

**MMA submissions  
NPO Bill  
June 2022**

CLAUSE COMMENTED ON	PROPOSAL	MOTIVATION
<p><b><u>Preamble:</u></b> Reference: to provide for the registration of nonprofit organisations and <b>compulsory registration of foreign organisations</b></p> <p><b><u>CLAUSE 2:</u></b> Amendments to section 1:  2 (f) "(f) facilitating voluntary registration of nonprofit organisations <b>and compulsory registration for foreign organisations</b> operating within the borders of the Republic of South Africa."</p> <p><b><u>CLAUSE 4:</u></b> Amendment to section 12 4(d)(5) Any nonprofit organisation, <b>including foreign nonprofit organisations</b> that intend to operate business within the Republic must be registered in</p>	<p>All references to compulsory registration be removed.</p>	<p><b><i>International human rights framework</i></b></p> <p>By way of brief context, it is necessary to note that it is well <a href="#">established</a> that the legal framework within which non-profit organisations (“NPOs”) operate must be consistent with international human rights law. This is due to the acceptance, by way of a <a href="#">Resolution</a> from the United Nations General Assembly, that “<b>everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.</b>” It is trite that the right to freedom of association serves as a vehicle for the exercise of many other civil, cultural, economic, political and social rights.</p> <p>In her 2012 <a href="#">Report</a>, Special Rapporteur on the rights to freedom of peaceful assembly and association, Maina Kiai, explained that the right to freedom of association is an essential component of democracy, empowering people to express their political opinions, engage in cultural, economic and social activities, and hold leaders accountable. She explains further that such “interdependence and interrelatedness” with other rights make it a valuable indicator of a State’s respect for the enjoyment of many other human rights.</p> <p>The right is tied to a corresponding duty on States. <b><u>States have a responsibility and obligation to protect, promote, and respect all human rights and fundamental freedoms, including the implementation of steps necessary to foster an environment that enables all persons to enjoy their right to associate. States are therefore required to adopt such legislative, administrative and other steps as may be necessary to ensure that the rights</u></b></p>

terms of this Act before operate and shall be subjected to the provisions of this Act and any other laws of

**and freedoms contained are effectively guaranteed. Our Constitution similarly envisages the right to freedom of association – a right guaranteed to “everyone”.**

We raise this due to the concern that the compulsory registration of foreign NPOs envisaged in the NPO Bill implicates and erodes the right to freedom of association.

***Compulsory registration***

While different routes can be pursued when it comes to registration, the prevailing international human rights law position favours a “notification procedure”, rather than a “prior authorization procedure” that requests the approval of the authorities to establish an association as a legal entity. Former Special Rapporteur Kiai [explains](#) that the former **complies better with international human rights law and should be implemented by States**. This is supported by the [position](#) that registration should not be compulsory. NPOs “should be allowed to exist and carry out collective activities without having to register if they so wish.” Research from [Freedom House](#) on anti-NGO measures in Africa finds that legal frameworks that mandate registration rather than mere notification of their existence, “improperly abridge the right to freedom of association”.

From an international law perspective, any restriction on the right to freedom of association and the rights of associations must be necessary for a democratic society and, thus, proportional to their legitimate aim. In terms of our Constitution, any limitations on a right in the Bill of Rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

