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Our reference: PEPUDA

Date: 30 June 2021

**Director-General
Justice and Constitutional Development
PRETORIA**

For attention: Ms F Bhayat

By email: fbhayat@justice.gov.za

Dear Ms Bhayat,

RE: SUBMISSIONS ON THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION AMENDMENT BILL, 2021

1. We refer to the abovementioned matter, specifically to the notice issued by the Department of Justice and Constitutional Development (“the Department”) on 26 March 2021, calling for interested parties to submit written comments on the proposed amendments to the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 (“PEPUDA” or “the Act”).
2. Cause For Justice (CFJ) hereby thanks the Department for the opportunity to make these written submissions and to participate in the law-making process, and for granting us an extension until 30 June 2021 to deliver submissions.
3. We focus our submissions on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights as well as related matters affecting the public interest in the context of the foundational constitutional values of human dignity, equality, and the advancement of fundamental human rights and freedoms (specifically the right to freedom of religion, belief and opinion, and the right to freedom of expression).

BACKGROUND TO CAUSE FOR JUSTICE

4. CFJ is an a-political, non-partisan human rights organisation that exists to act in the public interest and in the interest of justice by promoting and protecting constitutional rights, freedoms, and obligations in South Africa. The principal ways in which CFJ does this are through: (1) court proceedings; (2) public education and awareness campaigns; and (3) participating in the policy-making and legislative process, and other state decision-making structures.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: NC SNYDERS | JP DICKS

5. All five of CFJ's core values give it a particular interest in the Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill ("the PEPUDA Amendment Bill" or "the Bill"), namely: (1) the promotion of human dignity / worth; (2) the protection of the vulnerable in society (social justice); (3) the responsible exercise of freedom; (4) protecting the institutional authority of the family against undue encroachment from outside forces; and (5) ensuring accountable government action.

Freedom of religion

6. CFJ's involvement in matters pertaining to the protection and promotion of religious freedom date back to September 2014 when the "*Organisasie vir Godsdienstige-Onderrig en Demokrasie*"¹ instituted legal proceedings in the Johannesburg High Court against six public schools. CFJ joined the proceedings as amicus curiae (friend of the court). CFJ's contributions to the resolution of the constitutional questions included that a school system that tolerates diversity of religious practices and views should be favoured against a system that is essentially secular, denying all but agnostic or atheistic views in the life of a public school, since the South African constitutional order allows for the state to support and promote a variety of religious and irreligious views fairly and equitably. While CFJ acknowledged in its legal papers that accommodating religion in schools in a manner that ensures that the dignity and beliefs of all involved is respected, may at times not be an easy task, the answer cannot be to jettison religion – and along with it the enriching role that religious belief and practice play within the South African public sphere.
7. From 2018 to 2020, CFJ actively participated in the Parliamentary process around the Civil Union Amendment Bill (now the Civil Union Amendment Act). We delivered substantive written submissions to the Speaker of the National Assembly,² the Portfolio Committee on Home Affairs,³ and the Select Committee on Security and Justice.⁴ Our submissions focused on the constitutional imperative to balance fundamental rights in a just and equitable manner in order to maximise the enjoyment of rights by all persons.
8. During May 2021 CFJ delivered written submissions to the South African Law Reform Commission in respect of its Discussion Paper 152 on Marriage Reform.⁵ Our submissions emphasized the rich diversity of South Africa's pluralistic society and that the Preamble of the

¹ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others* (29847/2014) [2017] ZAGPJHC 160; [2017] 3 All SA 943 (GJ); 2017 (6) SA 129 (GJ) (27 June 2017). Available at: <http://www.saflii.org/za/za/cases/ZAGPJHC/2017/160.html>.

² CFJ Submissions on Civil Union Amendment Bill [B11-2018] (26 April 2018). Available at: https://causeforjustice.org/wp-content/uploads/2018/04/Civil-Union-Amendment-Bill-2018_CFJ-Submissions_Final.pdf.

³ CFJ Submissions on Civil Union Amendment Bill [B11-2018] (23 October 2018). Available at: https://causeforjustice.org/wp-content/uploads/2018/12/Civil-Union-Amendment-Bill-2018_CFJ-Submissions_23.10.2018.pdf.

