



Analysis of the Private Voluntary Organisations Amendment Bill, 2021



Introduction

On 31 August 2021, Cabinet approved the formulation of the Private Voluntary Organisations Amendment Bill, 2021 that would amend several provisions of the Private Voluntary Organisations Act (Chapter 17:05). The Bill was published in the Government Gazette on 5 November 2021 [GN 3107 of 2021]. The memorandum of the Bill states that the aims of the amendments are:

- Complying with the Financial Action Taskforce (FATF) recommendations made to Zimbabwe including recommendations under technical compliance raised under Zimbabwe's Mutual Evaluation Report;
- Streamlining administrative procedures for Private Voluntary Organisations to allow for efficient regulation and registration; and
- Prohibiting Private Voluntary Organisations (PVOs) from political lobbying.

The Financial Action Task Force (FATF) is a non-treaty inter-governmental body tasked with the promotion of measures to help combat money laundering and terrorist financing (ML/TF). It has developed 40 Recommendations or FATF Standards to measure technical compliance, and 11 Immediate Outcomes, to assess the effectiveness of government measures to combat ML/TF.

The FATF has identified activities of Non-Profit Organisations (NPOs) (in the context of Zimbabwe these may be not for profit charitable organisations including non-government organisations, private voluntary organisations, trusts, universities, faith based organisations, community based organisations) as potentially posing a risk of abuse for money laundering and funding of terrorist organisations. Recommendation 8 and Immediate Outcome 10 are the standards for NPO regulation. In terms of Recommendation 8, governments are required to:

"...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..."

In terms of Immediate Outcome 10.2, governments are required to show that they have

"...implemented a targeted approach, conducted outreach, and exercised oversight in dealing with PVOs that are at risk from the threat of terrorist abuse."

Zimbabwe is a member of the East and Southern Africa Anti-Money Laundering Group (ESAAMLG). ESAAMLG is a regional body that carries out mutual evaluations to assess the effectiveness and technical compliance of the member states with the FATF Recommendations or Standards. In its 2016 Mutual Evaluation Report, Zimbabwe was rated as non-compliant with Recommendation 8. Authorities were encouraged to review laws and frameworks, identify NPOs that pose high

terrorist financing risks, and apply commensurate measures. In 2019, Zimbabwe was re-rated as partly compliant with Recommendation 8.

It was found that although laws and sanctions were in place, Zimbabwe's risk assessment of the NPO sector was not comprehensive enough to identify a subset of organisations falling within the FATF definition of NPOs that are at risk for terrorist financing and money laundering. This rating remains the same in the ESAAMLG 2021 review.

ZLHR is concerned that the government is introducing amendments without:

1. Using a risk-based approach to identify, assess and understand the money laundering and terrorist financing risks, in consultation with NPOs,
2. Implementing a targeted approach in relation to NPOs that are at particular risk of terrorist financing and money laundering, as opposed to restricting the whole sector,
3. Having regard to Zimbabwe's international human rights obligations, particularly in relation to freedom of association,
4. Conducting comprehensive outreach and educational programs to raise and deepen awareness among NPOs.

ZLHR is concerned and disturbed that the pretext of complying with the FATF Recommendations is being used to rush through the proposed amendments to the PVO Act, which instead result in the undue targeting of PVOs, and other civil society organisations and non-government organisations not previously required to register under the PVO Act. The proposed PVO Bill amendments will result in government over-regulation, and ultimately the curtailment of human rights and fundamental freedoms.

The Bill contains several provisions that fall far short of the requirements of FATF Recommendation 8 and international law human rights standards, as summarised below:

- **Does not promote self-regulation** - The Bill seeks to bring trusts and common law universities organisations (currently exempt) under the Act. This will have a devastating impact on most of the NPO sector, as the Act is already very restrictive and most of the affected organisations have not been able to register in the past. Civil society has been advocating for enabling legislation that will promote self-regulation in the sector as has been the case in other countries around the world.
- **Consolidation of regulation of PVOs in Registrar' office a civil service functionary** - Although there is a PVO Board (whose composition is heavily dominated by executive appointees), the Bill bestows more power in the office of the Registrar. The registrar controls the re-registration of organisations if there are material changes after the initial application or after minor changes. The Registrar's office forms part of the Public Service, in essence is the Civil Service which is controlled by the President. They report to the President. This can potentially affect independence of PVOs as they will self-censure to prevent antagonising their regulators.
- **Excessive executive control over affairs of NPOs** - The Minister has extensive powers to arbitrarily interfere with the operations and activities of NPOs by designating any type of entity as "high risk" for terrorist financing and subjecting those entities to, as yet undetermined,

money laundering or terrorism financing (ML/TF) measures. The Minister also has broad discretionary powers to replace a PVO's executive committee with provisional members who are given wide powers to interfere with the internal affairs of a PVO.

- **In conflict with existing labour and criminal procedure and criminal laws** - The Minister can cause the summary dismissal of an employee or office holder of a PVO. Does not allow for due process, presumption of innocence before drastic punitive criminal penalties are imposed. Further there appears to be little synchronisation with existing laws on money laundering and suppression of terrorism.
- **The risk assessment process is not compliant with FATF Recommendation 8 and outcome 10** - There is a failure to include civil society actors in the risk assessment processes, the criteria used for the assessment and the designation process is overly vague and broad, and the process lacks accountability.
- **Lack of security for continued operations of NPOs** - There is a requirement to apply and potentially re-register with the Registrar of PVOs when there are, even minor, organisational changes. The relationship between the power of the Registrar on re-registration and the PVO Board is not well articulated.

It creates an opportunity for a government functionary to refuse registration to NPOs working on legitimate human rights, good governance and rule of law initiatives. There is no clarification on the status of NPOs pending the outcome of registration processes, which should be a simple notification process and legal status presumed until declared otherwise.

