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Our reference: Anti-Money Laundering Bill

Date: 22 November 2022

Select Committee on Finance
National Council of Provinces
Parliament of the Republic of South Africa
CAPE TOWN

For attention: Hon Mr YI Carrim, MP

By email: nmangweni@parliament.gov.za

Honourable Mister Chairperson,

RE: SUBMISSIONS ON THE GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL [B18B-2022]

1. We refer to the above matter and specifically to the notice issued by yourself on behalf of the Select Committee on Finance ("the Committee") on 17 November 2022, inviting the submission of public comments on the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18B-2022] ("the Bill").
2. Cause for Justice ("CFJ") hereby thanks the Committee for the opportunity to deliver written submissions and to participate in the law-making process.

BACKGROUND TO CAUSE FOR JUSTICE AND INTEREST IN MATTER

3. 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.

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

4. 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.
5. Furthermore, 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.
6. Previously, CFJ has engaged the Standing Committee on Finance in respect of the (original version of the) Bill, through delivery of:
 - 6.1. (Initial) written submissions on 10 October 2022;¹
 - 6.2. Oral submissions on 11 October 2022;²
 - 6.3. Further oral submissions on 18 and 28 October 2022;³ and
 - 6.4. Further (substantive) written submissions on 25 October 2022.⁴
7. CFJ makes submissions in relation to the NPO Act only.

¹ CFJ (*Initial Written Submissions on General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18-2022]*) (11 October 2022). Available at: <https://causeforjustice.org/wp-content/uploads/2022/10/CFJ-Intention-to-Make-Submissions-on-Anti-Money-Laundering-Bill.pdf>.

² CFJ *Oral Submissions on General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18-2022]* (12 October 2022). Available at: <https://causeforjustice.org/wp-content/uploads/2022/10/CFJ-Oral-Representations.pdf>. Standing Committee on Finance (11 October 2022) at [01:18:29] to [01:29:05]. Available at: <https://www.youtube.com/watch?v=bOr8cxoXaQw>.

³ Standing Committee on Finance (18 October 2022) at [02:44:58] to [02:46:56]. Available at: <https://www.youtube.com/watch?v=5tB4Hmv1NkE>. Standing Committee on Finance (28 October 2022) at [01:22:16] to [01:23:50]. Available at: <https://www.youtube.com/watch?v=mwEgmJ9f6Y0>.

⁴ CFJ (*Substantive Written Submissions on General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18-2022]*) (25 October 2022). Available at: https://causeforjustice.org/wp-content/uploads/2022/11/CFJ-Submissions_GL-Anti-Money-Laundering-and-CTF-AB.pdf.

STRUCTURE OF SUBMISSIONS

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A. NEED FOR ADEQUATE PUBLIC PARTICIPATION IN LEGISLATIVE PROCESS

2. 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 will close on 13:00 on Tuesday, 22 November 2022. This is a mere three and a half business days – an extraordinarily short period of time.
3. 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 are likely hard-pressed – especially in the characteristically perpetually overextended and under-

resourced NPO sector – to free sufficient capacity from existing prior work commitments on such extraordinarily short notice, in order to participate in the public consultation process.

4. CFJ is no exception in this regard. The call for comments came to our attention on Friday, 21 November 2022. A mere two and a half business days is inadequate for us to meaningfully engage with the B-version of the Bill and prepare thorough substantive submissions in respect thereof.
5. CFJ is further concerned:
 - 5.1. 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; and
 - 5.2. By the severely detrimental impact on work capacity and productivity of ongoing loadshedding (slow or no internet connectivity and device batteries that simply cannot outlast the duration of blackouts), including during office hours.
6. It is crucially important that all South Africans are given an adequate opportunity to comment on the B-version of the Bill. By allowing an extraordinarily short period for public comments, the Committee is likely 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.
7. ***REQUEST: In light of the above, we hereby request the Committee to re-open/grant a general extension of the call for comments for at least a further 10 days.***

B. REQUEST FOR PARTICIPATION IN PUBLIC HEARINGS

8. According to the notice issued by the Committee on 17 November 2022, public hearings will be held virtually on Wednesday, 23 November 2022.
9. ***REQUEST: We specifically hereby request an opportunity to make oral representations at the public hearings to be held in respect of the Bill – whether on 23 November or on any other later date(s).***

C. NEED FOR (AND JUSTIFICATION OF) LEGISLATIVE INTERVENTION

10. The amendments proposed in the Bill will only be necessary – and constitutionally defensible – if:
 - 10.1. Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and
 - 10.2. The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.