		<p>In light of the above, and what follows below, we submit that the compulsory registration for foreign NPOs has the potential to violate the right to freedom of association, and at this stage, it appears that such limitation falls short of a necessary, proportionate and reasonable and justifiable limitation.</p> <p>The position of favouring notification over compulsory or mandated registration should apply equally to domestic NPOs and foreign NPOs. NPOs, whether domestic or foreign should be subject to the same process and standards. The United Nations Secretary-General <a href="#">explains</a> that “foreign NGOs carrying out activities for the promotion of human rights must be allowed to register and function without discrimination, subject only to those requirements strictly necessary to establish bona fide objectives”.</p> <p>We note with concern that some <a href="#">African</a> states have applied unfair application procedures, inordinate registration delays, and unnecessary registration conditions on foreign NPOs. Subject to the specific context and legal framework, there is a reasonable likelihood that unfair requirements targeted at foreign NPOs can violate the right to freedoms of assembly and association.</p> <p>Similar concerns have arisen in countries such as the Russian Federation, Azerbaijan, Turkey and Hungary. The Council of Europe’s <a href="#">Parliamentary Assembly</a> has noted with concern various legislative changes in these countries resulting in the identification of and restrictions on “undesirable foreign organisations” or “foreign agents” making it difficult for foreign and international NPOs to operate. These changes threaten the survival of civil society and can undermine the freedom of expression and freedom of association as enshrined in the leading international human rights instruments and can have a deterrent effect on the exercise of those freedoms.</p>
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		<p>We highlight these examples to illustrate our concern with the compulsory registration of foreign NPOs envisaged in the NPO Bill. This position is <b>inconsistent with principles of international human rights law and our Constitution and has the potential to erode the functioning of civil society</b>. Accordingly, we strongly recommend the removal of the requirement of “compulsory registration” for foreign NPOs, and that the legal framework enables a notification procedure for all NPOs, both domestic and foreign.</p>
<p><b><u>CLAUSE 4:</u></b></p> <p>Amendment to section 12 4(d)(5) Any nonprofit organisation, including foreign nonprofit organisations that intend to operate business within the Republic <b>must be registered</b> in terms of this Act before operate and shall be subjected to the provisions of this Act and any other laws of</p>	<p>Mandatory registration requirements must be removed</p>	<p>For the reasons listed above, we recommend that the mandatory registration requirement be removed. The use of “must” suggests that registration is compulsory for all NPOs wanting to operate in South Africa. As noted above, this is inconsistent with international human rights law and our Constitution. We reiterate that the international human rights <a href="#">position</a>: “in order for human rights organizations to be able to carry out their activities, it is indispensable that they are able to discharge their functions without any impediments”. We are concerned that the mandatory registration requirement for all NPOs is an impediment to the functioning of civil society. We are concerned that such measures may have the effect of deterring NPO functioning, and seems to stifle or inhibit NPOs and civil society operations rather than enable an encouraging and supportive environment for NPOs to thrive.</p> <p>As noted above, and in line with the prevailing international human rights law position, we recommend that the DSD favours a notification procedure, rather than a prior authorisation procedure or mandatory registration procedure.</p>
<p><b><u>General comments and observations</u></b></p>	<p>Any measures are taken, whether to provide a framework for NGOs, or for counter-terrorism and security, must respect</p>	<p>At this stage, it is our understanding that the DSD have relied on the Financial Action Task Force (<a href="#">FATF</a>) (the global money laundering and terrorist financing watchdog) and its research and recommendation as a basis for the amendments to the NPO Bill. We note that the inter-governmental body sets international standards that aim to prevent these illegal activities and the harm they cause to</p>

	<p>international human rights law. South African government has an obligation, both in terms of our Constitution, and in terms of international human rights law to respect, protect, and promote the right to freedom of association. Any changes to the NPO Bill need to be consistent with this obligation.</p>	<p>society. As a policy-making body, the FATF works to generate the necessary political will to bring about national legislative and regulatory reforms in these areas. We further understand that the DSD have referred to Recommendation 8 as part of its justification for the proposed changes to the NGO Bill. <a href="#">Recommendation 8</a> requires that the laws and regulations that govern NGOs be reviewed so that these organisations cannot be abused for the financing of terrorism.</p> <p>Recommendation number 8 (revised) states that:</p> <p style="padding-left: 40px;">Countries should review the adequacy of laws and regulations that relate to non-profit organisations which the country has identified as being vulnerable to terrorist financing abuse. Countries should apply focused and proportionate measures, in line with the risk-based approach, to such non-profit organisations to protect them from terrorist financing abuse, including:</p> <ul style="list-style-type: none"><li>• by terrorist organisations posing as legitimate entities;</li><li>• by exploiting legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset-freezing measures; and</li><li>• by concealing or obscuring the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.</li></ul> <p>According to the FATF, it has established best practices, aimed at preventing the misuse of NPOs for the financing of terrorism while, at the same time, respecting the legitimate actions of NPOs.</p> <p>In what follows, MMA highlights some responses to the FATF and Recommendation 8.</p>
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***FATF's recommendation 8 is playing a destructive role***

