

MEMORANDUM

Proposed amendments to the Prevention and Combating of Terrorist and Proliferation Activities Act, No. 4 of 2014 (PACOTPAA)

Purpose

The purpose of this memo is to:

Provide the rationale behind the proposed amendments to the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014 (Act No. 4 of 2014)

Background

It is important to note that the Financial Action Task Force (FATF) reviewers concluded that additional amendments to the Prevention and Combating of Terrorist and Proliferation Activities Act should ensure that processes related to targeted financial sanctions (TFS) are streamlined to enable targeted sanctions to be implemented without delay. The team accordingly advised authorities to streamline processes, including to make it clear in the law that the moment there has been a United Nations (UN) designation, the legal framework in Namibia will automatically come into force to ensure that all transactions with designated persons/entities are deemed frozen from that moment onwards. In this regard, the following deficiencies were identified by the reviewers with regard to Targeted Financial Sanctions related to Proliferation:

- (a) No adequate mechanisms to implement Targeted Financial Sanctions without delay on Proliferation Financing PF);
- (b) No requirement for all natural and legal persons within the country to freeze, without delay and without prior notice, the funds or other assets of designated persons and entities; and
- (c) No mechanisms for providing guidance to financial institutions and other persons or entities, including Designated Non-Financial Businesses and Professions (DNFBP), that may be holding targeted funds or other assets, on their obligations to respect a de-listing or unfreezing action.

Failure by Namibia to adequately address the above concerns in line with the Action Plan agreed upon will result in the grey listing of the country as a non-cooperative jurisdiction and one whose financial system poses a risk to the international financial system. The listing may result in the country being subjected to various sanctions, which may have a direct effect on the Namibian economy, correspondent banking relationships, foreign direct investments and availability of funds to Namibian Foreign Missions.

Methodology

In coming up with the envisaged amendments, the Namibian Police Force Task Team (NamPol TT) considered the findings of the last Mutual Evaluation Report (MER) relating to Namibia and also compared the current provisions of the Prevention and Combating of Terrorist and Proliferation Activities Act with FATF methodology for assessing compliance with its recommendations. Comparative studies with other jurisdictions with closely related legal systems were also undertaken by the NamPol TT.

Suggested amendments

EXPLANATORY NOTE:

_____	Words underlined with a solid line indicate insertions in existing provisions
[]	Words in bold type in square brackets indicate omissions from existing provisions

Headnote

The headnote provides additionally for the amendment of the Prevention and Combating of Terrorist and Proliferation Activities Act so as to make provision for the definition of the words/phrases: ‘terrorist organisation’ and ‘without delay’ as well as to provide for the wilful provision of funds or other assets.

BILL

To provide for the offences of terrorism and proliferation and other offences connected or associated with terrorist or proliferation activities; to provide for the definition of terrorist organisation; to provide for measures to prevent and combat terrorist and proliferation activities; to provide for measures to give effect to the international conventions, Security Council Resolutions, instruments and best practices concerning measures to combat terrorist and proliferation activities; to provide for measures to prevent and combat the funding of terrorist and proliferation activities; to provide for the wilful provision of funds or other assets, to provide for investigative measures concerning terrorist and proliferation activities; to provide for measures to proscribe persons and organisations that conduct terrorist and proliferation activities; and to provide for incidental matters.

BE IT ENACTED as passed by the Parliament, assented to by the President, of the Republic of Namibia as follows:

Amendment of section 1 of Act No. 4 of 2014

Section 1 of the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014 is hereby amended by including the definitions of the following terms:

“terrorist organisation” for the purposes of this Act means any group of persons that:

- (i) commits, or attempts to commit, a terrorist activity by any means, directly or indirectly, unlawfully and wilfully;
- (ii) participates as an accomplice in a terrorist activity;
- (iii) organises or directs others to commit a terrorist activity; or
- (iv) contributes to the commission of a terrorist activity by a group of persons acting with a common purpose where the contribution is made intentionally and with the aim of furthering the terrorist activity or with the knowledge of the intention of the group to commit a terrorist activity”.