11. 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”).
12. 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.
13. 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.⁵

Critical preliminary questions

14. The Bill seeks to amend certain sections of the NPO Act, including making registration mandatory for a limited subset of NPOs (“affected NPOs”) – i.e. 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 borders⁶ – to comply with the existing provisions of the Act as well as the proposed new provisions in the Bill (or face administrative sanctions).
15. This is a drastic change from the status quo: from encouraging voluntary registration and compliance to compelling it against the threat of administrative sanctions.
16. 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.
17. To ensure the proposed amendments are necessary and constitutionally justified, we need to answer two critical preliminary questions concerning the:
 - 17.1. Likelihood of the legislative amendments achieving their purpose (Question 1); and
 - 17.2. Existence of less restrictive means to achieve the legislative purpose (Question 2).

⁵ CFJ *Initial Submissions* at [28] to [34].

⁶ See clause 11(a).

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?

18. 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).⁷
19. Specifically and most importantly – as the clear motivation behind the Bill is to meet the standards and recommendations set by the FATF (and avoiding grey-listing)⁸ – the proposed amendments (measures/solutions) must, if anything, actually achieve this objective.⁹ The legislation must be effective in combating money laundering and terrorism financing. The crux of the matter is: if the legislative intervention does not achieve this objective and therefore does not prevent grey-listing (by satisfying the FATF requirements), the whole exercise (and concomitant allocation of capacity and resources) will be in vain/a waste.
20. **REQUEST: We humbly request the Committee to thoroughly investigate this critical issue, by requesting the appropriate government departments¹⁰ 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.¹¹**
21. 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).¹²
22. 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”). We are concerned by:
 - 22.1. Other NPO stakeholders in general lamenting that the Directorate is essentially dysfunctional and/or unable to function effectively/cope under the current system of voluntary registration (i.e. its current workload – which is bound to increase dramatically if all affected NPOs are compelled to register).

⁷ I.e. unreasonably and unjustifiably limit their rights.

⁸ See *Memorandum on Objects of the Bill* at [1].

Available at: https://pmg.org.za/files/B18-2022_General_Laws_Anti-Money_Laundering.pdf.

⁹ I.e. satisfying the FATF Standards and Recommendations. See *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (March 2022).

Available at: <https://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>.

¹⁰ For example, the Department of Finance and/or the Department of Planning, Monitoring and Evaluation.

¹¹ I.e. combatting money laundering and terrorism financing by criminal enterprises and/or terrorists operating within the NPO sector.

¹² For the purpose of ascertaining whether their opinions and advice validates the evidence and arguments provided by the government.

- 22.2. The FATF's contention that "South Africa also has no capacity to monitor or investigate NPOs identified to be at risk of [terrorism financing] abuse".¹³
23. Despite the National Treasury and the Financial Intelligence Centre's (collectively, "Treasury") responses concerning the capacity of and/or plans to capacitate the Directorate,¹⁴ 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.
24. As mentioned above, proposed legislation limiting constitutional rights will be unconstitutional if it does not achieve the purpose for which it is made. The reason for this is found in the limitations clause in section 36(1) of the Constitution, which 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.*
25. 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.
26. 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.

¹³ FATF *Anti-Money Laundering and Counter-Terrorist Financing Measures South Africa: Mutual Evaluation Report* (October 2021) on p 176.

Available at: <https://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-South-Africa.pdf>.

¹⁴ National Treasury and Financial Intelligence Centre *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill: Responses to Submissions made to Standing Committee on Finance on 18 October 2022* (18 October 2022) on s 8.

Available at: [https://pmg.org.za/files/221018Presentation_to_SCOF_GLAB_finalised_for_submission_to Committee....pptx](https://pmg.org.za/files/221018Presentation_to_SCOF_GLAB_finalised_for_submission_to_Committee....pptx).

National Treasury and Financial Intelligence Centre *General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill: Responses to Submissions made to Standing Committee on Finance on 28 October 2022* (28 October 2022) on s 5.

Available at: https://pmg.org.za/files/221028Second_responses_Presentation_to_SCOF_GLAB_circulated_to_col.pptx.

Factor (a)

27. 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)

28. It is clear that the limitation serves an important purpose: to combat certain (criminal and detrimental) conduct and actions.
29. For the purposes of properly considering the Bill, factors (c) to (e) are critically important.