The Bill gives the Minister broad discretion "on information supplied to him" to suspend and replace a PVO's executive committee with provisional members (paid by the funds of the organisation, and able to make any decisions on behalf of the organisation - including disposal of assets, upon approval by the Minister.)

- **Criminalisation of civil society work and punitive civil liability** - The Bill seeks to criminalise NPOs for such vague grounds as "supporting or opposing any political party or candidate in a presidential, parliamentary or local government election". This can potentially affect civil and political rights. More particularly section 67 of the Constitution that guarantees political rights. The Bill allows for the imposition of civil penalty orders requiring defaulting PVOs to pay a fixed penalty amount in addition to any other criminal or non-criminal penalties imposed under the Act or any other law. The numerous penalties imposed under the act amount to arbitrary over-regulation of the sector.
- **Curtails freedom of association** - There is a requirement to disclose foreign funding. The Bill allows for the Minister to make regulations for PVOs to disclose sources of funding from outside of Zimbabwe.

The ZLHR analysis provided below considers the relevant clauses in the Bill against the provisions of the Private Voluntary Act which it seeks to amend. It also considers whether the proposed amendments are necessary and whether the issues can be resolved through other legal reform measures. Zimbabwe already has laws on anti-money laundering and countering terrorism within and beyond the borders.

These include the Criminal Law (Codification and Reform) Act [Chapter 9:23], which has penalties for acts of terrorism within the country, the Suppression of Foreign and International Terrorism Act [Chapter 11:21], the Bank Use Promotion and Suppression of Money Laundering Act [Chapter 24:24], the Criminal Procedure and Evidence Act [Chapter 9:07] and the Money Laundering and Proceeds of Crime Act [Chapter 9:24].

In 2020 the amendment to the Money Laundering and Proceeds of Crime Act was gazetted. This law initially came into operation in 2013 with the objective of suppressing the abuse of the financial system and to enable the unlawful proceeds of all serious crime and terrorist acts to be identified, traced, frozen, seized and eventually confiscated.

The amendment focused on beneficial ownership and unexplained wealth orders. It is pertinent to note that this amendment was passed way after the re-rating of Zimbabwe by FATF in 2019. Zimbabwe was re-rated as partly compliant with Recommendation 8. In 2020, ZLHR produced a position paper providing an ideal process that must be followed for the government to comply with the FATF requirements. Regrettably, the recommendations were not followed. ZLHR encourages the government to follow these recommendations.

The analysis also assesses if the proposed amendments are reasonably justifiable in a democratic society or undermine the objectives as set out in the Constitution of Zimbabwe, 2013. ZLHR also makes reference to best practices from other countries and the United Nations General Assembly Report of the Special Rapporteur on the rights of peaceful assembly and of association, A/68/299 (2013), the African Commission on Human and Peoples' Rights Guidelines on Freedom of Assembly and Association (ACHPR Guidelines on FoAA), as well as human rights instruments that Zimbabwe has ratified at the United Nations and African Union level.

These include the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR).

In 2019, the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association visited Zimbabwe on the invitation of the government of Zimbabwe (GoZ).

In his report, that was presented to the UN General Assembly during the June to July 2020 44th session, he made recommendations on how the GoZ can enhance the right to freedom of association.

Contrary to the provisions being proposed in the current draft of the PVO Bill, in paragraph 125(a) the UN SR recommended that the GoZ amends the PVO Act in full consultation with civil society and other relevant stakeholders and avoid enacting regressive legislation in the future. In particular that the GoZ:

- Adopts a regime of declaration or notification, whereby an organisation is considered a legal entity as soon as it has notified its existence to the regulating authorities;
- Ensures that the registration procedure for national and international organisations is more simple and expeditious;
- Abolishes the practice of using memorandums of understanding that render the operation of associations burdensome and limit their autonomy and independence;

- Avoids interference in the activities of organisations through the use of inspectors;
- Alleviates reporting requirements;
- Facilitates the ability of organisations to access funding and resources without interference; and
- Avoids the use of excessive sanctions, particularly incarceration, for omissions in law.

Several shortcomings were identified in his report on how the PVO Act granted too much discretionary power to the responsible Minister to interfere in internal affairs of a PVO. It was also stated that the procedure for registration under the PVO Act was onerous, lengthy and complex.

The proposed amendments do not take into account the recommendations by the UN Special Rapporteur, and in fact introduce more repressive provisions. A detailed analysis of the Bill is provided below:

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 1

Sets out Bill's short title.

COMMENT

No issues arise.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 2

This is the 'Interpretation Clause'. It amends section 2 of the PVO Act by widening the scope of definition of "funds or other assets" to include all financial assets and funds or other assets of every kind.

The clause also amends the definition of "private voluntary organisation" to include the words "legal person, legal arrangement". The PVO Act currently exempts Trusts and universitas associations in its definition of what is a PVO in section 2(iii) and 2(x). Most NGOs currently fall into these groups. Clause 2 subsections (ii)B and C repeal these provisions. The exemption of trusts established by any enactment is maintained, as well as those (i) maintained and controlled by the state or a local authority; (ii) religious bodies conducting religious activities; (iii) educational trusts; (iv) those operating solely for the benefit of its members; (v) registered health institutions; (vi) registered psychological health premises; (vii) those authorised to assist hospitals or nursing homes; (viii) political organisations; and (ix) the Zimbabwe Red Cross.

Inserts subsection (3) that gives the Minister wide discretionary powers to pass regulations designating by name, type, class, or

COMMENT

This definition of "funds or other assets" is relevant to the new section 21 in clause 7, on suspension of the executive committee and the powers of the provisional trustee to effect disposal of funds and assets with the approval of the Minister; and the powers of appointed trustees to lodge an application at the High Court on the basis of an alleged misappropriation of funds or assets by an officer or employee. The broad definition allows for excessive interferences by provisional trustees as highlighted below.