⁴ CFJ Submissions on Civil Union Amendment Bill [B11-2018] (6 December 2019). Available at: https://causeforjustice.org/wp-content/uploads/2020/06/CFJ-Submissions_Civil-Union-Amendment-Bill.pdf.

⁵ CFJ Submissions on SALRC Project 144 Discussion Paper 152 Single Marriage Act. Available at: https://causeforjustice.org/wp-content/uploads/2021/05/CFJ_Submissions_SALRC-Single-Marriage-Act_Final.pdf.

Constitution acknowledges and celebrates diversity and the right to be different. We argued that this meant protection the right to freedom of religion, opinion and belief of all marriage officers.

9. CFJ is in the process of finalising our written submissions to the Department of Home Affairs in respect of the Green Paper on Marriage in South Africa. Our focus is on protecting and promoting diversity and reasonably accommodating difference.

Freedom of expression

10. CFJ delivered written submissions to the Department on the then draft Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016⁶ and to Parliament's Portfolio Committee on Justice and Constitutional Development on the Combating of Hate Crimes and Hate Speech Bill, 2018.⁷ We focused on how hate speech legislation carries the grave risk of chilling all forms of speech in ways that are disproportionate to the risk of the harm it seeks to remedy, and the necessity of restricting the ambit of the hate speech offense so as not to limiting freedom of speech unreasonably.

STRUCTURE OF SUBMISSIONS

11. Our submissions are structured under the following headings:

A	Drafting the PEPUDA Amendment Bill	4
B	Adequacy of the public participation process	4
C	Need for the PEPUDA Amendment Bill	5
D	Fundamental freedoms	6
E	Problematic proposals	12
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⁶ CFJ Submissions on Prevention and Combating of Hate Crimes and Hate Speech Bill [B – 2016] (31 January 2017). Available at: https://causeforjustice.org/wp-content/uploads/2018/05/Hate-Crime-and-Hate-Speech-Bill_Cause-for-Justice-submission_31.01.2017.pdf.

⁷ CFJ Submissions on Prevention and Combating of Hate Crimes and Hate Speech Bill [B9 – 2018] (15 February 2019). Available at: https://causeforjustice.org/wp-content/uploads/2019/03/CFJ-Submissions_Hate-Crimes-and-Hate-Speech-Bill-15.02.2019.pdf.

A DRAFTING THE PEPUDA AMENDMENT BILL

12. According to the Background Note, the purpose of the Bill is to address certain problems that have been identified with the Act. We humbly request the Department to kindly provide us with a response to the following questions:

12.1 What are the specific problems that the Bill must address (please provide a list with examples)?

12.2 Who identified and/or reported these problems?

12.3 Who initiated the drafting of the Bill?

12.4 Who did the Department consult before and during the drafting process?

B ADEQUACY OF THE PUBLIC PARTICIPATION PROCESS

13. Given the significant impact the PEPUDA Amendment Bill will have on South African society, the Department must ensure adequate public participation takes place. The call for public comments was open between 26 March 2021 and 12 May 2021. During this time, there were four public holidays (including the Easter holidays) and many South Africans also take additional leave during this period.

14. We are grateful to the Department granting us an extension to deliver our submissions by 30 June 2021. However, this was not a “general extension” granted to all South Africans equally, giving all an equal opportunity to comment on this momentous Bill.

15. On 18 June 2021, we received a news alert that the email address indicated by the Department in its gazetted call for public comments,⁸ was no longer receiving emails as its associated inbox was full on account of the great magnitude of public comments received.

16. In light of the above, we humbly:

16.1 Submit that the Department may be falling foul of its constitutional obligation to facilitate effective public participation in the law-making process, exposing the Bill to constitutional challenge on procedural grounds; and

⁸ FOR SA press release 'Democratic process derailed as PEPUDA Amendment Bill submissions overwhelm email limits' (18 June 2021). Available at: <https://forsa.org.za/press-release-democratic-process-derailed-as-pepuda-amendment-bill-submissions-overwhelm-email-limits/>.