Factor (c)

30. 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.¹⁵ If we consider the possible detrimental effect of compulsory registration on affected NPOs (many or most, completely innocent of money laundering and terrorism financing),¹⁶ this factor already raises serious doubt as to whether the proposed legislation can even pass this test.

Factor (d)

31. Factor (d) actually establishes the principle of proportionality – i.e. whether a rational relationship exists between the limitation and its purpose.
32. The principle of proportionality was first established (under the interim Constitution) in the landmark Constitutional Court judgment of *S v Makwanyane*,^{17 18} and has since been applied in countless other cases. This constitutional principle is so important, that it found its way into the final (1996) Constitution, in the form of the limitations clause (section 36).¹⁹
33. The proportionality test consists of two elements:
- 33.1. First, it must be determined whether the limitation will achieve its purpose; and

¹⁵ *S v Bhulwana; S v Gwandiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 12 BCLR 1579 (CC) (29 November 1995) at [18]. Available at: <https://collections.concourt.org.za/handle/20.500.12144/2009>.

¹⁶ The human resources and financial cost of meeting additional compliance burdens, against the threat of criminal sanctions.

¹⁷ *S v Makwanyane and Another* 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995) at [109]. Available at: <http://www.saflii.org/za/cases/ZACC/1995/3.html>.

¹⁸ N Petersen *Proportionality and the Incommensurability Challenge: Some Lessons from the South African Constitutional Court* in 'Public Law & Legal Theory Research Paper Series Working Paper No 13-07' (New York University School of Law) (March 2013) on p 1.

Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230454.

¹⁹ *Ibid.*

33.2. Second, whether there is a rational relationship between the limitation and its purpose.

In respect of the first element:

34. 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.²⁰ This is a basic test for every piece of legislation that limits constitutional rights.²¹

In respect of the second element:

35. 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.²² 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).
36. For the reasons advanced above, 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).
37. Please note that 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?

²⁰ See *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002) at [108] to [109].

Available at: <http://www.saflii.org/za/cases/ZACC/2002/5.html>.

²¹ See *Savoi and Others v National Director of Public Prosecutions and Another* (CCT 71/13) [2014] ZACC 5; 2014 (5) BCLR 606 (CC); 2014 (1) SACR 545 (CC); 2014 (5) SA 317 (CC) (20 March 2014).

Available at: <http://www.saflii.org/za/cases/ZACC/2014/5.html>.

²² *Savoi* at [31]. See also *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* (CCT20/95, CCT21/95) [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 (9 May 1996).

Available at: <http://www.saflii.org/za/cases/ZACC/1996/7.html>.

These cases follow on the *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC) (9 June 1995) at [80] to [86], in which this principle was established.

Available at: <http://www.saflii.org/za/cases/ZACC/1995/6.html>.

38. 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)

39. 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.²³
40. 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,²⁴ 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).
41. We are encouraged by Treasury’s recognition that:²⁵
- 41.1. FATF Recommendation 8 does not require blanket compulsory registration of all NPOs, “*since not all NPOs are inherently high risk (and some may represent little or no risk at all)*”.
- 41.2. The subset of organisations that fall within the FATF definition of NPO – and are likely to be at risk of being abused for money laundering and terrorism financing – must be identified.
42. We are further encouraged by Treasury’s decision to:
- 42.1. Adjust its proposals regarding registration (and specifically, to abandon its proposal to introduce blanket compulsory registration) by rather identifying and focusing on a limited subset of ‘at-risk’ NPOs;²⁶ and
- 42.2. Form a technical team to investigate and understand the risk of terrorism financing (and money laundering) in and via the South African NPO sector.²⁷
43. 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:²⁸

²³ See *S v Williams* at [67]. See also *MEC for Education: Kwazulu-Natal and Others v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).

Available at: <https://www.saflii.org/za/cases/ZACC/2007/21.html>.

²⁴ Including being subjected to the concomitant compliance burdens and criminal sanctions for non-compliance.

²⁵ *Treasury Responses to Submissions* (18 October 2022) on s 8.

²⁶ *Treasury Responses to Submissions* (18 October 2022) on s 8.

Treasury Responses to Submissions (28 October 2022) on s 5.

Treasury Responses to Submissions (18 October 2022) on s 8 and 9.

²⁷ *Treasury Responses to Submissions* (18 October 2022) on 9.

²⁸ See clause 11(a) of Bill.

