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Address: 32 Bayridge Close, Somerset West, 7130, South Africa

Our reference: PEPUDA Amendment Bill

Date: 31 October 2022

**The Deputy Minister**

**Department of Justice and Constitutional Development**

**PRETORIA**

**For attention: Ms F Bhayat**

By email: [fbhayat@justice.gov.za](mailto:fbhayat@justice.gov.za)

Honourable Deputy Minister,

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

1. We refer to the abovementioned matter, specifically to the opportunity given by the Deputy Minister to attendees of the two virtual stakeholder workshops hosted by the Department of Justice and Constitutional Development ("the Department") on 17 October 2022, to make supplementary written submissions on the draft Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill, 2021 ("the Bill") by 31 October 2022.
2. Cause for Justice ("CFJ") hereby thanks the Deputy Minister and the Department for the opportunity to make these supplementary written submissions and to participate in the law-making process in respect of the amendment of the Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 ("PEPUDA" or "the Act").
3. Our submissions focus on matters affecting rights, values and interests protected and/or promoted in the Bill of Rights as well as related matters affecting the public interest in the context of the foundational constitutional values of human dignity, equality, and the advancement of fundamental human rights and freedoms (specifically the right to freedom of expression and the right to freedom of religion, belief and opinion).

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

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## CFJ SUBSTANTIVE WRITTEN SUBMISSIONS OF 30 JUNE 2021

4. CFJ delivered substantive written submissions on the Bill on 30 June 2021.<sup>1</sup>
5. In our June 2021 submissions, we introduced CFJ and explained our interest in the Bill and matters relating to freedom of expression and freedom of religion.
6. We repeat and affirm the contents – questions, concerns, commentary, submissions and recommendations – of our June 2021 submissions, and specifically draw the Department’s attention to the following:
  - 6.1 The Bill will only be necessary if:<sup>2</sup>
    - 6.1.1 Actual and sufficiently important problems and/or legislative gaps exist that are not adequately addressed by existing legislation; and
    - 6.1.2 The proposals contained in the Bill are able to successfully address these problems and gaps, without enabling unjustifiable violations of fundamental rights.
  - 6.2 The Bill’s general failure to distinguish between mere discrimination and unfair discrimination, exposes it to constitutional challenge on substantive grounds.<sup>3</sup>
  - 6.3 The definitions of “equality” and “discrimination” are overbroad and unconstitutional.<sup>4</sup>
  - 6.4 The imposition of strict liability and vicarious liability as proposed, is inconsistent with the South African legal framework.<sup>5</sup>
  - 6.5 Prohibiting the mere threat of (undefined) retaliation, is overbroad and unconstitutional.<sup>6</sup>
  - 6.6 The imposition of the regulation of private and public institutions by the State as proposed, is unwarranted and unjustified.<sup>7</sup>

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<sup>1</sup> CFJ *Written Submissions on 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](https://causeforjustice.org/wp-content/uploads/2021/07/CFJ-Submissions_PEPUDA-Amendment-Bill_Final.pdf).

<sup>2</sup> CFJ *Submissions June 2021* at [19] to [23].

<sup>3</sup> CFJ *Submissions June 2021* at [43] to [45].

<sup>4</sup> CFJ *Submissions June 2021* at [46] to [51].

<sup>5</sup> CFJ *Submissions June 2021* at [52] and [53].

<sup>6</sup> CFJ *Submissions June 2021* at [54] and [55].

<sup>7</sup> CFJ *Submissions June 2021* at [56] to [68].

## STRUCTURE OF SUBMISSIONS

|    |   |       |
|----|---|-------|
| 7. | Our submissions are structured under the following headings:  | page: |
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|    | - In re clause 1(a): substitution of the definition of "discrimination"                                   | 5     |
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### **A. CONSTITUTIONAL COURT’S REJECTION OF “HIERARCHY OF RIGHTS”**

8. We noted with concern comments to the effect that there is a hierarchy of constitutional rights.
9. This erroneous view is at odds with the position taken by the Constitutional Court itself, which unambiguously has held that the Constitution does not “*accord hierarchical precedence to any particular right entrenched in the Bill of Rights over other rights referred to therein*”.<sup>8</sup>
10. The proper approach is to weigh – balance and reconcile – (seemingly) competing rights on a case by case basis. The balancing and reconciliation of rights do not establish a hierarchy of rights.
11. In *Port Elizabeth Municipality v Various Occupiers*,<sup>9</sup> the Constitutional Court held that:

*“The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.”*

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<sup>8</sup> *Johncom Media Investments Limited v M and Others* (CCT 08/08) [2009] ZACC 5; 2009 (4) SA 7 (CC) ; 2009 (8) BCLR 751 (CC) (17 March 2009) at [19]. Available at: <http://www.saflii.org/za/cases/ZACC/2009/5.html>.