“competent authority” means a competent authority as defined in section 1 of the Financial Intelligence Act

Amendment of section 2 of Act No. 4 of 2014

The following section is substituted for section 2 of the Prevention and Combating of Terrorist and Proliferation Activities Act, 2014:

“2. (1) Subject to this Act, a person who, in or outside Namibia, directly or indirectly, engages in any terrorist activity commits the offence of terrorism and is liable to life imprisonment.

(2) Any person who by any means, in or outside Namibia –

- (a) Wilfully provides, solicits or collects funds or other assets, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used, in whole or in part:
 - (i) to carry out or attempt to carry out a terrorist activity; or
 - (ii) by a terrorist organisation or by an individual terrorist, even in the absence of a link to a specific terrorist activity; [provides, solicits or collects funds intending, knowing or having reasonable grounds to believe that such funds is to be used, in whole or part, to carry out any terrorist activity regardless of whether such funds or part thereof were actually used to commit a terrorist activity;]
- (b) finances the travel of any other person to a State other than **their State of residence or nationality** for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist activity or providing or receiving of terrorist training; or
- (c) contributes to the commission of one or more terrorist financing offences or attempted offences, by a group of persons acting with a common purpose,

commits an offence and is liable to a fine not exceeding N\$100 million or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.”

(3) **For purposes of (1) and (2), it shall not be necessary that such funds or part thereof were actually used to commit a terrorist activity or be linked to a specific terrorist activity.**

Amendment of section 22 of Act No. 4 of 2014

Section 22 of the Act is hereby amended by substitution of the entire section with the following provision:

Designation of persons, organisations or countries by Security Council

22. (1) A resolution adopted by the Security Council of the United Nations when acting under Chapter VII of the Charter of the United Nations, designating or listing persons, organisations or countries against whom member states of the United Nations must implement financial sanctions and take other actions as specified in the resolution, has immediate effect for the purposes of this Act upon its adoption by the Security Council of the United Nations.

(2) A resolution contemplated in subsection (1) ceases to be in effect upon a decision of the Security Council of the United Nations to no longer apply that resolution.

[Notification of designated persons or organisations by Security Council]

22. The Permanent Mission of the Republic of Namibia to the United Nations must, without delay, submit to the Ministry responsible for foreign affairs all designations made by the Security Council or relevant Sanctions Committees, as well as any sanctions list issued in connection therewith.]

Amendment of section 23 of Act No. 4 of 2014

Section 23 of the Act is hereby amended by substitution of the entire section with the following provision:

Monitoring Updates of the United Nations Security Council Sanctions Lists

23. (1) The Centre shall, on a daily basis, monitor the United Nations Security Council Sanctions lists where the United Nations act under Chapter VII of the Charter of the United Nations, for designations or listings.

“[Publication of sanctions list and issuance of freezing orders in respect of persons or organisations designated by Security Council]

23. (1) The Ministry responsible for foreign affairs must, without delay upon receipt of a sanctions list under section 22, submit such sanctions list to the Minister who must, without delay -

(a) publish the sanctions list by notice in the *Gazette* and, when necessary, in any other expeditious means of publication the Minister thinks appropriate; and

(b) issue the freezing order of –

(i) any funds, assets or economic resources that are owned or controlled directly or indirectly by the designated person or organisation, without such funds or assets necessarily tied to a particular terrorist act, plot or threat;

(ii) all funds, assets or economic resources that are wholly or jointly owned or controlled, directly or indirectly, by designated persons or organisations;

(iii) funds, assets or economic resources derived or generated from funds or other assets owned or controlled, directly or indirectly, by a designated person or organisation, including interests that may accrue to such funds, or other assets;

(iv) funds, other assets or economic resources of persons or organisations acting on behalf of, or at the direction of, designated persons or organisations; or

(v) any funds or assets held in a bank account, as well as any additions that may come into such account after the initial or successive freezing.

(2) All persons and institutions referred to in section 24(2) must inform the Financial Intelligence Centre, within a prescribed period, of any assets frozen or actions taken in terms of a freezing order.

(3) A person who claims to have a bona fide right to funds or assets frozen in terms of subsection (1) may apply to the Minister for the exclusion of his or her interest from the freezing order.