- 16.2 Request the Department to either withdraw the Bill, or re-open/extend the call for comments for at least another 60 to 90 days.
17. Should the Department decide to re-open/extend the deadline for public comments, we humbly advise the Department to ensure the public is effectively alerted to the existence and impact of the Bill, and the new submission deadline.
18. We agree with, confirm and support the submissions and proposals made by Freedom of Religion South Africa (“FOR SA”) in its submissions on the PEPUDA Amendment Bill in relation to “procedural concerns”.⁹

C NEED FOR THE PEPUDA AMENDMENT BILL

19. The PEPUDA Amendment Bill will only be necessary if:
- 19.1 Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and
- 19.2 The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.
20. The Background Note to the Bill states that the Bill aims to:
- 20.1 Prevent ‘unfair discrimination’; and
- 20.2 Promote ‘equality’.
21. Equality is a cornerstone value of South Africa’s Constitution and democracy.¹⁰ We regard the promotion of equality and the prevention of unfair discrimination as laudable objectives and a constitutional imperative.¹¹ Where fundamental rights come into conflict with another, a careful balance needs to be struck within constitutional parameters to ensure equality is promoted and persons are protected from unfair discrimination, whilst simultaneously protecting freedom of religion¹² and freedom of expression.¹³ We implore the Department to ensure the foundational

⁹ FOR SA Submissions on PEPUDA Amendment Bill (28 June 2021) at [25] to [31]. Available at: <https://forsa.org.za/mdocs-posts/for-sa-written-submission-to-department-of-justice-28-june-2021-2/>.

¹⁰ Section 1(a) of the Constitution of the Republic of South Africa, 1996. Available at <https://www.justice.gov.za/legislation/constitution/saconstitution-web-eng.pdf>.

¹¹ Section 9(2) of the Constitution.

¹² Section 15 of the Constitution.

¹³ Section 16 of the Constitution.

values of, and the human rights enshrined by, the Constitution, are upheld. To fail to do so would undermine the very objectives the Bill seeks to advance.

22. We agree with, confirm and support the submissions and proposals made by FOR SA, that there is no hierarchy of rights and that the constitutional approach to conflicting fundamental rights involves applying the standard of proportionality and is reconciliatory in nature.¹⁴
23. We note and share the concerns of the FW de Klerk Foundation in respect of the far reaching detrimental impact and constitutionality of the current version of the Bill, which is likely to have an adverse effect on the promotion of equality and prevention of unfair discrimination in South Africa due to its limitation (whether intentional or not) of a certain number of fundamental constitutional and human rights¹⁵ – most notably are freedom of religion¹⁶, freedom of expression¹⁷ and freedom of association.¹⁸

D FUNDAMENTAL FREEDOMS

Freedom of religion

24. Section 15 of the Constitution – “religion, belief and opinion” – protects the right to freedom of conscience, religion, thought, belief and opinion. This right is enjoyed by both natural and juristic persons, and can only be limited in terms of section 36 of the Constitution (the so-called “limitations clause”).
25. Section 31 of the Constitution – “cultural, religious and linguistic communities” – protects certain rights of cultural, religious and linguistic communities. Members of these communities may not be denied the right to “*enjoy their culture, practice their religion, and use their language*” or to “*form, join, and maintain cultural, religious and linguistic associations and other organs of civil society*”. The rights contained in section 31 are subject to internal limitation, i.e. they may not be exercised in a manner that is inconsistent with any provision of the Bill of Rights.
26. We agree with, confirm and support the submissions and proposals made by FOR SA, that the section 31 rights include the “*right to ‘maintain’ religious institutions include the right to exclude non-adherents from (membership, or leadership of) those institutions*”.¹⁹

¹⁴ FOR SA Submissions on PEPUDA Amendment Bill at [35].

¹⁵ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill (28 June 2021) at [4.2] to [4.4]. Available at: <https://www.fwdeklerk.org/index.php/en/document-library/submissions?download=1208:submission-on-the-pepuda-amendment-bill>.

¹⁶ Section 15 of the Constitution.

¹⁷ Section 16 of the Constitution.

¹⁸ Section 18 of the Constitution.

¹⁹ FOR SA Submissions on PEPUDA Amendment Bill at [38].