<sup>9</sup> *Port Elizabeth Municipality v Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004) at [23]. Available at: <http://www.saflii.org/za/cases/ZACC/2004/7.html>.

12. In *Midi Television v Director of Public Prosecutions (Western Cape)*,<sup>10</sup> the Supreme Court of Appeal held that:

*“Where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances and within the constraints that are imposed by s 36. That they are to be reconciled within the constraints of s 36 is apparent from the following observation of Langa DCJ in Islamic Unity Convention v Independent Broadcasting Authority:<sup>11</sup>*

*‘There is thus recognition of the potential that [freedom of] expression has to impair the exercise and enjoyment of other important rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation. The right is accordingly not absolute; it is, like other rights, subject to limitation under s 36(1) of the Constitution.’<sup>12</sup>*

13. In *One South Africa Movement v President of the Republic of South Africa*,<sup>12</sup> the High Court held that: “it is well settled in our law that there is no hierarchy of rights under the Bill of Rights, and that different rights may compete against each other.”

## **B. CONSTITUTIONAL IMPERATIVE TO PROTECT RELIGIOUS FREEDOM RIGHTS**

14. We note with approval the comments made by the Deputy Minister to the effect that the government recognises:

- 14.1 The rights of religious organisations to interpret, proselyte and/or espouse of any religious tenet, belief, teaching, doctrine and/or writings (even if these beliefs, teachings, doctrines and/or

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<sup>10</sup> *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* (100/06) [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA) (18 May 2007) at [9]. Available at: <http://www.saflii.org/za/cases/ZASCA/2007/56.html>.

<sup>11</sup> *Islamic Unity Convention v Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3; 2002 (4) SA 294; 2002 (5) BCLR 433 (11 April 2002) at [30]. Available at: <http://www.saflii.org/za/cases/ZACC/2002/3.html>.

<sup>12</sup> *One South Africa Movement and Another v President of the Republic of South Africa and Others* (24259/2020) [2020] ZAGPPHC 249; [2020] 3 All SA 856 (GP); 2020 (5) SA 576 (GP) (1 July 2020) at [88]. Available at: <http://www.saflii.org/za/cases/ZAGPPHC/2020/249.html>.

writings are not consistent with complete equality, especially on issues of sex, gender and sexual orientation); and that

14.2 Religious organisations are in a “different category” (as recognised and supported internationally by jurisprudence).

15. In this regard, we specifically highlight and affirm the contents of our June 2021 submissions concerning “Fundamental freedoms”.<sup>13</sup>

### **C. SIGNIFICANCE OF QWELANE JUDGMENT**

16. We note with approval the comments made by the Department to the effect that it is preparing legislative proposals (i.e. amendments to PEPUDA) – to be included in a separate Bill – to give effect to the Constitutional Court’s judgment in the matter of *Qwelane v South African Human Rights Commission*.<sup>14</sup>

17. In this regard, we highlight the following positive aspects of the *Qwelane* judgment:

17.1 Confirmation that determining whether hate speech is present entails an objective assessment.<sup>15</sup>

17.2 Confirmation that section 10(1)(a) to (c) of PEPUDA is read conjunctively/cumulatively – which is in line with section 16(2)(c) of the Constitution.<sup>16</sup>

17.3 Excluding private communications or conversations.<sup>17</sup>

17.4 Confirmation that the inclusion of “hurtful” in the definition of hate speech is unconstitutional.<sup>18</sup>

### **D. RESPONSES TO SPECIFIC QUESTIONS POSED AT STAKEHOLDER WORKSHOP**

#### ***IN RE CLAUSE 1(A): Substitution of the definition of “discrimination”***

#### **The application of the definition of “discrimination” by the Equality Courts.**

18. We reiterate the importance and necessity of consistently and clearly differentiating between “mere discrimination” (which is lawful) and “unfair discrimination” (which is unlawful). Section 9 of the Constitution – the “equality clause” – only prohibits unfair discrimination, yet the Bill fails to draw a distinction between “mere discrimination” and “unfair discrimination”.

19. “Fairness” is a moral concept used to distinguish between fair discrimination (legal) and unfair discrimination (illegal), and is determined by the impact (effect) of the discrimination on the person

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<sup>13</sup> CFJ *Submissions June 2021* at [24] to [42].

<sup>14</sup> *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (31 July 2021). Available at: <https://www.saflii.org/za/cases/ZACC/2021/22.html>.

<sup>15</sup> *Qwelane* at [96] to [101].

<sup>16</sup> *Qwelane* at [102] to [104].

<sup>17</sup> *Qwelane* at [116] to [119].

