at Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005;

(l) the *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted by the United Nations General Assembly on 13 April 2005. The Republic became a Party thereto by ratification on 9 May 2007;

(m) the *Convention on the Physical Protection of Nuclear Material*, adopted in Vienna on 26 October 1979. The Republic became a Party thereto by ratification on 17 September 2007; and

- (n) the *Treaty on the Non-Proliferation of Nuclear Weapons*, adopted at New York on 12 June 1968. The Republic acceded thereto on 10 July 1991;”;
- (c) by the substitution in the seventh paragraph for paragraphs (a) and (b) of the following paragraphs: 5
- “(a) The Convention [for] on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted at Rome on 10 March 1988 Relating to International Civil Aviation, adopted at Beijing on 10 September 2010 and signed on behalf of the Republic on 26 September 2013; and 10
- (b) the *Protocol [for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, adopted at Rome on 10 March 1988; and] Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, adopted at Beijing on 10 September 2010, and signed on behalf of the Republic on 26 September 2013;”;
- (d) by the deletion in the seventh paragraph of paragraph (c);
- (e) by the insertion after the seventh paragraph of the following paragraph: 20
- “**AND WHEREAS** the following international instruments have been adopted, but the Republic has not signed and is not a Party thereto:
- (a) *The Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, adopted at Montreal on 4 April 2014;
- (b) the *Amendment to the Convention on the Physical Protection of Nuclear Material*, adopted at Vienna on 8 July 2005; 25
- (c) the *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, adopted at London on 14 October 2005; and
- (d) the *Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, adopted at London on 14 October 2005;”;
- (f) by the substitution for the eighth paragraph of the following paragraph: 30
- “**AND WHEREAS** the Republic of South Africa has become a Party—
- (a) by ratification, on 7 November 2002, to the *Convention on the Prevention and Combating of Terrorism*, adopted by the 35
- Organisation of African Unity at Algiers on 14 July 1999; and
- (b) by ratification, on 25 March 2007, to the *Protocol to the Organisation of African Unity Convention on the Prevention and Combating of Terrorism*, adopted by the Assembly of the African 40
- Union at Addis Ababa on 8 July 2004;”.

Amendment of arrangement of sections of Act 33 of 2004

24. The arrangement of sections of the principal Act is hereby amended—
- (a) by the insertion after item 3 of the following item: 45
- “3A. Prohibition of publication with unlawful terrorism related content”;
- (b) by the insertion after item 4 of the following item:
- “4A. Offence relating to attempt to leave Republic”;
- (c) by the substitution for item 6 of the following item:
- “6. Offences relating to hijacking, destroying or endangering safety of [a] fixed platform”; 50
- (d) by the substitution for item 7 of the following item:
- “7. Offences relating to taking [a] hostage”;
- (e) by the substitution for item 9 of the following item:
- “9. Offences relating to hijacking [an] aircraft”;
- (f) by the substitution for item 10 of the following item: 55
- “10. Offences relating to hijacking [a] ship or endangering safety of maritime navigation”;
- (g) by the substitution for item 12 of the following item:
- “12. Duty to report presence of person suspected of intending to commit or having committed [an] offence and failure to so report”; 60

- (h) by the substitution for item 24 of the following item:
 “24. Cordoning off, stop and search of vehicle **[and]**, person and premises”;
- (i) by the insertion after item 24 of the following items:
 “24A. Application for decryption direction 5
24B. Order to disable access to internet or social media site”; and
- (j) by the deletion of items 25 and 26.

Amendment and repeal of laws

25. The laws set out in the Schedule are hereby amended or repealed to the extent indicated in the fourth column of the Schedule. 10

Short title and commencement of Act

26. This Act is called the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2022, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

