

# Oral Submissions

on the

General Laws (Anti-Money Laundering  
and Combating Terrorism Financing)  
Amendment Bill [B18B-2022]

Select Committee on Finance

**23 November 2022**



# *Structure of submissions*

1. Background to CFJ and interest in Bill
2. Need for adequate public participation in legislative process
3. Need for and justification of legislative intervention
4. Improved proposals
5. Problematic proposals
6. Recommendations



# *Background to Cause For Justice (CFJ) and interest in Bill*

- CFJ is a non-partisan and apolitical nonprofit 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.
- Two of CFJ's five core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, and (2) ensuring constitutional state action.
- As a nonprofit entity that has opted not to apply for voluntary registration in terms of the Nonprofit Organisations Act, 71 of 1997 ("NPO Act"), CFJ will be directly affected by proposed amendments to the NPO Act.
- CFJ makes submissions in relation to the NPO Act only.

# *Need for adequate public participation in legislative process*

- The Committee (and Parliament) is constitutionally bound to ensure adequate public participation takes place in respect of the Bill.
- The call for public comments opened on Thursday, 17 November 2022 and closed at 13:00 on Tuesday, 22 November 2022. This is a mere three and a half business days – an extraordinarily short period of time.
- CFJ is concerned that many stakeholders will only become aware of the call of comments too late (i.e. too close to or after the deadline), if at all.
- Of those stakeholders who are aware of the call for comments, many may likely be hard-pressed to free sufficient capacity from existing prior work commitments on such extraordinarily short notice, in order to participate meaningfully in the public consultation process.

# *Need for adequate public participation in legislative process*

- It is crucially important that all South Africans are given an adequate opportunity to comment on the B-version of the Bill.
- CFJ is further concerned that the call for comments was published before the B-version of the Bill was available, further delaying stakeholders in considering and commenting on its contents.
- By allowing an extraordinarily short period for public comments, the Committee may likely be falling foul of its constitutional obligation to facilitate effective public participation in the law-making process. This would make the Bill susceptible to constitutional challenge on procedural constitutional grounds.
- **REQUEST: Re-open/grant general extension of the call for comments for at least a further 10 days**

# *Need for and justification of legislative intervention*

- The amendments proposed in the Bill will only be necessary – and constitutionally defensible – if:
  - Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and
  - The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.
- CFJ acknowledges and agrees that preventing money laundering and combating terrorism financing is a necessary and legitimate government purpose, which simultaneously serves the public interest.
- CFJ further acknowledges and agrees that it is vitally important to the socio-economic well-being of South Africa and its people, to guard against the Republic being grey-listed by the Financial Action Task Force (“FATF”).

# *Need for and justification of legislative intervention*

- We commend and support constructive efforts to address serious social ills and criminal activities proactively and effectively. However, we also recognise and emphasise the equal importance of avoiding unforeseen and unintended detrimental consequences, especially those that would threaten the well-being of the Republic and its people.
- The nonprofit (“NPO”) sector serves millions of South Africans through doing good public benefit work. Legislative amendments that will put additional pressure on the already over-extended and under-resourced NPO sector, for example by taking up scarce and valuable capacity and resources, must be avoided.

# *Need for and justification of legislative intervention*

## **Critical preliminary questions**

- The Bill seeks to amend certain sections of the NPO Act, including making registration mandatory for a limited subset of ‘at risk’ NPOs (“affected NPOs”). Affected NPOs will also be required to comply with the existing provisions of the Act as well as the proposed new provisions in the Bill (or face administrative sanctions).
- Affected NPOs are those that:
  - Make donations to individuals or organisations outside of the Republic’s borders; or
  - Provide humanitarian, charitable, religious, educational or cultural services outside of the Republic’s borders.
- This is a drastic change from the status quo: from encouraging voluntary registration and compliance to compelling it against the threat of administrative sanctions.



# *Need for and justification of legislative intervention*

- The proposed amendments will impose legal obligations and limit the constitutional rights of affected NPOs, their governors and office-bearers, the majority of whom are unlikely to ever be involved in money laundering or the financing of terrorism.
- To ensure the proposed amendments are necessary and constitutionally justified, we need to answer two critical preliminary questions concerning the:
  - Likelihood of the legislative amendments achieving their purpose (Question 1); and
  - Existence of less restrictive means to achieve the legislative purpose (Question 2).