(4) An application referred to in subsection (3) must be accompanied by a sworn statement setting out –

(a) the nature and extent of the right, title or interest of the applicant in the funds or assets concerned;

(b) the time and circumstances of the acquisition by the applicant of the right, title or interest in the funds or assets; and

(c) any additional facts supporting the application, which assist the Minister to make an assessment on the bona fide ownership or interest in the frozen funds.

(5) Any person or organisation which has taken any freezing action under this section must ensure the reasonable preservation of funds and other assets in the manner as prescribed.

(6) Any person, organisation or institution that fails to comply with a freezing order issued in terms of subsection (1) commits an offence and is liable to a fine not exceeding N\$100 million or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.]”

Amendment of Section 24 of Act No. 4 of 2014

Section 24 of the Act is hereby amended by substitution of section 24 with the following provision:

Circulation of designations of persons or organisations by Security Council and any sanctions list issued in connection therewith

24. (1) [The Minister responsible for foreign affairs must, without delay, upon receipt of a designation or sanctions list under section 22, submit such designation or sanctions list to the Director of the Centre, or his or her authorized representative.]

[(2)] The Director of the Centre or his or her authorized representative after [receiving the sanctions list or the designation referred to in subsection (1),] a designation or listing referred to in Section 22, must, without delay/ immediately, cause its publication on the website of the Centre and also circulate the list using electronic mail, facsimile or any other expeditious means of communication to -

- (a) all accountable institutions listed in Schedule [I] 1 of the Financial Intelligence Act;
- (b) all supervisory bodies listed in Schedule [II] 2 of the Financial Intelligence Act;
- (c) all reporting institutions listed in Schedule [III] 3 of the Financial Intelligence Act;
- (d) all regulatory bodies listed in Schedule [IV] 4 of the Financial Intelligence Act;
- (e) the Minister, and
- (f) any other person, business, public body, office, Ministry, government institution or competent authority [as the Director, considers appropriate].

Amendment of Section 25 of Act No. 04 of 2014

By substitution of section 25 with the following provision:

‘Prohibition of making funds available to or on behalf of designated persons, organisations or countries

25. (1) All persons, organisations or institutions must upon designation or listing as provided for under Section 22, without delay and without prior notice, freeze -

- (i) any funds, assets or economic resources that are owned or controlled directly or indirectly by the designated person or organisation, without such funds or assets necessarily tied to a particular terrorist act, plot or threat;
- (ii) all funds, assets or economic resources that are wholly or jointly owned or controlled, directly or indirectly, by designated persons or organisations;
- (iii) funds, assets or economic resources derived or generated from funds or other assets owned or controlled, directly or indirectly, by a designated person or organisation, including interests that may accrue to such funds, or other assets;
- (iv) funds, other assets or economic resources of persons or organisations acting on behalf of, or at the direction of, designated persons or organisations; or
- (v) any funds or assets held in a bank account, as well as any additions that may come into such account after the initial or successive freezing.

(2) All persons and institutions referred to in section 24(1) must inform the Financial Intelligence Centre, without delay, of any assets frozen or actions taken in terms of subsection (1).

(3) The Financial Intelligence Center after receipt of information in terms of section 25 (2), must, without delay, submit such information to the Minister.

(4) A person who claims to have a *bona fide* right to funds or assets frozen in terms of subsection (1) may apply to the Minister for the exclusion of his or her interest from the freezing order.

(5) An application referred to in subsection (4) must be accompanied by a sworn statement setting out –

- (a) the nature and extent of the right, title or interest of the applicant in the funds or assets concerned;
- (b) the time and circumstances of the acquisition by the applicant of the right, title or interest in the funds or assets; and
- (c) any additional facts supporting the application, which assist the Minister to make an assessment on the bona fide ownership or interest in the frozen funds.

(6) Any person or organisation which has taken any freezing action under this section must ensure the reasonable preservation of funds and other assets in the manner as prescribed.

(7) Any person or organisation which has taken any freezing action under this section must ensure the reasonable preservation of funds and other assets in the manner as prescribed.