SCHEDULE

SCHEDULE OF LAWS AMENDED OR REPEALED: SECTION 25

Act no.	Year	Title	Extent of amendment or repeal
67	1962	Extradition Act	<p>1. The amendment of section 22 by the substitution for subsection (1) of the following subsection:</p> <p>“(1) Notwithstanding the provisions of section 15, a request for extradition based on the [offences referred to in section 4 or 5] <u>offence of terrorism referred to in section 2, an offence associated or connected with terrorist activities referred to in section 3, a Convention offence, or an offence referred to in section 11, 13 or 14 in so far as it relates to the aforementioned sections of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004</u>, may not be refused on the sole ground that it concerns a political offence, or an offence connected with a political offence or an offence inspired by political motives, or that it is a fiscal offence.”.</p>
51	1977	Criminal Procedure Act	<p>1. The amendment of section 18 by the insertion in subsection (1) after paragraph (f) of the following paragraph:</p> <p>“(fA) <u>a Convention offence as defined in section 1 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004), the offence of terrorism referred to in section 2 of the said Act and an offence associated or connected with terrorist activities referred to in sections 3, 3A, 13 or 14 of the said Act.</u>”.</p> <p>2. The amendment of section 21 by the insertion after subsection (1) of the following subsection:</p> <p>“(1A) <u>Notwithstanding any other law, an application for a warrant under this section may be made to any magistrate or justice, irrespective of whether or not the place of execution of the warrant or the place where the alleged crime has been committed falls within the jurisdiction of such magistrate or justice, in respect of the following offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004)—</u></p>

Act no.	Year	Title	Extent of amendment or repeal
			<p>(a) <u>the offence of terrorism referred to in section 2 of the said Act;</u></p> <p>(b) <u>an offence associated or connected with terrorist activities referred to in section 3 of the said Act;</u></p> <p>(c) <u>an offence referred to in section 3A of the said Act;</u></p> <p>(d) <u>a Convention offence as defined in section 1 of the said Act; or</u></p> <p>(e) <u>an offence referred to in section 13 or 14 of the said Act (in so far as it relates to the aforementioned sections).”.</u></p> <p>3. The amendment of section 25 by the insertion after subsection (1) of the following subsection: “(1A) <u>Notwithstanding any other law, an application for a warrant under this section in respect of the offences listed in section 21(1A)(a) to (d) may be made to any magistrate or justice, irrespective of whether or not the place of execution of the warrant, or the place where the alleged crime has been committed falls within the jurisdiction of such magistrate or justice.”.</u></p> <p>4. The amendment of section 43 by the insertion after subsection (1) of the following subsection: “(1A) <u>Notwithstanding any other law, an application for a warrant under this section in respect of the offences listed in section 21(1A)(a) to (d) may be made to any magistrate or justice, irrespective of whether or not the place of execution of the warrant, or the place where the alleged crime has been committed falls within the jurisdiction of such magistrate or justice.”.</u></p> <p>5. The amendment of Schedule 1 by the addition of the following item: “<u>Offences referred to in Chapter 2 of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004).”.</u></p> <p>6. The amendment of Schedule 2 by the addition to Part II and III of the following item: “<u>Any of the following offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004):</u> (a) <u>The offence of terrorism referred to in section 2 of the said Act;</u></p>

Act no.	Year	Title	Extent of amendment or repeal
			<p>(b) <u>an offence associated or connected with terrorist activities referred to in section 3 or 3A of the said Act;</u></p> <p>(c) <u>a Convention offence as defined in section 1 of the said Act; or</u></p> <p>(d) <u>an offence referred to in section 13 or 14 of the said Act (in so far as it relates to the aforementioned sections).”.</u></p> <p>7. The amendment of Schedule 5 by the substitution for the twelfth item of the following item: “The offences referred to in section 3, 3A, 4 [(2) or (3)], 11, 13 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004.”.</p> <p>8. The amendment of Schedule 6 by the substitution for the sixth item of the following item: “The offences referred to in section 2, 3(2)(a), 3A, 4 (1), 4A, 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, [section 2 (1) and (2) of the Civil Aviation Offences Act, 1972 (Act No. 10 of 1972)] sections 133 or 142(2A), read with section 142(6), of the Civil Aviation Act, 2009 (Act No. 13 of 2009), section 26(1)(j) of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act No. 87 of 1993) and section 56(1)(h) of the Nuclear Energy Act, 1999 (Act No. 46 of 1999).”.</p>
72	1982	Intimidation Act	<p>1. The amendment of section 1 by the deletion of subsections (1)(b) and (2).</p> <p>2. The repeal of section 1A.</p>