27. Section 18 of the Constitution – “freedom of association” – protects the right to freedom of association. According to the Supreme Court of Appeal:

*“It is so that our Constitution protects an individual’s rights to practise his or her religion as well as the rights of members of a particular religion to practise that religion in association with others and in conformity with the dictates, precepts, ethical standards and moral discipline which that faith exacts. Protecting the autonomy of religious associations is considered a central aspect of protecting religious rights. Indeed such protection has been described as ‘vital to a conscience-honouring social order.’”*²⁰

28. We agree with, confirm and support the submissions and proposals made by FOR SA, that the section 18 right “*extends to, and protects, religious associations*” and “*implies institutional autonomy*”.²¹

Particular importance of protecting freedom of religion

29. We agree with, confirm and support the submissions and proposals made by FOR SA, that religious freedom:

29.1 “*[P]revents people from being forced to do something contrary to their beliefs*”;

29.2 “*[A]llows persons and institutions of faith, to fairly discriminate in circumstances where such discrimination accords with the dictates and tenets of their specific faith or religion, and/or of the religious organisations they belong to*”; and

29.3 “*[O]ught to be expressly protected in the Bill*”.²²

30. According to the Constitutional Court:

30.1 “*The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity*”.²³

30.2 Freedom of religion includes “*the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the*

²⁰ De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the time being and Another (CCT223/14) [2015] ZACC 35; 2016 (1) BCLR 1 (CC); 2016 (2) SA 1 (CC) (24 November 2015) at [40]. Available at: <http://www.saflii.org/za/cases/ZACC/2015/35.html>.

²¹ FOR SA Submissions on PEPUDA Amendment Bill at [39].

²² FOR SA Submissions on PEPUDA Amendment Bill at [46].

²³ Christian Education South Africa v Minister of Education (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 (18 August 2000) at [36]. Available at: <http://www.saflii.org/za/cases/ZACC/2000/11.html>.

right to manifest religious beliefs by worship and practice or by teaching and dissemination".²⁴

- 30.3 *"The constitutional right to practise one's religion ... is of fundamental importance in an open and democratic society" and is "one of the hallmarks of a free society"*.²⁵
- 30.4 *"[F]reedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs"*.²⁶
- 30.5 The *"State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law"*.²⁷
31. We agree with, confirm and support the submissions and proposals made by FOR SA, in relation to the importance of individuals' freedom *"to share and practise the same interests of substance"* for their sense of self (dignity and identity) and the centrality of the doctrine on non-entanglement to secure this freedom.²⁸

Reasonable accommodation

32. There is no hierarchy of rights and conflicting fundamental rights must be balanced in a constitutional manner. The Constitution acknowledges diversity and pluralism in our society²⁹ and requires *"religious beliefs held by the great majority of South Africans [to] be taken seriously"*.³⁰
33. The constitutional principle of reasonable accommodation is of particular importance here: Freedom of religion is entwined with other fundamental rights and must be reasonably accommodated in the public sphere.
34. According to the Constitutional Court:

²⁴ Christian Education Minister of Education at [36], citing *S v Lawrence*, *S v Negal*; *S v Solberg* (CCT38/96, CCT39/96, CCT40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 (6 October 1997). Available at: <http://www.saflii.org/za/cases/ZACC/1997/11.html>.

²⁵ *Prince v President of the Law Society of the Cape of Good Hope* (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002) at [25]. Available at: <http://www.saflii.org/za/cases/ZACC/1999/7.html>.

²⁶ *S v Lawrence* at [92].

²⁷ *Christian Education SA Minister of Education* at [35].

²⁸ FOR SA Submissions on PEPUDA Amendment Bill at [41] to [43], and [51].

²⁹ *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04) [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (1 December 2005) at [61]. Available at: <http://www.saflii.org/za/cases/ZACC/2005/20.pdf>.

³⁰ *Minister of Home Affairs v Fourie* at [89].