The meanings of the words "legal person" and "legal arrangement" are unclear. This creates legal uncertainty. This provision is open to broad interpretation and can lead to arbitrary and even selective enforcement to include certain CSOs or NGOs, including those currently operating as 'Trusts' and common law universitas organisations, the majority of which are working on human rights, good governance and rule of law issues.

Due to the already excessive limitations, challenges and harsh sanctions, and the onerous, lengthy and complex registration procedure in the Private Voluntary Organizations Act, many NGOs have resorted to registering as Trusts under the Deeds Registries Act or to operating as common law universitas organisations. ZLHR attempted to register as a PVO in 2004, but its application was never considered and the organisation never received any response. The proposed removal of the universitas organisation exemption and of the ability of PVOs to self-register at the High Court in terms of the Deeds Registry Act is an attempt to further close the civic space.

Recommendation:

- Self-regulation of NGOs and CSOs to ensure that they are able to carry out their watchdog role over government. Current proposal of increasing the regulation powers of Public Service officials in the Registrar's office, who are essentially part of the Civil Service, will severely undermine civil society's watchdog role, especially when organisations can be de-registered on vague and flimsy grounds as highlighted in the following sections.
- In neighbouring countries, although there are laws regulating not for profit organisations, some can still operate as common law universitas (South Africa) or Trusts (Botswana). All organisations are not compelled to register under one law as proposed by the PVO amendment.

Subsection (3) gives the Minister extensive powers to unilaterally interfere with the activities of CSOs without any parliamentary oversight. It fails to guide what constitutes high risk or vulnerable to terrorist activities and it does not specify the procedure the Minister will use to determine such high risk or vulnerability. This provision could be applied to mean that all NPOs working on issues of governance and human rights who receive foreign funding are placed in the high risk or vulnerable categories and subjected to more extensive measures prescribed by the Minister, which have not been determined and will not be subjected to parliamentary scrutiny.

CLAUSE AND SUMMARY OF PROVISION

characteristics, any legal person, legal arrangement, body or association of persons, or institution, otherwise exempted under the PVO Act, if the Minister believes that they are at high risk of or vulnerable to misuse for terrorism funding or causes. The Minister has powers to require such high risk or vulnerable organisations to register as PVOs under the Act and to prescribe additional or special requirements, obligations or measures that should apply to the said organizations.

Inserts subsection (4) which makes Trusts registered at the High Court and not established by any enactment - though technically exempt from the definition of PVO in s (2) - subject to PVO Bill provisions if they are “collecting contributions from the public or outside the country” for the purposes of (a) providing material, mental, physical or social support to persons in need; (b) providing charity to persons in distress; (c) preventing social distress or destitution; (d) uplifting standards of living; (e) providing funds for legal aid; (f) preventing cruelty of, or promoting welfare of, animals; or (g) such other objects as may be prescribed.

- They may be served with a notice by the Registrar requiring them to submit a sworn declaration that the organisation will not collect contributions from the public or from outside the country for purposes (a) to (g) above, and requiring them to commence registration as a PVO, within 30 days.
- Subsection (5) deals with the penalties for failure to comply with the request of the Registrar in subsection (4) and for contravening subsection (4) after having submitted the required declaration pledging non-collection of contributions from the public or from outside the country. Any person found guilty is liable to a fine not exceeding level five or imprisonment not exceeding six months or to both.
- Subsection (6) imposes prosecution for Trustees who either fail to sign the section (4) declaration or who do but continue collecting contributions in contravention of the provision. A defence is created if they can prove on a balance of probabilities that they were not collecting contributions from the public.

Subsection (7) provides a Trustee who has been given a notice in terms of the above provision, an opportunity to make written representations to the Registrar within 14 days from the date of the notice to have it withdrawn on the basis that the notice was made in error. If the Registrar accepts such representations, the Registrar shall notify the Trustee in writing, of the withdrawal of the notice. If the Registrar rejects the representations, the Registrar notifies the Trustee in writing and the Trustee must make the declaration and commence registration in terms of section 4(b) within thirty days from the date of the notification of such rejection.

COMMENT

There is no clarity on the additional or special requirements, obligations, and measures to be taken. This provision does not comply with the FATF Recommendation 8, which requires a country to conduct a targeted risk assessment before regulating PVOs. Section 2(3) makes no provision for a risk assessment procedure to be taken before designating a type of legal entity as “high risk.” It is a violation of Article 22 of the ICCPR - protecting the right to the freedom of association. It also violates section 86 of the Constitution by applying anti-money laundering and counter-terrorist financing measures without a risk assessment, meaning that human rights NGOs may be subjected to such regulations. Such measures are not the least restrictive means to further a legitimate aim such as national security.

Recommendations:

- Should make room for a risk assessment that is taken in consultation with relevant civil society stakeholders (such as NPO representatives) to identify any particular type of entity as “high risk” or “vulnerable” to misuse for terrorist financing.
- Provision to explicitly list the types of measures that the Minister may apply to “high risk” entities, so that these be subject to public and parliamentary scrutiny.

It is confusing that trusts registered with the High Court are stated to be “exempt” from the PVO definition and provisions of the Bill but then in terms of subclause (4) - (6) are in effect subjected to (a) the Act and (b) more stringent provisions including criminal liability if they are found to be “collecting contributions from the public or from outside the country” for purposes prescribed under section 2. The terms “collecting contributions from the public or from outside the country” are also not defined. This is a violation of the international law principle of legality. It also violates the right to freedom of association.

The removal of the exemption creates competing or duplicate regulatory regimes and obligations. Registration of universitas associations should also be optional, not compulsory.