(8) A person to whom a designation or list has been communicated in terms of section 24(1) or any other person who knows or ought reasonably to know or suspect that he or she either directly or indirectly makes any funds, bulk cash, economic resources or any other assets or financial or related services, directly or indirectly, wholly or jointly available to or on behalf of or for the benefit of -

- (a) a designated person, organisation or country;
- (b) a person or organisation controlled or owned directly or indirectly by a person organisation or country mentioned in paragraph (a); or

(c) a person, organisation or country acting on behalf, or at the direction, of a person, organisation or country mentioned in paragraph (a),

commits an offence and is liable to a fine not exceeding N\$100 million or to imprisonment for a period not exceeding 30 years, or to both such fine and such imprisonment.’

Amendment of section 26 (1) of Act No. 4 of 2014

Section 26 (1) of the Act is hereby substituted for the following subsection:

26. (1) The Minister [responsible for foreign affairs] responsible for immigration and border control must, without delay, upon receipt of a designation or sanctions list under section [22] 24, [submit such designation or sanctions list to the Minister responsible for immigration and border control, who must, without delay,] cause-

(a) the prevention of entry into or transit through Namibia of designated persons and their biological or adoptive parents and children with the exception that -

(i) Namibian citizens may not be denied entry into Namibia, be required to depart from Namibia or be allowed to exit Namibia; and

(ii) this subsection does not apply where entry or transit is necessary for the fulfilment of a judicial process, for humanitarian reasons, or to honour a request received from the relevant Security Council Sanctions Committee to allow entry or transit or to attend meetings at the United Nations Headquarters;

(b) where appropriate, the expulsion from the Republic of Namibia of a national of a designated country -

(i) working on behalf of or at the direction of a designated person or organisation for purposes of terrorist or proliferation activities or the funding of such activities; or

(ii) assisting in the evasion of sanctions or violation of applicable Security Council Resolutions,

for purposes of repatriation to his or her country of origin, unless the presence of the person is required for fulfilment of judicial proceedings, medical, safety, or other humanitarian purposes.

Amendment of section 27 (1) of Act No. 4 of 2014

Section 27 (1) of the Act is hereby substituted for the following subsection:

“27. (1) The Minister [responsible for foreign affairs must, without delay] upon receipt of a designation or sanctions list under section [22] 24, [submit such designation or sanctions list to the Minister who] must, without delay, cause prevention of the direct or indirect supply, sale, brokering or transfer to designated persons, organisations or countries of all types of arms and related materials –

(a) by Namibian citizens or residents of Namibia;

(b) by Namibian citizens outside Namibia;

(c) using Namibian flagged vessels or aircraft or aircraft registered in Namibia.

Amendment of section 32 (1) of Act No. 4 of 2014

Section 32 (1) of the Act is hereby substituted for the following subsection:

32. (1) A person whose funds has been [affected by the freezing order] frozen [issued] in accordance with section [23] 25(1) may submit a request to the Minister to have such funds or a portion of such funds released to cover the following –

(a) necessary and basic expenses, including payments for rent or mortgage, foodstuffs, monthly family expenses, medicines and medical treatment, taxes, insurance premiums and public utility charges;

(b) expenses exclusively for payment of reasonable professional fees, or reimbursement of incurred expenses associated with the provision of legal services;

(c) fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources;

(d) necessary for extraordinary expenses; and

(e) in respect of funds frozen under UNSCR 1718 and 1737 (2006) –

(i) expenses necessary to honour, any judicial, administrative or arbitral lien or judgement;

(ii) payments due under contracts entered into prior to the listing of such person or entity, provided –

(aa) that it has been determined that the contract is not related to any of the prohibited items, materials, equipment, goods, technologies, assistance, training, financial assistance, investment, brokering or services referred to in the relevant Security Council resolution;

(ab) that it has been determined that the payment is not directly or indirectly received by a person or entity designated pursuant to UNSCR 1737; and

(ac) 10 working days prior notification of the intention to make or receive such payments or to authorize, where appropriate, the unfreezing of funds, other financial assets or economic resources for this purpose, has been given to the 1737 Sanctions Committee.

Amendment of section 33 (7) of Act No. 4 of 2014

Section 33 (7) of the Act is hereby substituted for the following subsection:

(7) All persons and institutions referred to in Schedules **[I, II, III and IV]** 1, 2, 3 and 4 of the Financial Intelligence Act, must report to the Centre, **[within a prescribed period]** without delay, any assets frozen or actions taken in terms of a freezing order contemplated in subsection (1).