- 34.1 The Constitution affirms the “*right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight[s] the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’*”.³¹
- 34.2 “*The principle of reasonable accommodation could be applied by the state to ensure that [those persons] who [have] sincere religious objections ... would not themselves be obliged to do [that which would result] in a violation of their conscience.*”³²
- 34.3 In the context of conflicting fundamental rights, the “*two sets of interests involved do not collide, they co-exist in a constitutional realm based on accommodation of diversity.*”³³
35. We agree with, confirm and support the submissions and proposals made by FOR SA, in relation to the constitutional importance of, and the state’s duty to, reasonably accommodate freedom of religion in the public sphere.³⁴

Approach followed in jurisprudence of the Unites States

36. The “free exercise” clause of the United States (“US”) Constitution’s First Amendment is comparable to the right to freedom of religion in the South African Constitution.³⁵ In the US, freedom of religion enjoys robust protection, as evidenced by the recent unanimous decision of the Supreme Court of the United States (“SCOTUS”) in the matter of *Fulton v City of Philadelphia*.³⁶ The case concerned the City of Philadelphia’s penalising of and/or failure to accommodate a religious social services organisation due to its policy of not certifying same-sex couples as foster parents.
37. It is significant that both conservative and liberal justices of the SCOTUS, being the highest court in the US, were unanimous in their view that the City of Philadelphia violated Catholic Social Services’ (“CSS”) right to freedom of religion. The following passages from the majority decision are informative in understanding how robustly difference can be accommodated and fundamental freedom s(specifically freedom of religion) can be accommodated and protected in a pluralistic constitutional democracy:

³¹ Minister of Home Affairs v Fourie at [61].

³² Minister of Home Affairs v Fourie at [159].

³³ Minister of Home Affairs v Fourie at [98].

³⁴ FOR SA Submissions on PEPUDA Amendment Bill at [50].

³⁵ First Amendment to United States Constitution: Freedom of Religion, Speech, Press, Assembly, and Petition. Available at: <https://constitutioncenter.org/interactive-constitution/amendment/amendment-i>.

³⁶ *Fulton v City Of Philadelphia*, Pennsylvania (Supreme Court of the United States). Available at: https://www.supremecourt.gov/opinions/20pdf/19-123_g3bi.pdf.

37.1 *“The religious views of CSS inform its work in [the Philadelphia foster care] system. CSS believes that “marriage is a sacred bond between a man and a woman.” ... Because the agency understands the certification of prospective foster families to be an endorsement of their relationships, it will not certify unmarried couples – regardless of their sexual orientation – or same-sex married couples. CSS does not object to certifying gay or lesbian individuals as single foster parents or to placing gay and lesbian children. No same-sex couple has ever sought certification from CSS. If one did, CSS would direct the couple to one of the more than 20 other agencies in the City, all of which currently certify same-sex couples.”*³⁷

37.2 *“... the City’s actions have burdened CSS’s religious exercise by putting it to the choice of curtailing its mission or approving relationships inconsistent with its beliefs. The City disagrees. In its view, certification reflects only that foster parents satisfy the statutory criteria, not that the agency endorses their relationships. But CSS believes that certification is tantamount to endorsement. And “religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” ... Our task is to decide whether the burden the City has placed on the religious exercise of CSS is constitutionally permissible.”*³⁸

After discussing how the process by which a foster care agencies such as CSS certifies persons as foster care parents differs from other commercial activities such as “staying in a hotel, eating at a restaurant, or riding a bus”, the court noted:

37.3 *“All of this confirms that the one-size-fits-all public accommodations model is a poor match for the foster care system.”*³⁹

37.4 *“A government policy can survive strict scrutiny only if it advances “interests of the highest order” and is narrowly tailored to achieve those interests. ... Put another way, so long as the government can achieve its interests in a manner that does not burden religion, it must do so.”*⁴⁰

37.5 *“... the interest of the City in the equal treatment of prospective foster parents and foster children. We do not doubt that this interest is a weighty one, for “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts*

³⁷ Fulton at p 2 to 3.

³⁸ Fulton at p 5.

³⁹ Fulton at p 12.