# ***Question 1: Likelihood of the legislative amendments achieving their purpose***

**What is the level of assurance that making registration under the NPO Act compulsory for affected NPOs, will in fact translate to preventing money laundering enterprises in the NPO sector?**

- It is necessary to ensure that the proposed amendments will in fact be effective at addressing money laundering and terrorism financing in practice. Otherwise, the amendments will serve no legitimate purpose and place an unconstitutional burden on affected NPOs (and their governors and office-bearers).
- Most importantly – as the clear motivation behind the Bill is to meet the standards and recommendations set by the FATF (and avoiding grey-listing) – the proposed amendments (measures/solutions) must, if anything, actually achieve this objective.
- If the legislative intervention does not achieve this objective and therefore does not prevent grey-listing, the whole exercise (and concomitant allocation of capacity and resources) will be in vain/a waste.

# ***Question 1: Likelihood of the legislative amendments achieving their purpose***

- **REQUEST:** We humbly request the Committee to thoroughly investigate this critical issue, by requesting the appropriate government departments to furnish 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 addressing the identified public ills.
- We further humbly submit that the Committee would be prudent to scrutinize and interrogate such evidence and arguments very carefully, and even seek input from independent experts (experienced and authoritative legal and financial anti-money laundering specialists).

## **Oversight and support capacity of DSD/NPO Directorate**

- An important and central aspect of a successful NPO registration and regulation system, is the support and oversight provided by the NPO Directorate (“the Directorate”), which is situated in the National Department of Social Development (“DSD”).

## ***Question 1: Likelihood of the legislative amendments achieving their purpose***

- Despite the National Treasury and the Financial Intelligence Centre’s (collectively, “Treasury”) responses concerning the capacity of and/or plans to capacitate the Directorate, we still have serious reservations as to if and how the Directorate will be able to effectively implement and manage the additional responsibilities (and increased workload) that will necessarily follow the implementation of the proposed amendments, let alone effectively identify and address money laundering and terrorism financing (the primary objective of the amendments).
- Even if the proposed amendments are able to address and resolve the identified social ills (of money laundering and terrorism financing), but are not proactively and effectively implemented, the FATF requirements will (still) not be complied with – and grey-listing will not be avoided.

# ***Question 1: Likelihood of the legislative amendments achieving their purpose***

## **Limitations analysis**

- Proposed legislation limiting constitutional rights will be unconstitutional if it does not achieve the purpose for which it is made.
- The limitations clause (section 36(1) of the Constitution) provides as follows:

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.

# ***Question 1: Likelihood of the legislative amendments achieving their purpose***

- A limitation on constitutional rights, which the proposed legislation implies, must in other words be reasonable and justifiable, and in order to determine that, factors (a) to (e) must be considered. This necessitates a delicate balancing exercise – popularly called the ‘proportionality test’ – requiring all five factors to be read together.
- In short, the question is: is there a rational relationship between the limitation on the rights and the purpose of the limitation, taking into account all five factors.
- **Factor (a) ‘the nature of the right’:** The rights in question – being the right to freedom of association (section 18) and the right to freedom of conscience, religion, thought, belief and opinion (section 15) – are important freedom rights under the South African Constitution. Any limitation on these rights must be considered carefully.
- **Factor (b) ‘the importance of the purpose of the limitation’:** It is clear that the limitation serves an important purpose: to combat certain (criminal and detrimental) conduct and actions.

# ***Question 1: Likelihood of the legislative amendments achieving their purpose***

- **Factor (c) ‘the nature and extent of the limitation’:** Factor (c) requires an examination into the severity of the limitation in limiting the rights in question. Answering this question assists in determining the relationship between the limitation and its purpose. It has been established by our courts that the more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be. If we consider the possible detrimental effect of compulsory registration on affected NPOs (many or most, completely innocent of money laundering and terrorism financing), this factor already raises serious doubt as to whether the proposed legislation can even pass this test.
- **Factor (d) ‘the relation between the limitation and its purpose’:** Factor (d) actually establishes the principle of proportionality – i.e. whether a rational relationship exists between the limitation and its purpose. The proportionality test consists of two elements:
  - First, it must be determined whether the limitation will achieve its purpose; and
  - Second, whether there is a rational relationship between the limitation and its purpose.