The imposition of harsh penalties for failure to comply with any of the provisions of the Bill is an affront to freedom of association. In the ‘2020 Report to the General Assembly’ by the UN Special Rapporteur on the rights to freedom of peaceful assembly and of association on Zimbabwe, it was recommended that the government should avoid using excessive sanctions such as incarceration on civil society organisations for omissions in law.

Recommendations:

- Subsections 4-6 must be removed. Historically, development funds have been provided by external sources, as government does not provide such resources. This has provided critical support to Zimbabweans, for example during humanitarian crises such as Cyclone Idai. Further, members of the public have a right to freedom of association and should they choose to support NGOs or PVOs they should not be precluded.
- As a best practice, newly adopted laws should not require previously lawfully established organisations to re- register, so that existing organisations do not face arbitrary rejection or delays of registration that hinder their activities, as recommended by the former United Nations Special Rapporteur on the right to freedom of peaceful assembly and of association, Maina Kiai in U.N.DOC A/HRC/20/27 (2012), at para. 62.

There is no requirement for due process before the Registrar’s notice is issued and this may unnecessarily hinder the operations of PVOs especially when such notice is given in error or based on malicious grounds.

Recommendation:

- Subsection 7 must be removed as with preceding subsections 4-6

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 3

Repeals and substitutes section 5 of the PVO Act relating to the Registrar of PVOs. Clause 3(1) adds more officers to the office of the Registrar whose offices shall be public offices, forming part of the Public Service.

Subsections (2) and (3) deal with the maintenance of a Register of PVOs - in which all particulars in relation to the registration of PVOs including their constitutions, and any other particulars as prescribed or ordered- is accessible to members of the public. Subsection (4) deals with the delegation of the functions of the Registrar to the additional officers referred to in subsection (1). In terms of subsection (5), the Registrar has powers to delegate any of his or her powers to any officer other than the power of delegation

COMMENT

There is no clear guidance on the appointment procedure of the Registrar and additional officers, their role and who they are, save to say they will be part of the Public Service. In essence, this whole section seeks to increase powers over oversight of the operations of PVOs wholly in a Public Service functionary who is part of the Civil Service and under the executive arm of government.

The members of the Civil Services Commission are appointed by the President. It is clear the President will have greater control of the affairs of PVOs due to the powers he has in appointing the Civil Service Commission that regulate the Public Services as provided in the Public Service Act. It takes away the semblance of power in the current PVO Board on registration, cancellation and re-registration.

The nature and extent of the information relating to the organisation that will be made public is not clear, which may amount to a violation of the right to privacy and to non-interference in internal affairs of the organisation.

Recommendations:

- Self-regulation of PVOs with their own Registrar, that is independent of public service will be ideal.
- There is need to review and improve on the composition of the PVO Board as it exists in the current PVO Act for a more independent and efficient board that is not heavily dominated by executive appointees as highlighted on the last page of this analysis.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 4

Amends section 9 of the PVO Act and empowers the Registrar to collect fees for the registration of PVOs. The secretary of a PVO is required to lodge an application with the Constitution and prescribed fee in the prescribed manner.

COMMENT

The ACHPR Guidelines on FoAA provide that a registration fee may be imposed to cover administration fees, but only provided that this fee is modest and does not have the effect of deterring associations from registering in practice. The procedure and criteria for registration, and timeframes for registration and decisions on registration applications, have also notably not been included in the Act and subject to parliamentary scrutiny.

Recommendations:

- In terms of international best practice, the application process should be a straightforward notification procedure, with minimal documentation required. Once an application has been made, the organisation should be deemed to be registered unless a negative response is received within a prescribed (short) period.
- The prescribed fee must not be prohibitive and burdensome for any organisation, in particular, smaller organisations should be able to afford the fee. The fee must also be equally and fairly employed to all organisations.
- There should be clear and limited grounds for rejection, with the ability to appeal the decision.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 5

Amends section 10 of the PVO Act relating to cancellation or amendment of registration certificates. Subparagraph (e1) prohibits PVOs from supporting or opposing any political party or candidate in a presidential, parliamentary or local government election through contribution of funds or otherwise.

COMMENT

The prohibition of political involvement of CSOs is vague and open to abuse. Given the history of crackdowns against CSOs, if this provision becomes law it will be used for gross violations of the rights to freedom of assembly and association in Zimbabwe. For example, CSOs may not agree with the ruling party's policies or governance practices -particularly if these include poor governance, human rights violations and corruption- whilst sharing similar goals with an opposition political party that is pro-human rights and good governance, which will result in easily being targeted and accused of contravening this provision. Further, law based organisations providing support to opposition candidates in electoral challenges may also be targeted. The nature of the support is not specified.

CLAUSE AND SUMMARY OF PROVISION

PVOs are also prohibited from being a party to a violation of section 7 under Part III of the Political Parties (Finance) Act [Chapter 2:12] namely that 'No person who is a citizen of a foreign country domiciled in a country other than Zimbabwe shall, within Zimbabwe, solicit donations from the public on behalf of any political party or candidate.'

Any PVO found in breach of this section shall be guilty of an offence and liable to a fine of level twelve or imprisonment for a period not exceeding one year, or both such fine or such imprisonment.

COMMENT

This provision is an affront to the right to freedom of association under Article 22 of the International Covenant on Civil and Political Rights (ICCPR), Article 20 of the Universal Declaration of Human Rights and Article 10 of the African Charter. The ACHPR Guidelines on FoAA in Africa require that associations be able to engage in the political, social and cultural life of their societies, and to be involved in all matters pertaining to public policy and public affairs, including, inter alia, human rights, democratic governance, and economic affairs, at the national, regional and international levels. The United Nations Special Rapporteur on the Right to Freedom of Association and Peaceful Assembly emphasises that CSOs such as PVOs have the right to freely participate in activities related to the electoral process, including advocating for electoral and broader policy reforms, discussing issues of public concern and contributing to public debate, monitoring and observing electoral processes, initiating polls and surveys during the voting process, and engaging in voter education, among other activities (United Nations General Assembly, Report of the Special Rapporteur on the rights of peaceful assembly and of association, A/68/299 (2013), Section B (discussing civil society organizations and their role in elections).