⁴⁰ Fulton at p 13.

or as inferior in dignity and worth.” ... On the facts of this case, however, this interest cannot justify denying CSS an exception for its religious exercise.”⁴¹

37.6 “CSS seeks only an accommodation that will allow it to continue serving the children of Philadelphia in a manner consistent with its religious beliefs; it does not seek to impose those beliefs on anyone else.”⁴²

38. The *Fulton*-matter illustrates the crucial importance of the law protecting the rights of both natural and juristic persons to live in accordance with their sincerely held religious beliefs, and the laws ability to do so magnificently. To millions of South Africans, their religious beliefs are not a trivial matter – its foundational to who they are and informs how they want to and able to life a meaningful life, and as such is inseparable from their human dignity.

39. We humbly submit that the Department is constitutionally obligated to ensure PEPUDA does not violate the rights to freedom of religion (and expression). It can do so by ensuring that the provisions of PEPUDA is able to accommodate complex and nuanced situations such as the one exemplified by the *Fulton*-matter, where people (and the association they formed) merely want to live and participate in public life in a manner consistent with their religious views without prescribing to others how they should live.

Freedom of expression

40. Section 16 of the Constitution – “freedom of expression” – protects the right to freedom of expression, which includes the “*freedom to receive or impart information or ideas*”. Not all speech is protected. The right does not extend to nor protect (1) propaganda for war; (2) incitement of imminent violence; (3) or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. All other speech is deemed protected and may only be limited in terms of section 36 of the Constitution.

Particular importance of protecting freedom of expression

41. According to the Constitutional Court, freedom of expression:

41.1 Not only “*lies at the heart of a democracy*” but is an “*instrumental function as a guarantor of democracy*”.⁴³

⁴¹ Fulton at p 14.

⁴² Fulton at p 15.

⁴³ South African National Defence Union v Minister of Defence (CCT27/98) [1999] ZACC 7; 1999 (4) SA 469; 1999 (6) BCLR 615 (26 May 1999) at [7]. Available at: <http://www.saflii.org/za/cases/ZACC/1999/7.html>.

41.2 “[P]rotect[s] the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.”⁴⁴

41.3 “[I]s of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America... Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed.”⁴⁵

42. We agree with, confirm and support the submissions and proposals made by FOR SA, relating to the constitutional case law confirming the importance of the right to freedom of expression and the constitutional protection afforded to it.⁴⁶

E PROBLEMATIC PROPOSALS

General comments

43. The Bill fails to draw a distinction between “mere discrimination” and “unfair discrimination”. While unfair discrimination is illegal, mere discrimination is not.

44. According to Currie and De Waal, “*discrimination is a particular form of differentiation*”.⁴⁷ Section 9 of the Constitution – the “equality clause” – only prohibits unfair discrimination. “Fairness” is a moral concept used to distinguish between fair discrimination (legal) and unfair discrimination (illegal), and is determined by the impact of the discrimination on the person receiving differential treatment.⁴⁸ The concept of dignity is of central importance in determining whether discrimination is unfair,⁴⁹ since unfair discrimination is “*principally means treating people differently in a way that*

⁴⁴ South African National Defence Union v Minister of Defence at [8].

⁴⁵ S v Mamabolo (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 April 2001) at [37]. Available at: <http://www.saflii.org/za/cases/ZACC/2001/17.html>.

⁴⁶ FOR SA Submissions on PEPUDA Amendment Bill at [48].

⁴⁷ I Currie and J De Waal Bill of Rights Handbook 6th Edition Juta (2013) at p 222.

⁴⁸ Bill of Rights Handbook at p 223.

⁴⁹ Bill of Rights Handbook at p 223.

impairs their fundamental dignity as human being, who are inherently equal in dignity".⁵⁰ To determine whether discriminate is unfair, its impact must be assessed objectively and not subjectively.⁵¹

45. We agree with, confirm and support the submissions and proposals made by FOR SA, relating to the impact of the Bill's general failure to distinguish between mere discrimination and unfair discrimination, being that the Bill in its current form will not pass constitutional muster.⁵²

Clause 1: definition of "discrimination"

46. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the definition of "discrimination" in clause 1 of the Bill.⁵³

47. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the definition of "discrimination".⁵⁴

48. We share the concerns of Dr Nicola de Jager, senior lecturer in political science at the University of Stellenbosch, that the Bill:

48.1 *"Changes the definitions of "discrimination" to something completely different to what the ordinary person understands, resulting in people not knowing when they are breaking the law or not"*,⁵⁵ and

48.2 *"Unfairly holds a person with no intention to discriminate liable for another person discriminating"*.⁵⁶

Clause 1: definition of "equality"

49. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the definition of "equality" in clause 1 of the Bill.⁵⁷

⁵⁰ Prinsloo v Van der Linde and Another (CCT4/96) [1997] ZACC 5; 1997 (6) BCLR 759; 1997 (3) SA 1012 (18 April 1997) at [22]. Available at: <http://www.saflii.org/za/cases/ZACC/1997/5.html>.