## ***Question 1: Likelihood of the legislative amendments achieving their purpose***

- In respect of the first element: If there is no convincing indication that the proposed legislation will in fact achieve its purpose (i.e. combat money laundering and terrorism financing) effectively, the Bill cannot meet the first element of factor (d) and it would mean that there can never be a rational relation between the limitation and its purpose. This is a basic test for every piece of legislation that limits constitutional rights.
- In respect of the second element: Even if it can be argued that Bill does in fact achieve its purpose, factor (d) requires further that it must also be determined to what extent the limitation imposed by the legislation indeed promotes the purpose of the legislation. If the limitation promotes the purpose, but in the process affects persons, organisations, conduct or interests that have nothing or very little to do with the matter, the limitation is over-broad or over-inclusive – meaning, it covers more than what is necessary to be effective. An over-broad or over-inclusive limitation does not comply with the second element required by factor (d), meaning the limitation would still be unconstitutional (despite achieving its purpose).



## ***Question 1: Likelihood of the legislative amendments achieving their purpose***

- For these reasons, we submit with respect that the proposed legislation does not meet these basic requirements of section 36 and that the Bill will be unconstitutional (if adopted without amendment).
- Factor (e) of section 36(1) is discussed under ‘Question 2’.

## ***Question 2: Existence of less restrictive means to achieve the legislative purpose***

**Are the measures in the NPO Act, which will now become compulsory for affected NPOs, the least restrictive means to achieve the purpose of preventing money laundering and combatting terrorism financing in the NPO sector?**

- Even if the proposed amendments are good measures/solutions, in order to be constitutionally defensible, they must also comply with factor (e) of section 36(1), and must infringe the existing rights and freedoms of NPOs (and their governors and office-bearers) as little as is practically possible.
- **Factor (e) ‘less restrictive means to achieve the purpose’:** Factor (e) requires that where less restrictive (and lawful) means are available to achieve the purpose of the limitation, only such less restrictive means will pass constitutional muster. This is because, as explained above, all five factors in section 36(1) must be read together. This means that factor (e) also contributes to answering the question of whether there is a rational relationship between the purpose of the limitation and the severity of the limitation.

## ***Question 2: Existence of less restrictive means to achieve the legislative purpose***

- The NPO Act is a law of general application. The right of affected NPOs (and their governors and office-bearers) to choose whether to register, may be restricted – by making registration compulsory – if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (as provided by section 36 – the limitations clause).
- By limiting the scope of the application of NPO Act, the proposed measures are immediately less restrictive. However, registration is still required of all NPOs that:
  - Make donations to individuals or organisations outside of South Africa’s borders; or
  - Provide humanitarian, charitable, religious, educational or cultural services outside of South Africa’s borders.
- To pass constitutional muster, the measures that will become compulsory for the limited subset of affected NPOs, must still be the least restrictive means to achieve the purpose of preventing money laundering and combatting terrorism financing in the NPO sector.

## ***Question 2: Existence of less restrictive means to achieve the legislative purpose***

- We are immediately concerned by the fact that many religious organisations routinely, as part and parcel of practicing the doctrines and tenets of their faith/fulfilling their religious ‘mandate’:
  - Make donations to individuals or organisations outside of South Africa’s borders; or
  - Provide humanitarian, charitable, religious, educational or cultural services outside of South Africa’s borders.
- Practically, this means that many (if not most) religious organisations will be compelled to register and comply with the NPO Act, placing an immense administrative and financial burden on such organisations and exposing them to administrative sanctions for non-compliance. The additional burden may cause many religious organisations to cease operations, which necessarily means the loss of good and essential public benefit work being done.