Act no.	Year	Title	Extent of amendment or repeal
130	1998	Refugees Act	<p>1. The amendment of section 4 by the insertion in subsection (1) after paragraph (a) of the following paragraph: “(aA) has committed any of the following offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004): (i) <u>The offence of terrorism referred to in section 2 of the said Act;</u> (ii) <u>an offence associated or connected with terrorist activities referred to in section 3 or 3A of the said Act;</u> (iii) <u>any Convention offence as defined in section 1 of the said Act; or</u> (iv) <u>an offence referred to in section 13 or 14 of the said Act (in so far as it relates to the aforementioned sections).”.</u></p>
46	1999	Nuclear Energy Act	<p>1. The amendment of section 34A(2) by the substitution for paragraph (a) of the following paragraph: “(a) intentionally and without lawful authority, receive, possess, use, transfer, alter, dispose of or disperse, nuclear material, <u>or nuclear-related equipment and material,</u> which causes or is likely to cause death or serious bodily injury to any person or substantial damage to property <u>or to the environment;”.</u></p>
38	2001	Financial Intelligence Centre Act	<p>1. The amendment of section 26A by the deletion of subsection (2). 2. The amendment of section 28A— (a) by the deletion in subsection (1) of paragraph (b); and (b) by the deletion in subsection (3) of paragraph (a).</p>

**MEMORANDUM ON THE OBJECTS OF THE PROTECTION OF
CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RE-
LATED ACTIVITIES AMENDMENT BILL, 2022**

1. BACKGROUND

- 1.1 International law requires national legislation to be aligned with international instruments relating to counter-terrorism and binding Chapter 7 (of the United Nations Charter) Resolutions of the United Nations Security Council.
- 1.2 The Republic enacted and implemented the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act No. 33 of 2004) (“principal Act”). The principal Act was regarded as being fit to serve as model legislation regarding counter-terrorism during the 2007 compliance visit by the United Nations Counter-Terrorism Executive Directorate (“UNCTED”). During the compliance visit to the Republic in 2018, the need to make provision in respect of Foreign Terrorist Fighters in the principal Act was expressed by the UNCTED. The UNCTED further expressed—
 - (a) 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;
 - (b) the lack of any reference to administrative sanctions for violating asset-freezing orders issued pursuant to section 23; and
 - (c) 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.

2. OBJECTS OF BILL

- 2.1 The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill, 2022 (“Bill”), seeks to update the principal Act to developments in international law, to give effect to certain Constitutional Court judgments and to address challenges experienced with conducting investigations and prosecutions. 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.
- 2.2 The proposals involve the amendment of certain definitions in the principal Act, the insertion of new offences related to maritime and aviation security and addressing the problem of foreign terrorist fighters. It proposes to shift the responsibility for the publication of United Nations Security Council Resolutions in a notice in the *Gazette*, and other appropriate means, to the Minister of Finance in terms of the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001) (“Financial Intelligence Centre Act”), and the Director of the Financial Intelligence Centre. It simplifies the interpretation of the jurisdiction provision and expands the extradition provisions to all terrorism-related offences in the principal Act.
- 2.3 There are presently 19 international instruments, and one regional (African Union) instrument on counter-terrorism, of which the following were adopted after the commencement of the principal Act:
 - (a) The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (“SUA Convention”), adopted in Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005;
 - (b) the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf* (“SUA Protocol”), adopted in Rome on 10 March 1988. The Republic became a Party thereto by accession on 8 July 2005;

- (c) the *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted by the United Nations General Assembly on 13 April 2005. The Republic became a Party thereto by ratification on 9 May 2007;
- (d) the *Convention on the Physical Protection of Nuclear Material*, adopted in Vienna on 26 October 1979. The Republic became a Party thereto by ratification on 17 September 2007;
- (e) the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, adopted in Beijing on 10 September 2010 and signed on behalf of the Republic on 26 September 2013;
- (f) the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft*, adopted in Beijing on 10 September 2010 and signed on behalf of the Republic on 26 September 2013;
- (g) the *Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft*, adopted in Montreal on 4 April 2014;
- (h) the *Amendment to the Convention on the Physical Protection of Nuclear Material*, adopted in Vienna on 8 July 2005;
- (i) the *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, adopted in London on 14 October 2005;
- (j) the *Protocol to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, adopted in London on 14 October 2005; and
- (k) the *Protocol to the Organisation of African Unity Convention on the Prevention and Combating of Terrorism*, adopted by the Assembly of the African Union in Addis Ababa on 8 July 2004.