⁵¹ Bill of Rights Handbook at p 223 to 224.

⁵² FOR SA Submissions on PEPUDA Amendment Bill at [57].

⁵³ FOR SA Submissions on PEPUDA Amendment Bill at [58] to [65].

⁵⁴ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.1.5] to [4.5.1.8], and [4.5.1.10] to [4.5.1.14].

⁵⁵ Dr N De Jager Submissions on PEPUDA Amendment Bill (7 June 2021) at [5.2].

⁵⁶ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.3].

⁵⁷ FOR SA Submissions on PEPUDA Amendment Bill at [66] to [71].

50. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the definition of “equality”.⁵⁸

51. We share the concerns of Dr Nicola de Jager that the Bill “[b]roadens the definition of “equality” to exceed or go further than the original intent of the Constitution making it unconstitutional”.⁵⁹

Clause 2: extension of legal liability

52. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the extension of legal liability in clause 2 of the Bill.⁶⁰

53. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the imposition of “vicarious liability for harassment, discrimination and hate speech”.⁶¹

Clause 3: “prohibition of retaliation”

54. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the prohibition of retaliation in clause 3 of the Bill.⁶²

55. We share the concerns of Dr Nicola de Jager that the Bill “[d]oes not define “retaliation” allowing for a very broad interpretation”.⁶³

Clause 4: general responsibility on all persons to promote equality and prevent discrimination

56. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the general responsibility on all persons to promote equality and prevent discrimination in clause 4 of the Bill.⁶⁴

57. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the “regulation of private and public institutions by the State”.⁶⁵

⁵⁸ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.1.1] to [4.5.1.4].

⁵⁹ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.1].

⁶⁰ FOR SA Submissions on PEPUDA Amendment Bill at [72] to [80].

⁶¹ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.2].

⁶² FOR SA Submissions on PEPUDA Amendment Bill at [81] to [85].

⁶³ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.4].

⁶⁴ FOR SA Submissions on PEPUDA Amendment Bill at [86] to [91].

⁶⁵ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.3.1], and [4.5.3.2.3] and [4.5.3.2.4].

58. We share the concerns of Dr Nicola de Jager that the Bill:

58.1 *“Places unrealistic obligations on all persons and institutions defined within the Equality Act to promote “equality” as prescribed by the Bill in their public activities”;*⁶⁶ and

58.2 *“Imposes financial obligations on institutions (including religious institutions) to make [funds] available in their already constrained budgets to implement measures to promote “equality” and eliminate “discrimination” [, which] is an impossibility for small businesses, NGO’s and community-based organisations”.*⁶⁷

Clause 5: measures by which State must achieve equality and eliminate discrimination

59. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the measures by which State must achieve equality and eliminate discrimination in clause 5 of the Bill.⁶⁸

60. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the “regulation of private and public institutions by the State” and the “impact of the Bill on South Africa’s broader societal levels as a whole”.⁶⁹

61. We share the concerns of Dr Nicola de Jager that the Bill “[c]alls for a revolution of South Africa’s entire legal system, using the Bill’s understanding of “equality””.⁷⁰

Clause 6: specific duties on constitutional institutions

62. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the specific duties on constitutional institutions in clause 6 of the Bill.⁷¹

63. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the “regulation of private and public institutions by the State”.⁷²

Clause 8: persons exercising a public power or performing a public function on behalf of the State

⁶⁶ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.6].

⁶⁷ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.8].

⁶⁸ FOR SA Submissions on PEPUDA Amendment Bill at [92] to [98].

⁶⁹ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.3.2.1] and [4.5.4].