## ***Question 2: Existence of less restrictive means to achieve the legislative purpose***

- We reiterate that religious organisations do tremendous good public benefit work, impacting millions both locally and abroad, and often for the benefit of society's socio-economically vulnerable and marginalised. In this way, these organisations take a lot of pressure off the state (and particularly DSD) by providing welfare/quasi-welfare services. If the proposed amendments will force these organisations to cease operations, much harm will be suffered by South African society (and even communities abroad).
- We urge the Committee to scrutinise any proposed wording to ensure that these fundamental rights and freedoms are indeed protected.

# *Need for and justification of legislative intervention*

## **In summary and conclusion**

- 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.
- It is our firm conclusion that the legislation as it stands does not pass the requirements of factor (e) of section 36(1) in that it does not employ the least restrictive means to achieve its purpose.
- We are also convinced that if the legislation is not amended, it will not establish a rational relationship between the limitations imposed by it and the purpose for which is it proposed.
- This means that it will not comply with the requirements of section 36(1) and will be unconstitutional.



## *Improved proposals*

- CFJ supports – and is encouraged by – the following improvements to the Bill:
  - Abandoning of blanket mandatory registration of all NPOs;
  - Abandoning of criminal sanctions for non-compliance with the NPO Act; and
  - Limiting the circumstances in which an NPO may be required (i.e. compelled) to alter its constitution (i.e. greater protection of religious freedom rights).

# *Problematic proposals*

## **General comments**

- Will CFJ welcomes the abandonment of blanket compulsory registration for all NPOs, CFJ still concerned by the far-reaching detrimental impact of the proposed additional compliance burden – i.e. the compulsory registration (and/or compulsory compliance requirements, irrespective of registration status) – on affected NPOs (i.e. those identified as the limited subset of ‘at-risk’ NPOs).

## **Mandatory registration of ‘at-risk’ NPOs with Directorate**

- The B-version of the Bill proposes mandatory registration of all ‘at-risk’ NPOs with the Directorate. However, according to FATF Recommendation 8, it is unnecessary to impose specific licensing or registration requirements (for counter-terrorist financing purposes) on NPOs that are already registered with tax authorities (for e.g. SARS) and monitored in the context of qualifying for favourable tax treatment (for e.g. Public Benefit Organisations (“PBOs”).



# *Problematic proposals*

- Excluding NPOs that are registered as PBOs with SARS from being deemed ‘at-risk’ NPOs that need to register with DSD, will lessen the burden on the State and NPOs without falling foul of FATF’s Recommendations.
- It will simultaneously prevent numerous religious organisations from being subjected to additional administrative and/or financial burdens which such organisation may find difficult to cope and comply with.
- CFJ is preparing draft legislative text to this effect, in respect of new section 12(1)(b) (and will share same with the Committee as soon as possible).

## **Appropriateness of identified limited subset of NPOs**

- Due to the extraordinarily short opportunity for public comments on the B-version of the Bill, we are unable to properly evaluate the appropriateness (i.e. the rationality and per extension, the constitutional defensibility) of the identified limited subset of NPOs.

# *Problematic proposals*

- Under the circumstances, we make the following brief observations:
  - Even at a cursory glance, the identified limited subset of NPOs is still too broad, including a wide array of NPOs; and
  - Practically, all religious organisations that make donations or provide services outside of South Africa’s borders (likely a vast number), will be required to register and comply with the NPO Act – or face administrative sanctions.

## **Comments on specific clauses**

### **Clause 9: Amendment of section 2 – ‘Objects of Act’**

- It is our firm conclusion that blanket compulsory registration of the identified limited subset of NPOs (“affected NPOs”) will not comply with the requirements of section 36(1) and will be unconstitutional.
- CFJ does not support the compulsory registration of any NPO.

# *Problematic proposals*

- Many affected NPOs choose not to register for various legitimate reasons. Compulsory registration will automatically impose additional compliance burdens on such NPOs and administrative sanctions for non-compliance. This will necessarily divert valuable and scarce human and financial resources away from performing good public benefit work in order to fulfil and meet administrative functions and obligations.
- While Treasury's intended abandoning of 'blanket compulsory registration' is a welcome improvement, CFJ still prefers and supports registration remaining completely voluntary for all NPOs.
- Alternatively, CFJ would support registration being made compulsory for a limited subset of 'at-risk' NPOs, subject to:
  - The limitation of rights and freedoms of the limited subset of 'at-risk' NPOs being constitutionally defensible (i.e. rational); and
  - The explicit and effective protection of religious freedom rights.

