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Our reference: Anti-Terrorism Amendment Bill

Date: 18 October 2022

Portfolio Committee on Police
National Assembly
Parliament of the Republic of South Africa
CAPE TOWN

For attention: Hon Ms T Joemat-Pettersson, MP
Chairperson of the Portfolio Committee on Police

By email: POCDATARAamendmentbill@parliament.gov.za

Honourable Madam Chairperson,

**RE: SUBMISSIONS ON THE PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST
TERRORIST AND RELATED ACTIVITIES AMENDMENT BILL [B15-2022]**

1. We refer to the abovementioned matter, specifically to the notice issued by the Portfolio Committee on Police (“the Committee”) on 3 August 2022, calling for interested parties to submit written comments on the proposed amendments as contained in the Protection of Constitutional Democracy Against Terrorist and Related Activities Bill [B15-2022] (“the Bill”).
2. Cause for Justice (CFJ) hereby thanks the Committee for the extended opportunity to make written submissions and to participate in the law-making process. CFJ specifically expresses its desire, and requests an opportunity, to make oral submissions to the Committee in respect of the Bill.
3. We focus our brief 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.

CHIEF EXECUTIVE: SA SMIT | NON-EXECUTIVES: EFJ MALHERBE | NC SNYDERS

BACKGROUND TO CAUSE FOR JUSTICE AND INTEREST IN MATTER

4. CFJ is a non-partisan/apolitical non-profit human rights and public interest organisation whose primary objective is 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.
5. Two of CFJ's five core values¹ give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, and (2) ensuring constitutional state action.
6. In the context of responsibly exercising fundamental freedoms and ensuring constitutional state action, CFJ has delivered submissions to:
 - 6.1. The Department of Justice and Constitutional Development, in respect of the draft Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016² and the draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, 2021;³
 - 6.2. Parliament's Portfolio Committee on Justice and Constitutional Development, in respect of the Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018;⁴ and

¹ CFJ's core values are:

- 1) Human dignity/worth: The pre-eminent worth of human life dictates that each human life carries equal value, and everyone is entitled to equal protection and benefit of the law.
- 2) Responsible freedom: Every person has the right to freedom of conscience, religion and opinion, freedom of expression and freedom of association.
- 3) Family: A stable family unit is the cornerstone of a healthy, well-functioning (flourishing) communities and society at large.
- 4) Social justice: Society is collectively responsible for the social welfare and security of all people, especially the most vulnerable in our society.
- 5) Accountable governance: Everyone in authority must act in the best interest of the people they serve/govern. Everyone under authority is called to wilful obedience, but should be allowed to express grievances appropriately in a non-violent manner.

² CFJ written submissions on draft 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.

³ CFJ written submissions on draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, 2021 (30 June 2021). Available at: https://causeforjustice.org/wp-content/uploads/2021/07/CFJ-Submissions_PEPUDA-Amendment-Bill_Final.pdf.

⁴ CFJ written 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. Oral submissions available at: https://causeforjustice.org/wp-content/uploads/2022/06/Cause-for-Justice-Oral-submissions_17.05.2022.pdf.

6.3. Parliament's Standing Committee on Finance, in respect of the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill, 2022.⁵

STRUCTURE OF SUBMISSIONS

7. Our submissions are structured under the following headings:

Preliminary concerns –

- A. Need for the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill** 3

Problematic amendment proposals –

- B. Definition of “terrorist activity”** 5
- C. Overbroad application and reach of Bill** 6
- D. General concerns and other problematic proposals** 8
- E. Recommendations** 9
- F. Conclusion** 9

PRELIMINARY CONCERNS –

A. NEED FOR THE PROTECTION OF CONSTITUTIONAL DEMOCRACY AGAINST TERRORIST AND RELATED ACTIVITIES AMENDMENT BILL

8. The Bill will only be necessary if:

- 8.1. Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and
- 8.2. The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.

Our submissions focused on how hate speech legislation carries the real and grave risk of chilling all forms of expression/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 offence in order to prevent limiting the fundamental right to freedom of speech/expression unreasonably and/or unjustifiably (i.e. unconstitutionally).

⁵ CFJ written submissions on General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18-2022] (7 October 2022). Available at: <https://causeforjustice.org/wp-content/uploads/2022/10/CFJ-Intention-to-Make-Submissions-on-Anti-Money-Laundering-Bill.pdf>. Oral submissions available at: <https://causeforjustice.org/wp-content/uploads/2022/10/CFJ-Oral-Representations.pdf>.