2.4 In practice, the publication in terms of the Act of notifications that the UN Security Council has listed an entity as a terrorist entity or connected therewith by Proclamation in the *Gazette* by the President has proven to be a cumbersome process, also delaying the publication of such notices. It is proposed in the Bill that all Resolutions of the United Nations Security Council, which include financial sanctions, must be published by the Minister of Finance in accordance with section 26A(1) of the Financial Intelligence Centre Act.

3. SUMMARY OF BILL

3.1 *Ad clause 1*

This clause proposes the substitution, deletion and insertion of certain definitions in section 1 of the principal Act.

3.2 *Ad clause 2*

Clause 2 proposes to amend section 3 of the principal Act 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.

3.3 *Ad clause 3*

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

3.4 *Ad clause 4*

This clause proposes the amendment of section 4 of the principal Act 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.

3.5 *Ad clause 5*

This clause seeks to insert section 4A 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.

3.6 *Ad clause 6*

Clause 6 seeks to amend section 5 of the principal Act by extending the offence related to terrorist bombings to private places.

3.7 *Ad clause 7*

Clause 7 proposes to amend section 6 of the principal Act, by inserting additional offences in accordance with international law.

3.8 *Ad clause 8*

Clause 8 proposes to amend the heading to section 7 in accordance with legislative drafting practices.

3.9 *Ad clause 9*

This clause proposes the amendment of section 9 of the principal Act 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.

3.10 *Ad clause 10*

Clause 10 proposes to amend section 10 of the principal Act by providing for additional offences in accordance with Article 3bis of 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.

3.11 *Ad clause 11*

Clause 11 proposes to amend section 11 of the principal Act 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 amendments proposed to sections 13 and 15 of the principal Act.

3.12 *Ad clause 12*

Clause 12 proposes to amend section 12 of the principal Act 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 or reporting institution as defined in the Financial Intelligence Centre Act or any other person.

3.13 *Ad clause 13*

Clause 13 seeks to amend section 13 of the principal Act 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.

3.14 *Ad* clause 14

Clause 14 seeks to simplify the language of section 15 of the principal Act 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 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.

3.15 *Ad* clause 15

Clause 15 seeks to amend section 16 of the principal Act 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.

3.16 *Ad* clause 16

Clause 16 proposes the substitution in section 17 for the reference to the Department of Foreign Affairs with the Department responsible for International Relations and Cooperation.

3.17 *Ad* clause 17

Clause 17 seeks to align the sentencing, as laid down in section 18 of the principal Act, with the severity of the offence, especially in relation to the financing of terrorism. It also provides for sentences in respect of the offences listed in sections 3A(2) and (3), 4A and 24B(12) and (13).

3.18 *Ad* clause 18

Clause 18 proposes to substitute section 23 of the principal Act as a consequence of the proposed repeal of section 25 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 bonis* and interim orders.

3.19 *Ad* clause 19

Clause 19 proposes to amend section 24 of the principal Act 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.

3.20 *Ad* 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.

3.21 *Ad* clause 21

Clause 21 proposes the repeal of sections 25 and 26 of the principal Act.

3.22 *Ad* clause 22

Clause 22 proposes amendments to section 27 of the principal Act 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, remains valid and has 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.

3.23 *Ad* clause 23

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.

3.24 *Ad* clause 24

Clause 24 proposes amendments to the arrangement of sections of the principal Act.