The provision will also criminalise the capacity of Zimbabwean citizens by birth, who may be dual citizens, in the diaspora to fundraise for donations for political parties of their choice back in Zimbabwe. These provisions fail the limitation test in both Article 19(3) of the ICCPR and section 86 of the Constitution of Zimbabwe, which requires only permissible, justifiable, necessary and proportionate restrictions on rights to be prescribed by law. The imposition of harsh penalties such as imprisonment for violation of this provision without any justification or regard to civil remedies or administrative fines diminishes the autonomy of PVOs and instead criminalises their work.

Recommendations:

- Provisions on cancellation or amendment of registration certificate must not be unreasonable, or vague and open to abuse, they must be supported by due process and in compliance with tenets of natural and administrative justice, that are fair and reasonable, as provided in the Constitution.
- The rules for regulation of "support" or "opposition" to political parties should be clear and reasonable, such as for campaigning or financing campaigns, to ensure that PVOs remain apolitical. It should not be so broad as to outlaw activities that facilitate the exercise of human rights and fundamental freedoms of any person. These rules should be clarified in the Political Parties (Finance) Act, there is no need for further regulation in the PVO Act.
- Zimbabwean citizens who may be part of governance structures of PVOs but holding dual citizenship must not be unreasonably precluded from fundraising for political parties of their choice. It is recommended that this provision be removed.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 6

Adds a new provision section 13A of the PVO Act. It provides for instances that require application for approval, and potentially re-registration, of private voluntary organisations if there are material changes that occur in the private voluntary organisation concerned.

Subsection (1) defines the term "material change" as (a) any change that happens in the Constitution of the PVO upon the PVO's

COMMENT

The requirement for application for approval, and potentially re-registration, of PVOs after any organisational changes such as a change in personnel is intrusive. It is prone to abuse by the government to interfere with the internal management and governance matters of PVOs. It erodes the autonomy of PVOs by giving extensive powers to the Registrar (an employee of the Public Service that falls under Civil Service) to refuse registration to PVOs that work on sensitive issues. More so, given the power of the President over the Civil Service, any PVOs that are critical of the President or the ruling party cannot operate freely without fear of reprisals affecting their registration status.

This clause violates the right to freedom of association by empowering the Registrar to make reversals of decisions taken by PVOs in their internal operations. It takes away the autonomy of PVOs to determine their own internal processes. The restriction on the freedom of association does not seem to further any legitimate aim in terms of section 86 of the Constitution. It is unclear how requiring re-registration upon a material change in a PVO would further national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. Requiring re-registration after such small changes is not the least restrictive way to further a legitimate aim. The ACHPR Guidelines on FoAA also provide that organisations should not be required to register more than once.

CLAUSE AND SUMMARY OF PROVISION

termination for any reason concerning the disposal of its assets on the date of its termination; (b) any institutional or personnel change in the management of the PVO; or (c) any variation of the capacity of the private voluntary organisation to operate as a private voluntary organisation.

Subsection (2) requires the Secretary of a PVO to make an application for amendment to the particulars of registration, if there is any material change in the particulars furnished together with the application for the registration of a PVO. The application must be submitted no later than one month from the date when the material change occurred.

Subsection (3) outlines the powers of the Registrar in terms of the application in (2). The Registrar may (a) approve the application or (b) reject the application and order the reversal of the material change that prompted the application within a specified period or (c) reject the application for the amendment and order the applicant to re-register in terms of section 9.

Subsection (4) provides for the transfer of a certificate of registration to another PVO or to another person who is not a PVO subject to subsections (5) and (6). Subsection (5) requires that an application be made to the Registrar for approval before transfer. The Registrar treats the application as if it is an application for the approval of a material change to which the provisions of subsection (2) and (3) shall apply. The Registrar has powers in terms of this provision to cancel the certificate of registration of the PVO being transferred or to allow the applicant to hold it as a separate certificate.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 7

Substitutes section 21 of the PVO Act relating to the suspension of the executive committee. It affords the Minister the discretion to suspend all or any of the members of the executive committee of a PVO; and appoint provisional trustees to run the affairs of the organisation for up to 60 days pending the election of members of a new executive committee, on “information provided to him” that (a) the organisation is not operating in furtherance of the objects of its Constitution; (b) maladministration of the organisation; (c) involvement in any illegal activities; or (d) it is in the public interest to do so. The Minister’s suspensions and appointments must be subsequently confirmed through an application to the High Court.

COMMENT

Recommendations:

- PVOs should not be required to register more than once, in violation of the African Commission Guidelines on FoAA

The Registrar (who is part of the Public Service) is given wide discretionary powers to accept or reject applications for organisational changes, and effectively de-register the organisation, without the provision of any grounds for such refusal. There is no judicial oversight in this process. This is a violation of the right to access to information in section 62 of the Constitution and the right to administrative justice under section 68 of the Constitution of Zimbabwe. It will give unfettered powers to the Registrar (a Public Servant – answerable to the executive including the President) to delay or take away the legal status of organisations that work on sensitive or controversial issues. This provision also punishes PVOs for revising their internal management structures without informing the Registrar. In practice, PVOs are required to ask the authorities for permission for any organisational changes.