- 43.1. Make donations to individuals or organisations; or
- 43.2. Provide humanitarian, charitable, religious, educational or cultural services, outside of South Africa's borders.
44. In order 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. According to (law) Professor Niels Petersen, “[i]n a significant portion of cases, the constitutional incompatibility of a statute is based on the argument that a less restrictive means would have achieved the same purpose”.²⁹
45. 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’:
- 45.1. Make donations to individuals or organisations domiciled in a foreign country (including to individuals physically present in the Republic); and
- 45.2. Provides services (including of a humanitarian, charitable, religious, educational or cultural nature) outside of South Africa's borders.
46. 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.
47. Professor Peterson notes the importance of the “*less restrictive means argument*” in the seminal Constitutional Court judgment of *S v Manamela*,^{30 31} where the court noted the importance of:
- 47.1. Appreciating South Africa's social reality;³²
- 47.2. Considering the impact of the legislation (the width of its application and the socio-economic status of those likely to be affected);³³ and
- 47.3. Determining whether “*there is a less invasive means of achieving the legislative purpose which serves to a significant degree to reconcile the conflicting interests... and which does not raise*

²⁹ Peterson *Proportionality and the Incommensurability Challenge* on p 6.

³⁰ *S v Manamela and Another* (Director-General of Justice Intervening) (CCT25/99) [2000] ZACC 5; 2000 (3) SA 1; 2000 (5) BCLR 491 (14 April 2000) at [45] and [49].

Available at: <http://www.saflii.org/za/cases/ZACC/2000/5.html>.

³¹ Peterson *Proportionality and the Incommensurability Challenge* on p 7.

³² *Manamela* at [45].

³³ *Ibid* at [44].

concerns relating to additional cost, the prioritisation of social demands and practical implementation".³⁴

48. 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).
49. We note Treasury's commitment to proposing amended wording that will ensure that "*the power of registration would not be able to be exercised in a manner that would potentially infringe on the rights to freedom of association and freedom of religion*",³⁵ and we urge the Committee to scrutinise any proposed wording to ensure that these fundamental rights and freedoms are indeed protected.

In summary and conclusion

50. 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.
51. 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 it is proposed. It will not comply with the requirements of section 36(1) and will be unconstitutional.

Constitutional imperative to protect and promote fundamental rights and freedoms

52. We agree with, confirm and support Freedom of Religion South Africa's ("FOR SA") concerns and submissions in respect of the legal framework,³⁶ and specifically as it applies to:
- 52.1. "*Religious freedom rights*";³⁷
- 52.2. "*The right to freedom of association*";³⁸ and
- 52.3. "*The rights of religious communities*".³⁹

³⁴ Ibid at [49].

³⁵ Treasury Responses to Submissions on s 20.

³⁶ FOR SA Submissions on General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill [B18-2022] (4 October 2022) at [35].

Available at: <https://forsa.org.za/slug/for-sa-submission/>.

³⁷ FOR SA Submissions at [35].

³⁸ FOR SA Submissions at [36] to [41].

³⁹ FOR SA Submissions at [42] to [44].

53. We further agree with, confirm and support FOR SA's concerns and submissions in respect of "*religious autonomy and the doctrine of entanglement*".⁴⁰

D. IMPROVED PROPOSALS

54. CFJ supports – and is encouraged by – the following improvements to the Bill:

- 54.1. Abandoning of blanket mandatory registration of all NPOs;⁴¹
- 54.2. Abandoning of criminal sanctions for non-compliance with the NPO Act;⁴² and
- 54.3. 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).⁴³

E. PROBLEMATIC PROPOSALS

General comments

55. CFJ is foremostly 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).
56. We are also concerned by other potential unintended detrimental consequences, such as the NPO Act enabling DSD and/or the Directorate (i.e. the state) to dictate the mandate and/or limit the scope of lawful (i.e. legally allowable) nonprofit activities.
57. Even if registration is limited to affected NPOs only, we still note and share ngoLAW's concerns that "*the compulsory and mandatory registration*" of NPOs:⁴⁴
- 57.1. "*Is not required by the [FATF R]ecommendation*";
- 57.2. "*Is an unnecessary breach of human rights, privacy and freedoms and opposition will be huge and vocal*";
- 57.3. "*Will be an unmanageable burden for DSD and parts of the sector*";
- 57.4. "*Does not take into account that the NPO system does not have the granularity and searchability of data functions to allow, for instance, ineligible board members to be located, identified and notified*"; and

⁴⁰ FOR SA *Submissions* at [45] to [55].

⁴¹ See clause 11(a).

⁴² See clause 17(b).

⁴³ See clause 11(d).