9. CFJ acknowledges the importance of preventing and combatting money laundering and the financing of terrorist activities in and via the Republic of South Africa. We commend and support constructive efforts to address these serious social ills and criminal activities proactively and effectively.
10. However, we also recognise and emphasise the equal importance of avoiding unforeseen and unintended detrimental consequences, especially those that would (ironically) endanger the well-being of our constitutional democracy rather than protecting it.
11. We are concerned that the proposed amendments will have a chilling effect on the fundamental right to freedom of expression (see “Overbroad application and reach of Bill” below). Where fundamental rights come into conflict with another, a careful balance must be struck within constitutional parameters to ensure the maximum realisation and enjoyment of all rights.
12. We note and share AfriForum’s concerns that:
 - 12.1. While there is a need for legislative intervention to address real and legitimate concerns,⁶ the Bill in “*an ill-considered, disproportionate manner*” attempts to “*address comparatively minor domestic concerns*”.⁷
 - 12.2. No “*pre-existing statute or precedent [has been cited] as an obstacle to [the state’s] objectives in this arena, and [that the state] indeed has been successful to some extent in its investigations and prosecutions*”.⁸
13. To avoid legislative duplication, the state must first ascertain whether existing legislation⁹ – when proactively and effectively implemented – is sufficient to adequately meet the Bill’s objectives.

⁶ See the discussion concerning the need for legislative intervention, in AfriForum’s Parliamentary Submission on the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill (“AfriForum Submissions”) at [10] to [13]. Available at: https://cdn.dearsouthafrica.co.za/wp-content/uploads/2022/10/04181915/AfriForum-Commentary-on-POCDATARA-Amendment-Bill-dated-18-August-2022.pdf?_gl=1*sxx9b2*_ga*OTc5NDc4Mjc4LjE2NjYxMDAzNTg.*_ga_DZFBJKSYJ5*MTY2NjEwMDM2NC4xLjEuMTY2NjEwMDM2OS41NS4wLjA.&_ga=2.163667320.617889508.1666100363-979478273.1666100358.

⁷ AfriForum Submissions at [14].

⁸ AfriForum Submissions at [21].

⁹ AfriForum notes that the Criminal Procedure Act 51 of 1977, the Prevention of Organised Crime Act 121 of 1998, and the Financial Intelligence Centre Act 38 of 2001, have been successfully used to prosecute domestic terrorism. See AfriForum Submissions at [19] to [21].

PROBLEMATIC AMENDMENT PROPOSALS –

B. DEFINITION OF “TERRORIST ACTIVITY”

14. We regard the proposed amendment to the definition of “terrorist activity” particularly concerning and problematic. To the extent that the definition is broad and vague, it creates legal uncertainty and will invite litigation – making it a choice target for constitutional challenge.
15. We note and share the concerns of AfriForum regarding the vague and ‘flexible’ definition of terrorism, especially considering that its meaning is ‘notoriously contested’ and lacks international consensus, which makes it susceptible for (political) abuse.¹⁰
16. The proposed inclusion of the word ‘encourages’ in new section 3A (concerning the “Prohibition of publication with unlawful terrorism related content”) is particularly concerning, as it equates merely encouraging an act of terrorism with committing an act of terrorism (and criminalises it). Combined with the proposed overbroad and vague (i.e. constitutionally indefensible) definition of “terrorist activity”, this could lead to absurd consequences – including “*criminalis[ing] conduct that would not otherwise constitute terrorism*”¹¹ – and is susceptible to abuse.¹²
17. This is a disproportionate limitation of the fundamental right to freedom of expression compared to the actual risk of domestic terrorism. It is especially alarming in light of the Commissioner of Human Rights’ (for the Council of Europe) concern that the abuse of anti-terrorism legislation is a threat to freedom of expression.¹³

¹⁰ AfriForum Submissions at [31].

¹¹ AfriForum Submissions at [31.3].

¹² AfriForum notes how the definition of “terrorist activities” can be abused in respect of the ‘CapeExit movement’ and ‘Israel-Palestine debate’. See AfriForum Submissions at [34.1] and [34.2].

¹³ Commissioner of Human Rights (Council of Europe) Human Rights Comment: Misuse of Anti-Terror Legislation Threatens Freedom of Expression (4 December 2018). Available at: <https://www.coe.int/en/web/commissioner/-/misuse-of-anti-terror-legislation-threatens-freedom-of-expression>.