Recommendations:

- International best practice demands that associations are not required to obtain permission from authorities before revising their internal management structures or rules.
- There is no clear guidance on what will be deemed as a “material change” and interpretation of this clause may be open to abuse.
- PVOs should be able to make material changes as long as they will continue to fulfil their mandate and they will not be venturing into illegal activities.
- This provision must be removed and provision be made for a notification process that requires PVOs to simply notify the Registrar of any significant changes to their structure, in circumstances where the change in structure undermines the PVO’s ability to operate as a PVO as defined in the Act.
- The Registrar (who should not be part of the civil service but part of the self-regulation framework) should only be allowed to de-register a PVO after securing a court order and PVOs must also be allowed to appeal the decision in court.

COMMENT

This proposed clause is unconstitutional. It violates the right to freedom of association. The Minister is given extensive arbitrary powers to interfere with the internal governance structure of PVOs by suspending and replacing a PVO’s executive committee with provisional members on the basis of “information supplied to him” (the source or veracity of the information and standard of proof is not specified) on such vague grounds as “maladministration” and “in the public interest”. The Bill fails to define what constitutes “information supplied to him”. It is also not clear who supplies such information and the basis upon which such information is supplied.

The Minister can therefore appoint anyone to interfere in the running of the organisation, on any flimsy information. This can potentially cause irreparable harm to the PVO’s set programs, activities, and other legal obligations. The Supreme Court of Zimbabwe struck down a similar provision in the PVO Act in 1997 because the Minister’s power to suspend executive members of an organisation without providing them with a hearing violated the right to a fair hearing in the determination of a person’s civil rights, protected under section 18(9) of the 1980 Constitution in the case of *Holland & Ors v Minister of the Public Service & Ors*, 1997 (1) ZLR 186 (S).

CLAUSE AND SUMMARY OF PROVISION

Subclause (3) provides that even if the High Court refuses an application to appoint or confirm the appointment of trustees mentioned above under sub-clause 1(e), such refusal does not affect the validity of anything done by the provisional trustee in good faith before the date of such refusal.

Subclause (4) provides that any provisional trustee appointed shall exercise all the functions of the executive committee of the organisation, subject to any directions from the Minister. The Trustee may even acquire or dispose of funds or other assets of the organisation but only with the approval of the Minister.

Subclause (7) also provides for provisional or final trustees who are not full-time employees of the state to be entitled to be paid from the funds of the organisation. The Minister determines the rate of the trustees' monthly salary.

In terms of sub-clause (8), if an appointed trustee carries out an investigation and finds sufficient evidence on a balance of probabilities that there has been misappropriation of any funds or other assets of the organisation by an office-bearer or employee of the organisation, they may make an affidavit which includes the evidence and file application at High Court for an order directing the person who is or has been an office-bearer or employee of the organisation to refund or return to such organisation any funds or other assets which the respondent has misappropriated from such organisation.

Sub-clause (9) lays down the procedure for the enforcement of the order of the court by the trustee.

Subclause (10) defines "misappropriate" funds or other assets of the organisation under trusteeship as expending or disposing of the funds or other assets of the organisation; or withdrawing moneys from any account with any bank, building society or other financial institution operated on behalf of the organisation.

COMMENT

The Bill fails to specify the appointment criteria of such provisional trustees, and the qualifications and or experience they should have. Although the High Court can refuse an application to appoint or confirm trustees, by the time such application is determined, these trustees could have potentially caused irreparable harm to the PVOs due to bad decisions. Instead, such trustees must only be appointed after the power of the Minister is subjected to judicial review.

The Minister usurps the right of PVOs to determine their internal management structures and rules, and to manage their own funds and assets, by directing the provisional trustees to be paid by the funds of the organisation, and by granting them powers to make any decisions on behalf of the organisation - including disposal of assets, subject to the Minister's approval. The Guidelines on FoAA in Africa prohibits public authorities from interfering with associations' choices of managing officers unless such persons are barred by national law from holding the positions in question based on legitimate grounds as interpreted by regional and international human rights law. The grounds provided in the Bill for such interference by the Minister are vague and too broad. This is a violation of not only freedom of association but other rights such as the right to administrative justice under section 68 of the Constitution of Zimbabwe.

The trustees' affidavits on "misappropriation" may also be used as evidence to undermine the organisation and specific officers. It is not clear what area of expertise such a Trustee should have to be able to make such a determination. PVOs are already subjected to financial audits and other processes, based on their own rules or the rules of funding partners, where investigations are made on the abuse of resources, and appropriate action can be taken in the event of misappropriation.

Recommendations:

- In the event that there is a need to appoint provisional trustees to a PVO this must be done after following due process and the trustees must have appropriate qualifications. Ideally, a PVO must only be put under a provisional trusteeship as a last resort based on a clear process, similar to the judicial management of private companies, when the structures of the PVO have broken down and will not function without external support.
- PVOs must be encouraged to carry out regular financial audits (at least once a year) based on international standards and best practices.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 8

This clause makes provision for a new section 22 on "Identification, appreciation and assessment of risks in relation to private voluntary organisations and other institutions", purportedly to comply with FATF recommendation 8. It outlines the process of risk assessment of PVOs that the Minister, in cooperation with the Financial Intelligence

COMMENT

The government's intended response to FATF recommendations ignore established human rights norms and standards on freedom of association and fails to respect Zimbabwe's international human rights obligations. This clause 8 is open to abuse, and creates opportunities for the government to over-regulate the PVO sector using compliance with the FATF recommendations as a justification. The risk identification assessment procedure in the Bill is not clearly stated. The Minister is given broad unilateral discretion to interfere with PVOs based on future undetermined criteria "furnished from time to time by the Financial Action Task Force" (which is not a judicial entity). The Minister is not required to include PVOs in risk assessments of the sector for money laundering and

CLAUSE AND SUMMARY OF PROVISION

Unit, makes at at-minimum 5-yearly intervals to identify organisations at risk or vulnerable to being misused by terrorists to pose as legitimate entities; or to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; or to conceal or obscure the clandestine diversion of funds for terrorist purposes.