In 2019, the Working Group on Torture and Terrorism (composed of 17 NGOs coming from around the world, working across 32 countries) along with the SOS-Torture Network prepared [submissions](#) to the UN Office of the High Commissioner for Human Rights, in which they highlighted that the “FATF’s recommendation 8 is playing a **destructive role** on civil society freedom and vital human rights work.” They explained as follows:

- “In practice, FATF and its regional bodies have exerted considerable influence, pressuring governments to adopt or amend national counter-terrorism legislation following opaque process. Regularly they are devoid of proper consultation with HRDs/civil society and characterized by an almost complete lack of accountability.”
- “Among the real-life impact of the FATF’s recommendation is often an overly-complicated, **restrictive registration requirement, limitations or de facto prohibition of foreign funding for critical human rights work**, as well as the targeting of human rights work through restrictive banking laws.” (own emphasis).

The group goes on to list several examples of countries in order to demonstrate the concerns and harms caused by recommendation 8. In India for example, in Indonesia, following a rating from the AGP (Asian Pacific Group, FATF-style regional body) that Indonesia was non-compliant with recommendation 8, embarked on law reform reforming laws pertaining to NGOs. According to the Working Group, the new laws **infringed upon the rights to freedom of association, expression, and religion, and provide the government wide latitude to obstruct NGO work. The law imposes a variety of vague**

		<p><b>obligations and prohibitions on NGO activities, and severe limitations on the creation of foreign-funded organizations.</b></p> <p><a href="#">Reports</a> from Pakistan note that “thousands of small and medium level non-governmental organisations (NGOs) have suffered during the government’s campaign to regularise their affairs in a bid to fulfil the requirements of Financial Action Task Force (FATF), the global watchdog for illicit financing.” According to the reports, the mapping of NGOs started in May 2019 to fulfil the FATF requirements and resulted in the provincial government <b>deregistering around 3,851 NGOs of the total 4,935</b>, working in different sectors in the province.</p> <p><b><i>Recommendation 8’s unexpected implications for NGOs</i></b></p> <p>Community World Service Asia, (CWS) a humanitarian and development organisation, recently <a href="#">reflected</a> on the impact of the FATF standards on the non-profit sector during COVID-19. As a general observation, CWSA remarked that “although many countries have pursued initiatives to counter terrorism funding by multilateral legislative structures such as the FATF, steps such as the Recommendation 8 have had unexpected implications for non-profit organisations (NPOs). The strong requirement to control the sector as a whole for greater efficiency and accountability has contributed to the following:</p> <ul style="list-style-type: none"><li>• increasing surveillance and state regulation</li><li>• for obtaining and sharing financial services for growth and humanitarian relief, human rights and development work</li><li>• the creation of onerous and restrictive laws, rules and regulations for the sector</li><li>• the cutting-back, in general, of the field of civil society, with Recommendation 8 improving the instruments already in use by the</li></ul>
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		<p>government, such as counter-terrorism laws and regulations, to overregulate civil society</p> <p>In terms of the pandemic, CWS observed that “COVID 19 exacerbates already existing challenges stemming from the interpretation by governments and banks of the FATF standards. On this point, Lia van Broekhoven, Co-founder and Executive Director of Human Security Collective remarked:</p> <p>“We have been discussing various instances that have occurred since the offset of the COVID pandemic. In one case, 90% of the bank transfers especially to Syria of an international humanitarian organization were blocked by banks. The banks mentioned that the FATF standards and US and UN sanctions were the reason they were the victims of risk aversion to transferring money to countries like Syria and others that the bank considered to be high risk. We also see that donors want NPOs to vet against Counter terrorist lists and perform “Know Your Client” due diligence (KYC) on beneficiaries which would be in <b>total contravention of humanitarian principles of independence, neutrality, partiality and humanity</b>”.</p> <p><i><b>FATF’s admission of challenges</b></i></p> <p>The FAFT itself acknowledges that there are <a href="#">challenges</a> and there are some states that misuse FAFT compliance for more nefarious agendas:</p> <p>“In response to ongoing concerns that AML/CFT measures were having a chilling effect on NPOs’ legitimate activity, in June 2016 the FATF revised its Standards and Methodology</p>
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