# *Problematic proposals*

- To this end, we specifically emphasise the importance of ensuring that any amendments do not exceed the requirements set by the FATF's Recommendation 8 – and further emphasise that the identified limited subset of 'at risk' NPOs is still too broad.

## **Clause 11: Amendment of section 12 – 'Requirements for registration'**

- CFJ does not support the compulsory registration of any (or any particular limited subset of) NPOs. CFJ prefers and supports registration remaining completely voluntary.
- Alternatively, CFJ would support registration being made compulsory for a rationally identified (i.e. constitutionally defensible), appropriate limited subset of 'at-risk' NPOs only. For this reason, we emphasise the importance of:
  - Limiting compulsory registration to a rationally identified (i.e. constitutionally defensible), appropriate defined class of at-risk NPOs; and
  - Inserting a (new) definition for 'at-risk NPO' into section 1 of the NPO Act.

# *Problematic proposals*

## **Clause 17: Amendment of section 29 – ‘Offences and contraventions’**

- While CFJ welcomes the abandonment of criminal sanctions, we are concerned that ‘prescribed administrative sanctions’ are not defined or described.
- The Committee (Parliament) cannot approve legislative proposals whose wording (i.e. content) will be determined or added by the state (executive) at a later stage, as this would render the legislation unconstitutional for circumventing the prescribed parliamentary process.
- If the legislative text were to authorise a specified official to determine the ‘prescribed administrative sanctions’ in Regulations, the unconstitutionality would possibly be cured.

# *Recommendations*

**Registration: Preferred option – keep registration completely voluntary for all NPOs**

- CFJ recommends that registration of all NPOs remains completely voluntary.

**Registration: Alternative option – compulsory registration for a rationally identified, constitutionally defensible, appropriate limited subset of ‘at-risk’ NPOs only**

- Should the Committee decide against keeping registration completely voluntary for all NPOs (our primary/preferred option), CFJ recommends (in the alternative), that registration be made compulsory for an appropriate (i.e. rationally identified and constitutionally defensible) limited subset of ‘at-risk’ NPOs only.
- To this end we recommend that ‘at-risk’ NPOs should not be defined too broadly.

# Recommendations

- We also recommend that the following NPOs are excluded from being deemed ‘at-risk’ (i.e. do not need to register with the Directorate):
  - NPOs that are registered as PBOs with SARS;
  - Foreign companies already required to register and report to CIPC; and
  - Trusts (will be required to report to the Master of the High Court in terms of the proposed amendments to the Trust Property Control Act).

## Administrative sanctions

- We recommend that the ‘prescribed administrative sanctions’ are specified in the legislative text.
- Alternatively, we recommend that the legislative text identifies and authorises a specified official to determine the ‘prescribed administrative sanctions’ in Regulations.

## *In summary*

1. Need for adequate public participation in legislative process:
  - Re-open/grant general extension of the call for comments for at least a further 10 days
2. Need for and justification of legislative intervention:
  - Likelihood of the legislative amendments achieving their purpose (Question 1)
  - Existence of less restrictive means to achieve the legislative purpose (Question 2)
3. Improved proposals
4. Problematic proposals:
  - General concerns
  - Clause 9: Amendment of section 2 – ‘Objects of Act
  - Clause 11: Amendment of section 12 – ‘Requirements for registration’
  - Clause 17: Amendment of section 29 – Offences and contraventions’



## *In summary*

### 5. Recommendations:

- Registration – preferred option: CFJ does not support the compulsory registration of any (or any particular limited subset of) NPOs. CFJ prefers and supports registration remaining completely voluntary.
- Registration – alternative option: CFJ would support registration being made compulsory for a rationally identified (i.e. constitutionally defensible), appropriate limited subset of ‘at-risk’ NPOs only.
- Administrative sanctions: Specify what the ‘prescribed administrative sanctions’ are or identify an official authorised to prescribe such sanctions in Regulations.

# Thank you

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