⁷⁰ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.5].

⁷¹ FOR SA Submissions on PEPUDA Amendment Bill at [99] to [101].

⁷² FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.3.2.1].

64. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of persons exercising a public power or performing a public function on behalf of the State in clause 8 of the Bill.⁷³

65. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the “regulation of private and public institutions by the State”.⁷⁴

Clause 9: “duty of all persons to promote equality”

66. We agree with, confirm and support the submissions and proposals made by FOR SA in respect of the duty on all persons to promote equality in clause 9 of the Bill.⁷⁵

67. We agree with, confirm and support the submissions and proposals made by the FW de Klerk Foundation in respect of the “regulation of private and public institutions by the State”.⁷⁶

68. We share the concerns of Dr Nicola de Jager that the Bill:

68.1 *“Government ministers will be empowered to discriminate between people and institutions on numerous factors (size, resource, influence), which opens the door wide for abuse of power and the opportunity for State capturing and penalising those that do not “comply” with the State’s agenda and policies”;*⁷⁷ and

68.2 *“Imposes State regulation on persons and institutions. This is regulation of religion through the front door and the Bill’s understanding of discrimination and equality will clash with the core values of many religious institutions”.*⁷⁸

F LIMITATIONS ANALYSIS

69. The current version of the Bill infringes upon and limits various fundamental rights. A “limitations analysis” needs to be done to ensure these limitations do not fall foul of section 36 of the Constitution, which states that the *“rights in the Bill of Rights may be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”*.

⁷³ FOR SA Submissions on PEPUDA Amendment Bill at [102] to [104].

⁷⁴ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.3.1].

⁷⁵ FOR SA Submissions on PEPUDA Amendment Bill at [105] to [112].

⁷⁶ FW de Klerk Foundation Submissions on PEPUDA Amendment Bill at [4.5.3.2.2].

⁷⁷ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.4].

⁷⁸ Dr N De Jager Submissions on PEPUDA Amendment Bill at [5.9].

70. We agree with, confirm and support the submissions and proposals made by *FOR SA* in respect of the limitations analysis of the various fundamental rights infringed upon and limited by the Bill.⁷⁹

G RECOMMENDATIONS

71. We agree with, confirm and support the recommendations made by *FOR SA* in respect of the Bill.⁸⁰

CONCLUSION

72. In conclusion, we humbly re-iterate that:

72.1 The Department may be falling foul of its constitutional obligation to facilitate effective public participation in the law-making process, exposing the Bill to constitutional challenge on procedural grounds.

72.2 The PEPUDA Amendment Bill will only be necessary if:

72.2.1 Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and

72.2.2 The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.

72.3 There is no hierarchy of rights and conflicting fundamental rights must be balanced and reasonably accommodated in a constitutional manner as the Constitution acknowledges diversity and pluralism in our society.

72.4 The rights to freedom of religion and freedom of expression are crucially important for the functioning and flourishing of South Africa's constitutional democracy.

72.5 The PEPUDA Amendment Bill's general failure to distinguish between mere discrimination and unfair discrimination, exposes the Bill to constitutional challenge on substantive grounds.

72.6 The definitions of "equality" and "discrimination" are overbroad and unconstitutional.

⁷⁹ FOR SA Submissions on PEPUDA Amendment Bill at [113] to [118].

⁸⁰ FOR SA Submissions on PEPUDA Amendment Bill at [119] to [120].

- 72.7 The imposition of strict liability and vicarious liability as proposed, is inconsistent with the South African legal framework.
- 72.8 The imposition of regulation of private and public institutions by the State as proposed, is unwarranted and unjustified.
73. We trust that the above comments and inputs are of assistance to the Department. We look forward to your response thereto in due course, if any.
74. Cause For Justice remains at the Department's disposal to assist in the further development and/or amendment of the Bill, and specifically in relation to promoting equality, preventing unfair discrimination and protecting fundamental freedoms within the parameters set by the Constitution.
75. We would appreciate any opportunity that the Department is willing and able to afford us to take further part in discussions and/or to make further contributions to the further development and/or amendment of the Bill.

Yours faithfully,

Liesl Pretorius

Legal Advisor: Law and Policy