⁴⁴ ngoLAW *Covering letter to Submissions on General Laws Amendment (Anti-Money Laundering and Combating Terrorism Financing) Bill* (10 October 2022) on p 2.

- 57.5. *“Will have the opposite effect from that intended, as the data and reports of every tiny voluntary association in the country will bury the important information that is needed to assess and address risks”.*
58. Even if registration is limited to affected NPOs only and sanctions for non-compliance are administrative (rather than criminal) in nature, we still note and share FOR SA’ concerns regarding the:
- 58.1. *“State regulation of religion/contravention of doctrine of entanglement”*;⁴⁵
- 58.2. *“Duplication of administrative/reporting burdens”*⁴⁶;
- 58.3. *“Lack of DSD manpower”*;⁴⁷ and
- 58.4. Lack of *“State... justification analysis as required by section 36 [of the Constitution]”*.⁴⁸
59. Even if registration is limited to affected NPOs only, we still note and share Christian View Network’s (“CVN”) concerns on the *“harmful effects of the [B]ill on [NPOs]”*, and in particular that the proposed amendments would:⁴⁹
- 59.1. *“[D]estroy... a major part of the welfare [system] and put... more [pressure] on the Department of [Development]”*; and
- 59.2. *“[D]iscriminate against smaller community-based [NPOs] that lack the administrative skill and resources, thus prejudicing the poor”.*

Mandatory registration of ‘at-risk’ NPOs with Directorate

60. 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 (i.e. SARS) and monitored in the context of qualifying for favourable tax treatment (for e.g. Public Benefit Organisations (“PBOs”) who successfully applied for and are monitored for tax exemptions).⁵⁰
61. 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

⁴⁵ FOR SA *Submissions* at [24].

⁴⁶ FOR SA *Submissions* at [25].

⁴⁷ FOR SA *Submissions* at [26].

⁴⁸ FOR SA *Submissions* at [27].

⁴⁹ CVN *Initial Comment: Anti-Money Laundering Bill Threatens to Shut Down Most of South Africa’s Non-Profit Sector, Hurting Democracy and the Poor* (10 October 2022) on p 2.

Available at: <https://causeforjustice.org/wp-content/uploads/2022/10/CVN-Initial-Comment-on-Anti-Money-Laundering-Bill-Oct-2022.pdf>.

⁵⁰ See fn 28 to para 6(b)(i) on p 61 under Recommendation 8 of *FATF Recommendations*.

to additional administrative and/or financial burdens which such organisation may find difficult to cope and comply with.

Appropriateness of identified limited subset of NPOs

62. 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. Under the circumstances, we make the following brief observations:

- 62.1. Even at a cursory glance, the identified limited subset of NPOs is still too broad, including a wide array of NPOs; and
- 62.2. 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’

63. It is our firm conclusion that blanket compulsory registration of a limited subset of NPOs (“affected NPOs”) will not comply with the requirements of section 36(1) and will be unconstitutional.⁵¹
64. **CFJ does not support the compulsory registration of any NPO.**
65. Many affected NPOs choose not to register for various legitimate reasons.⁵² Compulsory registration will automatically impose additional compliance burdens on such NPOs and administrative sanctions for non-compliance.⁵³ This will necessarily divert valuable and scare human and financial resources away from performing good public benefit work in order to fulfil and meet administrative functions and obligations.
66. 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.**⁵⁴

⁵¹ See [14] to [50] above.

⁵² CFJ *Initial Submissions* at [18].

⁵³ Registered NPOs must comply with the administrative requirements set out in the following sections of the NPO Act:

- Section 17 “Accounting records and reports”
- Section 18 “Duty to provide reports and information”
- Section 19 “Changing constitution or name of registered nonprofit organisation”
- Section 25 “Access by public to documents submitted to director”

Administrative sanctions for non-compliance are imposed by the following sections of the NPO Act:

- Section 29 “Offences and contraventions”
- Section 30 “Penalties”

⁵⁴ However, we note Treasury's response that “*retaining a completely voluntary approach, ... would not be sufficient to satisfy compliance with [R]ecommendation 8 of the Mutual Evaluation Report. Even an approach of only require[ing] notification would not likely be sufficient*” and acknowledge the importance of avoiding the Republic being grey-listed by the FATF. See *Treasury Responses to Submissions* on s 22.