18. Similarly, the UN Human Rights Committee has cautioned in its General Comment No 34 that offences:¹⁴

“such ... as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression.”

19. CFJ implores the Committee to ensure that the proposed amendments do not disproportionately encroach on fundamental rights, such as and particularly the right to freedom of expression – or even worse, criminalise the legitimate (i.e. constitutional) exercise of such rights.

C. OVERBROAD APPLICATION AND REACH OF BILL

Particular importance of protecting freedom of expression

20. 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*”.

21. 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.

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

22.1. Not only “***lies at the heart of a democracy***” but is an “***instrumental function as a guarantor of democracy***”.¹⁵

22.2. “[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**

¹⁴ CCPR/C/GC/34 (12 September 2011). Available at: <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

¹⁵ 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>.

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.”¹⁶

22.3. “[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.**”¹⁷

23. The current version of the Bill infringes upon and limits *inter alia* the fundamental right to freedom of expression. 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”.¹⁸

24. We agree with, confirm and support the submissions and proposals made by AfriForum, in respect of the constitutional case law confirming the importance of the right to freedom of expression to constitutional democracy and the strong constitutional protection afforded to it.¹⁹

¹⁶ Ibid at [8].

¹⁷ 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>.

¹⁸ CFJ reserves the right to amplify its comments concerning the “limitations analysis” during its oral submissions.

¹⁹ AfriForum Submissions at [29] to [35].

D. GENERAL CONCERNS AND OTHER PROBLEMATIC PROPOSALS

General concerns:

25. We agree with, confirm and support the concerns of AfriForum, in respect of the Bill in general.²⁰

Clause 1: Amendment of definition of “property”

26. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed amended definition of “property”.²¹

Clause 1: Amendment of definition of “terrorist activity”

27. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed amended definition of “terrorist activity”.²²

Clause 3: Insertion of new section 3A “Prohibition of publication with unlawful terrorism related content”

28. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed new section 3A.²³

Clause 5: Insertion of new section 4A “Offence relating to attempt to leave (the) Republic”

29. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed new section 4A.²⁴

²⁰ AfriForum Submissions at [36] to [39].

²¹ AfriForum Submissions at [5.1.1].

²² AfriForum Submissions at [5.1.2].

²³ AfriForum Submissions at [5.2].

²⁴ AfriForum Submissions at [5.3].

Clause 18: Subsection 23(2)(a) – substitution of section 23 – “Freezing order”

30. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed substitution of subsection 23(2)(a).²⁵

Clause 20: Insertion of new sections 24A “Application for decryption direction” and 24B “Order to disable access to internet or social media site”

31. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed insertion of new sections 24A and 24B.²⁶

Clause 21: Repeal of sections 25 and 26 “Parliamentary supervision”

32. We agree with, confirm and support the submissions made by – and share the concerns of – AfriForum, in respect of the proposed omission (repeal) of sections 25 and 26.²⁷

E. RECOMMENDATIONS

33. We agree with, confirm and support the recommendations made by AfriForum, in respect of the Bill in general.²⁸

F. CONCLUSION

34. In conclusion, we re-iterate:

34.1. That the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill Amendment Bill, will only be necessary if:

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

²⁵ AfriForum Submissions at [5.4].

²⁶ AfriForum Submissions at [5.5].

²⁷ AfriForum Submissions at [5.6].

²⁸ AfriForum Submissions at [40].

- 34.1.2. The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.
- 34.2. The right to freedom of expression is crucially important for the functioning and flourishing (well-being) of South Africa's constitutional democracy.
- 34.3. The proposed definition of "terrorist activity" is overbroad – and unconstitutional.
- 34.4. The proposed overbroad application and extension of state (police) powers, is unwarranted and unjustified – and unconstitutional.
35. We trust that the above comments and inputs are of assistance to the Committee. We look forward to your response thereto in due course, if any.
36. Cause for Justice remains at the Committee's disposal to assist in the further development and/or amendment of the Bill, and specifically in relation to the responsible exercise of freedom and ensuring constitutional state action.
37. We would appreciate any opportunity that the Committee 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.
- 37.1. **In this regard we specifically re-iterate our for an opportunity to make oral submissions to the Committee if/when public hearings are held in respect of the Bill.**

Yours faithfully,

Stefanie Kotze

Legal Advisor: Law and Policy

and

Liesl Pretorius

Legal Advisor: Law and Policy