

Oral Submissions

on the

General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill

Standing Committee on Finance

11 October 2022



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Introduction: Background to Cause For Justice (CFJ) and interest in Bill

CFJ is a non-partisan/apolitical non-profit human rights and public interest organisation with the primary objective of advancing constitutional justice in South Africa:

- Primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.
- As non-profit entity, has opted not to apply for voluntary registration in terms of NPO Act, meaning CFJ will be directly affected by proposed amendments to NPO Act.



CFJ five core values:

- Responsible exercise of freedom
- Ensuring accountable exercise of state power
- Promotion of human dignity/inherent worth of all human beings
- Protection of the vulnerable in society (social justice)
- Protection of the family against destructive outside and inside forces

PLEASE NOTE: CFJ intends making submissions in relation to provisions of NPO Act only



Importance of preventing money laundering and combatting terrorism financing

Anti-money laundering legislation serves:

- Necessary and legitimate government purpose
- Public interest

Constitutional importance of ensuring adequate public participation

Comment period:

- 27 September to 10 October 2022 (at 12:00/noon)
- Very short (only 9.5 business days)

During this period (impact of):

- South African public schools holiday break (1 to 10 October 2022)
- Ongoing loadshedding, including during office hours
- Example: specific predicament of CFJ legal drafting team

Crucially important: all South Africans given adequate opportunity to comment on Bill

Inordinately short period for public comments:

- Falls foul of constitutional obligation to facilitate effective public participation in the law-making process
- Will make Bill unconstitutional on procedural grounds

REQUEST: Re-open/grant general extension of the call for comments for at least a further 30 days

- Alternatively, remove parts of Bill dealing with NPO Act

Critical preliminary questions

Unable to critically consider merits of specific clauses in any detail:

- Insufficient time due to inadequately short comment period

Focus of brief/preliminary submissions:

- Three major overarching questions (relevant to constitutionality of Bill)



Less restrictive means to achieve purpose

QUESTION 1: Are the measures in the NPO Act, which will now become compulsory, the least restrictive means to achieve the purpose of preventing money-laundering and combatting terrorism financing in the NPO sector?

Discussion:

- Preventing money laundering and combatting terrorism financing is a necessary and legitimate government purpose and would serve the public interest.
- **However, it must be assured that the means proposed to address these public ills (in this instance, the amendments proposed in the Bill), do not go further than is necessary to achieve its purpose.**

- **Section 36(1) of the Constitution (limitations clause):**

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, including:

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose

- The limitation of rights entails a delicate balancing exercise which should attempt to maximise respect for, promoting, protecting and fulfilling the rights in the Bill of rights:

- **Where less restrictive means are available to limit rights, only such means will pass constitutional muster.**



- The Bill seeks to amend certain sections of the NPO Act, including making registration mandatory and requiring all NPOs to comply with existing provisions of the Act and proposed new provisions in the Bill (or face criminal sanctions):
 - The proposed amendments will impose legal obligations and limit constitutional rights of NPOs, their governors and office-bearers, the majority of whom are unlikely to ever be involved in money-laundering or financing terrorism.
 - **This is a drastic change from the current the status quo: from encouraging voluntary registration and compliance to compelling against the threat of imprisonment and fines.**



Additional compliance burden and criminal sanctions

QUESTION 2: Is the burden of placing additional compliance obligations on law-abiding citizens and non-profit entities, that choose to operate outside of the scope of the NPO Act, and concomitant penalties and criminal justice consequences for non-compliance, a constitutionally justifiable cost of reducing/eliminating money laundering among those who conduct criminal enterprises by way of non-profit entities outside of the scope of the NPO Act?

Discussion:

- Additional compliance requirements would mean more work for NPOs, taking up more valuable capacity and resources.
 - It is common cause that the NPO sector is over-extended and under-resourced.
- **Many law-abiding non-profit entities choose not to apply for voluntary registration in terms of the NPO Act for a wide variety of legitimate reasons (for example, CFJ):**
 - Reasons for choosing not to register in terms of the NPO Act, can include minimising the time, funds and other resources spent to meet legal and administrative compliance requirements.
 - **If the Bill is passed in its current format, it would force these entities to register under and/or comply with the requirements in the Act or face criminal sanctions.**

- Seriously doubt whether the consequences of these measures are appropriate and proportional (i.e. constitutionally defensible) when compared to the potential benefit to be achieved by them:
 - I.e. reducing money-laundering done by criminal enterprises through the NPO sector versus both the cost to the entities and the cost to society (as many more NPOs would need to apply human and financial resources towards compliance with the NPO Act, rather than doing good public benefit work).
- **If the proposed amendments will not yield a significant net benefit, the proposed amendments will not constitute reasonable and justifiable limitation of the rights of law-abiding non-profit entities and their governors and office bearers:**
 - I.e. if the cost to the NPO sector and society materially outweigh/exceed the benefits to be achieved by reducing/eliminating money laundering this sector.

Likelihood of legislative amendments achieving their purpose

Question 3: What is the level of assurance that making the NPO Act compulsory will in fact translate to prevention of money laundering enterprises in the NPO sector?



Discussion:

- **It is necessary to investigate whether the proposed amendments will be effective at addressing the identified public ills.**
- If what the Bill proposes is not highly likely to translate into effectively preventing and combatting money laundering and financing terrorism in practice, the amendments would:
 - **Serve no legitimate purpose, and**
 - **Unreasonably and unjustifiably limit the rights of NPOs, their governors and office bearers, by placing an unconstitutional burden on them.**

REQUEST: Thoroughly investigate this issue (and to this end):

- Require the Department of Finance and/or the Department of Planning, Monitoring and Evaluation to provide it with sound evidence and a rational basis for why and how the specific proposed amendments in the Bill will in fact translate into effectively combatting money laundering by criminal enterprises operating within the NPO sector.
- Scrutinize and interrogate such evidence and arguments very carefully (and even seek independent expert opinions and advice to corroborate whatever evidence if provided by the government).

In summary

Importance of ensuring adequate public participation

Critical preliminary questions:

- Less restrictive means to achieve purpose
- Additional compliance burden and criminal sanctions
- Likelihood of legislative amendments achieving their purpose

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Concluding remarks

- These questions, and others, require a considered appraisal and investigation by the public in order to formulate a view on and make meaningful submissions on the Bill.
- These questions are complex, requiring proper consideration of the constitutionality of intended implications and unintended consequences, and of the constitutional rights and interests at play.



- If CFJ was afforded sufficient time to consider the Bill and engage with applicable legal precedent and academic writing, we would want to include in our submissions to the Committee a reasoned and authoritative answer to these questions and other matters (and augment/amplify our submissions as necessary).
- CFJ remains at the Committee's disposal to assist in the further development and/or amendment of the Bill to effectively achieve constitutionally compliant legitimate government purposes and prevent any unforeseen detrimental consequences to the NPO sector and society flowing from its enactment.

Thank you

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