3.25 *Ad* clause 25

Clause 25 proposes to amend or repeal the laws to the extent indicated in the Schedule to the Bill. The proposed amendment to the Intimidation Act, 1982 (Act No. 72 of 1982) ("Intimidation Act"), gives effect to the Constitutional Court Judgment delivered on 22 October 2019 in the matters of *General Alfred Moyo and Another v Minister of Police and Others* and *Nokulunga Primrose Sonti and Another v Minister of Police and Others* [2019] ZACC 40, where sections 1(1)(b) and 1(2) of the Intimidation Act were ruled as unconstitutional. See also the recommendation of the South African Law Reform Commission in its Report on the Review of Security Legislation: Project 105, at page 1046.

3.26 *Ad* clause 26

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

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

The Bill and proposals were extensively consulted within the Inter-Departmental Counter-Terrorism Working Group ("IDCTWG"), convened by the Department for International Relations and Cooperation, which is also part of the IDCTWG. The IDCTWG also consists of the Department of Home Affairs, the Department of Justice and Constitutional Development, the Department of Defence (Defence Intelligence), the State Security Agency, the National Intelligence Coordinating Committee ("NICOC"), the South African Police Service (Legal Services), Crime Intelligence Division and the Directorate for Priority Crime Investigation, the Department of Correctional Services, the Department of Social Development, the Financial Intelligence Centre (Department of Finance), National Treasury and the Department for Evaluation and Monitoring and the Civilian Secretariat for the Police Service. Consultations took the form of briefings, submission of draft documents for comments, reworking of documents and two Workshops of which the last was during September 2018. One-on-one discussions were, where required, held with individual institutions and Departments, such as the Priority Crime Litigation Unit, the Directorate for Priority Crime Investigations and the South

African Police Service: Legal Services. Departments which did not attend the last Workshop were also individually consulted. Discussions were held with the Financial Intelligence Centre on the transfer of the function to announce United Nations Security Council Resolutions pertaining to sanctions relating to terrorism to the Minister of Finance and the Financial Intelligence Centre. There is general consensus by all the role-players on the contents of the Bill. Comments on the Bill were provided by the South African Revenue Service, which were taken into account. Public comments on the Bill were invited by notice in the *Gazette*, on 28 May 2022. The public comments were considered and the Bill was reviewed.

5. FINANCIAL IMPLICATIONS FOR STATE

Financial implications are linked to line-function responsibilities of Departments and would not include new functionalities or actions. 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.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution regulates the manner in which legislation may be enacted by the legislature and thus prescribes the different procedures to be followed for such enactment. The national legislative process is governed by sections 73 to 77 of the Constitution.
- 6.2 We have considered the Bill against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 A Bill falling within a functional area listed in Schedule 4 of the Constitution must be dealt with in accordance with the procedure set out in section 76. Schedule 4 lists the functional areas of concurrent national and provincial legislative competence. Schedule 5 of the Constitution lists the functional areas of exclusive provincial legislative competence. Therefore, those areas not falling within Schedule 4 and Schedule 5 fall within the exclusive national legislative competence.
- 6.4 The test for the classification of a Bill, as established in the Constitutional Court judgment of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*¹ (“Tongoane judgment”), is that any Bill with provisions which in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule.² The Tongoane judgment therefore laid down the substantial measures test for the tagging of a Bill which requires one to determine whether to a substantial extent the legislation under consideration actually regulates matters falling within Schedule 4 of the Constitution. If so, the Bill must be tagged in terms of section 76 of the Constitution.
- 6.5 As the Bill does not deal with a functional area listed in Schedule 4 or Schedule 5 of the Constitution, we submit that section 44(1)(a)(ii) of the Constitution is applicable with regard to the power of the National Assembly to pass legislation on “any matter”.
- 6.6 It is therefore the opinion of the State Law Advisers and the Department: Civilian Secretariat for Police Service, that the Bill must be dealt with in accordance with the legislative procedure outlined in section 75 of the Constitution as it contains no provisions to which the procedure set out in section 74 or 76 of the Constitution applies.

1. CCT 100/09 [2010] ZACC 10.

2. *Ibid* paragraph 72.

- 6.7 The State Law Advisers are of the opinion that it is not necessary to refer the Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a)(i) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), as it does not contain any provisions which directly affect traditional or Khoi-San communities or provisions which pertain to customary law or customs of traditional or Khoi-San communities.