Amendment of section 45 (1) of Act No. 4 of 2014

Section 45 (1) of the Act is hereby substituted for the following subsection:

45. (1) [After] Upon publication of the notice of proscription in terms of section 44(3), the Minister, by notice in the Gazette, must, **[without delay]** immediately/simultaneously, issue an order for the freezing of -

- (a) any funds or assets that are owned or controlled by the proscribed person or organisation, without such funds or assets necessarily being tied to a particular terrorist or proliferation act, plot or threat;
- (b) all funds or assets that are wholly or jointly owned or controlled, directly or indirectly, by proscribed persons or organisations;

- (c) funds or assets derived or generated from funds or other assets owned or controlled, directly or indirectly, by proscribed persons or organisations, including any interest that may accrue to such funds, or other assets; or
- (d) funds or other assets of persons or organisations acting on behalf of, or at the direction of, proscribed persons or organisations.

Amendment of section 45 (2) of Act No. 4 of 2014

Section 45 (2) of the Act is hereby substituted for the following subsection:

(2) A person or an institution referred to in Schedules **[I, II, III or IV]** 1,2,3 or 4 of the Financial Intelligence Act must report to the Centre **[within a prescribed period]** without delay any assets frozen or actions taken in terms of a freezing order contemplated in subsection (1).

Amendment of section 46 (3)(b) of Act No. 4 of 2014

Section 46 (3)(b) of the Act is hereby substituted for the following subsection:

(b) circulate the list using electronic mail, facsimile or any other expeditious means of communication to -

- (i) all accountable institutions listed in Schedule **[I]** 1 of the Financial Intelligence Act;
- (ii) all supervisory bodies listed in Schedule **[II]** 2 of the Financial Intelligence Act;
- (iii) all reporting institutions listed in Schedule **[III]** 3 of the Financial Intelligence Act;
- (iv) all regulatory bodies listed in Schedule **[IV]** 4 of the Financial Intelligence Act; and
- (v) any other person, business, public body, office, ministry, Government institution or competent authority as the Director, considers appropriate.

Amendment of section 46 (3) of Act No. 4 of 2014

The Principal Act is amended by the insertion of Section 46(3A) after Section 46(3) of the following section:

(3A) All persons, organisations or institutions to whom a domestic list has been communicated in terms of section 46(3)(b) must immediately, and without prior notice, freeze -

- (i) any funds, assets or economic resources that are owned or controlled directly or indirectly by the designated person or organisation, without such funds or assets necessarily tied to a particular terrorist act, plot or threat;
- (ii) all funds, assets or economic resources that are wholly or jointly owned or controlled, directly or indirectly, by designated persons or organisations;
- (iii) funds, assets or economic resources derived or generated from funds or other assets owned or controlled, directly or indirectly, by a designated person or organisation, including interests that may accrue to such funds, or other assets;
- (iv) funds, other assets or economic resources of persons or organisations acting on behalf of, or at the direction of, designated persons or organisations; or
- (v) any funds or assets held in a bank account, as well as any additions that may come into such account after the initial or successive freezing.

Amendment of section 46 (8) of Act No. 4 of 2014

Section 46 (8) of the Act is hereby substituted for the following subsection:

“8. The Security Commission may also, **[if it thinks appropriate]** if reasonable grounds exists, propose proscribed persons or organisations to the Security Council 1267 (1999) Committee, the 1989 (2011) Committee, the 1988 (2011) Committee, the 1718 (2006) Committee or the 1737 (2006) Committee for designation, in the prescribed form and manner.”

Amendment of section 46 (9) of Act No. 4 of 2014

Section 46 (9) of the Act is hereby amended by the addition of the following subsection:

“9. (e) must advise whether Namibia’s status as designating State should be made known to other UN member states.”

Amendment of section 59 of Act No. 4 of 2014

Section 59 of the Act is hereby amended by the substitution of section 59 (e) and (f) of the following subsections:

- “59. (e) aids, abets, facilitates, supports or counsels the commission of; [or]
(f) incites the commission of, or
(g) participates or contributes with common purpose to, ...”
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