The Minister may make such an assessment with respect to individual organisations or institutions, or organizations or institutions of a specified class, or both. The criteria for the assessment is not provided. The assessment is said to be an assessment in accordance with the criteria furnished from time to time by the Financial Action Task Force.

In terms of (3), through a written notice to the concerned PVO or institution, the Minister may require the designated organisation or institution to undertake specified measures to mitigate the identified risk or vulnerability within a specified time.

Under (4), if the designation of organisation or institution was made in error, or measures specified by the Minister to mitigate the identified risk or vulnerability are unreasonable or disproportionate in relation to the identified risk or vulnerability, there is a right to make written representations within 14 days to the Minister to set aside or amend the designation. The Minister may reject or accept, conditionally or unconditionally, such representations

Under (5), the Minister may prescribe special measures and requirements to the designated private voluntary organisations referred to in subsection (3), to eliminate or minimise the risk of abuse.

Subsection (6) lists matters to be prescribed that may include: identifying the at-risk or vulnerable PVOs; special reporting requirements for PVOs, such as beneficial ownership; maintenance of specific records or other information; the Registrar's monitoring and enforcement powers, including to revoke licensing or registration of a non-compliant PVO, or to order the removal of a director, trustee, employee or another office-bearer of a PVO. Additional matters to be prescribed include: the powers of the Financial Intelligence Unit or other competent authority as may be prescribed by the Minister, to receive or access information held or maintained by the PVOs; and designating a person/ authority to cooperate with foreign counterparts in sharing information and preventing the abuse of PVOs for financing or supporting terrorism.

Subsection (6) criminalises failure to register as a PVO by a designated institution. The PVO is guilty of an offence and liable to a penalty

COMMENT

terrorist financing, which violates FATF Recommendation 8. Recommendation 8 also does not apply to the Non-Private Organisations (NPOs) sector as a whole. It only applies to those NPOs that pose the greatest risk of terrorist finance abuse. The FATF Interpretive Note to Recommendation 8 on NPOs demands that States adopt targeted measures against high-risk organizations.

Recommendations:

- PVOs should be consulted in the risk assessment as this assists in avoiding overbroad AML/CFT rules that restrict legitimate non-profit activities.
- Section 22(2) must be revised to require the Minister to consult with PVOs and other forms of NPOs when undertaking a risk assessment of the sector.
- The government is encouraged to be guided by FATF Recommendations and Interpretive Notes.
- FATF suggests identifying an actor as the focal point for NPO outreach, such as the PVO regulator, tax authority, or other relevant body. FATF recommends that the focal point engages in continuous, two-way dialogue with the NPO sector, including organisations, coalitions, self-regulatory bodies, and donor organizations (Financial Action Task Force, Combating the Abuse of Non-Profit Organisations (Recommendation 8), paras. 25-27)
- There should basically be less restrictive measures to comply with FATF targeted risk assessment processes in consultation with CSOs and that the FIU and AML/CT legislation in place be used to regulate them. No need for an additional regulatory regime for NGO sector which has not been identified as being at particular risk in Zimbabwe
- Zimbabwe government must apply recommendations of the most recent reviews by the regional monitoring group which is no longer requiring amendment of NGO laws.

There is no judicial or parliamentary oversight of the designation process, this process gives unfettered powers to the Minister, and can be open to abuse.

The nature of the special measures, such as special reporting requirements, are not determined, and may be open to abuse. FATF itself has recognised that its processes (including increased monitoring) have led to unintended consequences such as restrictive measures, forced dissolution or suspension of PVOs that may be prescribed under subsections (5)-(6) of the Bill. There is need for clarity and certainty, further due to the watchdog role of PVOs it is not ideal that they report to the executive member of government.

The Minister and Registrar have extensive powers to remove employees of the organisation through unspecified special measures. Such actions may violate tenets of natural justice and the labour laws of Zimbabwe as well as the International Labour Organisation standards that Zimbabwe has voluntarily ratified. It also creates a lacuna on where an aggrieved employee or any other office bearer would sue for unfair labour practices.

Another unintended consequence of over-regulation in the name of AML/CTF in the Bill is the criminalisation of the PVO administration. Members of any designated institution that fails to comply with the additional regulations imposed shall be liable to a fine of level 14 and up to 10 years imprisonment. This is grossly excessive criminal liability for an administrative offence considering the presumption of innocence and right to fair trial as provided in the Constitution.

Ordering the removal of an employee or office holder within an organisation, without following necessary procedures as provided in the Labour Relations Act [Chapter 28:01], will amount to summary dismissal and is in violation of the Labour Relations Act. The proposed remedy of appealing to the Minister in subsection 8, flies in the face of logic as it creates a potential conflict with labour processes as well as the rights to administrative justice as provided in section 68 of the Constitution.

of a fine not exceeding level fourteen. Members of the governing body of that organisation or institution are also liable to the offence and penalty of a fine. They can also be imprisoned for a period not exceeding ten years.

Under (7), the Registrar, at the direction of the Minister shall impose one or both of the following measures against a designated PVO that fails to comply with the prescribed requirements: (a) revocation or suspension of the licence or registration of the PVO, and/or (b) ordering the removal of a director, trustee, employee or other office holder of the PVO.

Under (8), any person aggrieved by a decision of the Minister in terms of this Act may appeal to the High Court in terms section 4 of the Administrative Justice Act [Chapter 10:28]. Under (9), upon an appeal in terms of subsection (8), the High Court may uphold the decision of the Minister; or refer the decision back to the Minister for reconsideration (whether with or without directions on how the decision is to be reconsidered).