67. **Alternatively**,⁵⁵ CFJ would support registration being made compulsory for a limited subset of ‘at-risk’ NPOs, subject to:

67.1. The limitation of rights and freedoms of the limited subset of ‘at-risk’ NPOs being constitutionally defensible (i.e. rational);⁵⁶ and

67.2. The explicit and effective protection of religious freedom rights.⁵⁷

68. To this end, we further agree with, confirm and support ngoLAW’s concerns and submissions in respect of the amendment of section 2,⁵⁸ and specifically emphasise the importance of ensuring that any amendments do not exceed the requirements set by the FATF’s Recommendation 8.⁵⁹

Clause 11: Amendment of section 12 – ‘Requirements for registration’

69. **CFJ does not support the compulsory registration of any (or any particular limited subset of) NPOs.**⁶⁰ **CFJ prefers and supports registration remaining completely voluntary.**⁶¹

70. **Alternatively**,⁶² CFJ would support registration being made compulsory for a rationally identified (i.e. constitutionally defensible), appropriate limited subset of ‘at-risk’ NPOs only.⁶³

71. To this end, CFJ would confirm and support ngoLAW’s concerns and submissions in respect of the amendment of section 12,⁶⁴ and specifically confirm our agreement with and support for:

71.1. Limiting compulsory registration to a rationally identified, appropriate “*defined class of at-risk [NPOs]*”;⁶⁵ and

71.2. Inserting a (new) definition for ‘at-risk NPO’ into section 1 of the NPO Act.⁶⁶

F. RECOMMENDATIONS

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

72. **CFJ recommends that registration of all NPOs remains completely voluntary.**

⁵⁵ In the event that the Committee decides against keeping registration completely voluntary for all NPOs.

⁵⁶ See [14] to [50] above.

⁵⁷ See [51] and [52] above.

⁵⁸ ngoLAW *Detailed Submissions on General Laws Amendment (Anti-Money Laundering and Combating Terrorism Financing) Bill* (21 October 2022) on p 12 to 13.

⁵⁹ FATF *Mutual Evaluation Report* on p 173.

⁶⁰ See [14] to [50] above.

⁶¹ See [59] to [62] above.

⁶² In the event that the Committee decides against keeping registration completely voluntary for all NPOs, and instead makes registration compulsory for a limited subset of ‘at-risk’ NPOs.

⁶³ See [63] to [65] above.

⁶⁴ ngoLAW *Detailed Submissions* (21 October 2022) on p 13 to 17.

⁶⁵ ngoLAW *Detailed Submissions* (21 October 2022) on p 13 to 15.

⁶⁶ ngoLAW *Detailed Submissions* (21 October 2022) on p 13 to 15.

73. To this end, we agree with and support:

73.1. FOR SA's recommendation that "*NPOs registration with DSD remain voluntary, given the duplication of registration/reporting/compliance duties[, considering that] most NPOs [are already] registered with other state institutions and already [have] to comply with various tax reporting requirements imposed by SARS*".⁶⁷

73.2. CVN's recommendation that the "*registration of NPOs remains voluntary*".⁶⁸

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

74. 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.**

75. To this end, we agree with and support ngoLAW's recommendations that compulsory and mandatory registration with the NPO Directorate:⁶⁹

75.1. "*Need not apply to foreign companies who are already required to register and report to CIPC*";

75.2. "*Should not apply to trusts, as they are required to report to the Master of the High Court in terms of the proposed amendments to the Trust Property Control Act*"; and

75.3. "*Should not target voluntary associations broadly, for fear of crippling the NPO directorate with sheer numbers and the small community organisations that do not have capacity themselves*".

76. **We also recommend that NPOs that are registered as PBOs with SARS, are excluded from being deemed ‘at-risk’ NPOs that need to register with the Directorate.**

CONCLUSION

77. We trust that these brief written submissions (which we reserved the right to augment and/or amplify as necessary) will be of assistance to the Committee and look forward to the Committee's response thereto (if any) in due course.

78. In addition to the above, we re-iterate our request for the Committee to:

78.1. Re-open or grant a general extension of the call for comments for at least a further 10 days; and

78.2. Grant us an opportunity to make oral submissions at the public hearings in respect of the Bill.

⁶⁷ FOR SA *Submissions* at [56].

⁶⁸ CVN *Initial Comment* on p 2.

⁶⁹ ngoLAW *Covering letter to Submissions* (10 October 2022) on p 4.

79. CFJ remains at the Committee's disposal to assist in the further development and/or amendment of the Bill to effectively achieve constitutionally compliant purposes and prevent any unforeseen detrimental consequences flowing from its enactment.

Yours faithfully,

Liesl Pretorius

Legal Advisor and Parliamentary Liaison