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 9 & 11

This clause inserts a new section 22A which makes provision for the power of the Registrar to impose civil penalty orders under this Act on non-complying private voluntary organisations whilst clause 11 makes provision for insertion of a Schedule in the Act that provides for the civil penalty regime contemplated in the clause.

CLAUSE AND SUMMARY OF PROVISION

CLAUSE 10

This clause amends section 28 of the PVO Act which provides for the powers of the Minister to make Regulations concerning PVOs. The powers of the Minister have been extended, to make regulations on the procedure and frequency of meetings of the Board; and conditions under which members of the Board shall hold or cease to hold office; and the fees payable to the Board in carrying out its functions in terms of this Act.

The Minister may also require disclosures of sources of funding, from outside Zimbabwe whether in the application, the audit report or both.

Under (b) the Clause also allows for a fine of “up to level 14” to be imposed for violations of the regulations.

Although “any person aggrieved by a decision of the Minister” under the Act “may appeal to the High Court”, if the appeal is successful the matter is merely sent back to the Minister for reconsideration, rather than revoked. There is no review of the designation process itself. It is unclear why the Minister and Registrar are given unilateral discretion to determine PVOs at risk when there is a Financial Intelligence Unit.

Recommendations:

- Legitimate activities of NPOs should not be criminalised.
- The designation process must be subject to checks and balances as it may be open to abuse.
- Implementation of FATF recommendations, must be guided by identified best practices provided by FATF and or ESAAMLG recommendations during the mutual reviews.
- The Minister and Registrar should not have excessive powers that will violate labour rights and are in conflict with labour relations and jurisprudence on labour law set by the courts. Removal of employees or office bearers in PVOs should only be done after following due process.

COMMENT

The Bill allows for the imposition of civil penalty orders requiring defaulting PVOs to pay a fixed penalty amount in addition to any other criminal or non-criminal penalties imposed under the Act or any other law.

Recommendation:

- The numerous penalties imposed under the act amount to arbitrary over-regulation of the sector. They must be proportionate civil penalties to prevent over-regulation.

COMMENT

The provision allowing for regulation of “the Board” is ambiguous and can potentially be manipulated. Section 28 refers to the powers of the Minister to make ‘Regulations’ on various issues in subsection (e) which relates to the manner in which authorised persons collect funds on behalf of the PVO. The inserted subsections (e1-e4) are introducing new issues not necessarily linked to the collection of funds on behalf of PVO. The insertion is on the frequency of meetings of the Board; conditions of office of Board members; fees payable to the Board for registration for carrying out its functions in terms of this Act and lastly disclosures of sources of funding from outside Zimbabwe in the application or in the audit report or both.

These additions either be interpreted as relating to the PVO Board, as provided in section 3 & 4 of the Act, or the internal board of trustees of a PVO. Section 2 of the Act defines “Board” as the PVO Board established in terms of the Act. Ideally these additional subsections should have been cross referenced with section 3&4 of the Act for the avoidance of doubt and any confusion. It is hoped that the additional provisions will not - due to their location in section 28 of the Act - be interpreted widely to relate to internal board procedures of CSOs, and unlawfully restrict the constitutional right to freedom of assembly and association under section 58, and other international and regional standards protecting these rights.

CLAUSE AND SUMMARY OF PROVISION

COMMENT

Recommendation:

- In order to ensure some level of independence, the PVO Board should have capacity to come up with its own procedures on meetings, number of meetings etc. These procedures on meetings should be developed by the PVO Board.

The proposed subsection (e4) of the Bill allows for the Minister to make regulations for PVOs to disclose sources of funding from outside of Zimbabwe. The Guidelines on Freedom of Association and Assembly in Africa provides for laws to clearly state that associations have the right to seek, receive and use funds freely. In terms of international best practice, states should not prohibit funding solely on the basis that it is foreign, impose excessive reporting requirements relative to foreign funding, ban foreign-funded associations from otherwise legitimate activities, initiate aggressive auditing campaigns, or impose criminal or other excessive penalties based on receipt of foreign-funding as such. See UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Report to the UN Human Rights Council (Funding of associations and holding of peaceful assemblies), UN Doc. A/HRC/23/39 (Apr. 24, 2013)

Recommendations:

- Foreign funding should be permitted so long as organisations comply with the relevant customs and foreign exchange laws, fraud, and anti-money laundering regulations. It is recommended that this provision be repealed, and best practices be followed. For example in Ethiopia, Article 63/1(c) of the Ethiopia CSO Proclamation, provides that:- Any Organization shall have the right to solicit, receive and utilize funds from any legal source to attain its objective.)
- Criminal offence of “up to level 14” must be reviewed downwards or ideally removed as it amounts to over-regulation and criminalisation of CSOs

CLAUSE AND SUMMARY OF PROVISION

COMMENT

SECTION 3 & 4 OF PVO ACT

Provides for the PVO Board responsible for the registration, amendment or cancellation of the certificate of registration. It has at least 23 members, as follows, 5 are appointed from PVOs which the Minister considers as representative of PVOs, and section 3(2) (b) ‘one representative from such private voluntary organization, association, institution or other organization as the Minister may determine, from each of the provinces into which Zimbabwe is for the time being divided’ and 6 from named government ministries. The Registrar sits in the PVO Board ex officio.

The current appointment process of the PVO Board members is heavily dominated by the Minister as the Minister appears to have a say in all the appointments of PVO representatives. Further, the section 3(2)(b) is not clear whether there is one PVO representative in addition to the 10 that will be representing the provinces. The exact number of Board members is not clear, depending on how section 3(2)(b) is interpreted, they can either be 22 or 23.

Recommendation:

- The majority of members must be appointed by PVOs following a set criteria.
- Representation of the executive should be minimal, with self-regulation as best practice.
- Further, the Registrar should not erode the powers of the PVO Board as proposed in the current Bill.

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