<sup>18</sup> *Qwelane* at [102] to [104].

receiving differential treatment.<sup>19</sup> To determine whether discriminate is unfair, its impact must be assessed objectively and not subjectively.<sup>20</sup>

### **The difference between “effect” and “feeling”.**

20. The Merriam-Webster online dictionary describes “effect” *inter alia* as “something that inevitably follows an antecedent (such as a cause or agent)”.<sup>21</sup>
21. “Effect” therefore denotes the factual – i.e. objectively determinable and/or verifiable – impact, of an act or omission.
22. The Merriam-Webster online dictionary describes “feeling” *inter alia* as an:<sup>22</sup>
  - 22.1 “[E]motional state or reaction”; and
  - 22.2 “[O]ften unreasoned opinion or belief”.
23. “Feeling” therefore denotes a perception of (interpretation of or meaning given to) a an act or omission (or particular set of circumstances).
24. In the context of “hate speech” and “freedom of expression”, we again highlight the importance of the Constitutional Court’s findings in the *Qwelane* matter, that:
  - 24.1 Determining whether hate speech is present entails an objective assessment;<sup>23</sup> and
  - 24.2 The inclusion of “hurtful” in the definition of hate speech is unconstitutional.<sup>24</sup>
25. According to the Constitutional Court:
  - 25.1 “Before this Court, the parties debated whether the phrase “that could reasonably be construed to demonstrate a clear intention” postulates a subjective or objective test. In my view, it is plainly an objective standard that requires a reasonable person test. This is based on the gloss “reasonably be construed” and “to demonstrate a clear intention”, implying an objective test that considers the facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group.”<sup>25</sup>

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<sup>19</sup> I Currie and J De Waal *Bill of Rights Handbook* 6<sup>th</sup> Edition Juta (2013) at p 223.

<sup>20</sup> *Bill of Rights Handbook* at p 223 to 224.

<sup>21</sup> Definition of ‘effect’ in *Merriam-Webster Dictionary*. Available at: <https://www.merriam-webster.com/dictionary/effect>.

<sup>22</sup> Definition of ‘feeling’ in *Merriam-Webster Dictionary*. Available at: <https://www.merriam-webster.com/dictionary/feeling>.

<sup>23</sup> *Qwelane* at [96] to [101].

<sup>24</sup> *Qwelane* at [102] to [104].

<sup>25</sup> *Qwelane* at [96].

- 25.2 *“Because the objective test of the reasonable reader is to be applied, it is the effect of the text, not the intention of the author, that is assessed.” I endorse this approach. It is consistent with our jurisprudence concerning similar issues.”<sup>26</sup>*
- 25.3 *“Importantly, an objective standard gives better effect to the spirit, purport and objects of the Bill of Rights. On the one hand, if it were based on the subjective perception of the target group, it would unduly encroach on freedom of expression, since claims could be based on “a multiplicity of trivial actions by hypersensitive persons”. On the other hand, if it were based on the subjective intention of the speaker, the threshold for civil liability would be considerably higher than usual.”<sup>27</sup>*
- 25.4 *“Expressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. It is well established that the prohibition of hate speech is not aimed at merely offensive speech, but that offensive speech is protected by freedom of expression. This point is eloquently articulated in Whatcott, where it was noted that merely offensive or hurtful expression should be excluded from the ambit of a hate speech prohibition and respect should be given to the Legislature’s choice of a provision predicated on hatred.”<sup>28</sup>*
26. The implication is that it is the effect of the expression that must be given consideration to – and that it must be assessed objectively (in accordance with the standard of the “reasonable person”) and not with reference to any particular person’s subjective perception (i.e. “feelings”) of it.

***IN RE CLAUSE 1(B): Substitution of the definition of "equality"***

**Equality and persons from “non-disadvantaged groups”.**

27. According to section 9(1) of the Constitution,
- “Everyone is equal before the law and has the right to equal protection and benefit of law.”*
28. The implication is:
- 28.1 The Constitution enshrines the right of all persons – which includes persons from “non-disadvantaged groups” – to enjoy equal benefit and protection of the law (including PEPUDA);
- 28.2 Rights enshrined in the Bill of Rights may only be limited in terms of section 36 of the Constitution; and
- 28.3 No person – whether advantaged or disadvantaged – may be unfairly discriminated against.

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<sup>26</sup> *Qwelane* at [97].

<sup>27</sup> *Qwelane* at [99].

<sup>28</sup> *Qwelane* at [103].

29. If one is concerned about and committed to the constitutional project and its ideals, one would earnestly and diligently seek to maximise the enjoyment of fundamental rights and freedoms by all (i.e. demonstrating a true respect for and celebration of diversity and democracy), which includes carefully and thoughtfully balancing seemingly competing rights on a case by case basis.

***IN RE CLAUSE 2: Substitution of section 6 “Prevention and general prohibition of unfair discrimination”***

**The Bill must make it reasonably clear to those who are bound by it, what is required from them so they may regulate their conduct accordingly.**

30. It is trite that laws must be clear, accessible and not vague or overbroad – otherwise they will not pass constitutional muster. Practically, this means the persons to whom the law applies, need to know what the law expects of them. It would be manifestly unfair – and unlawful – to hold persons accountable and even attach consequences to their actions (and/or omissions), but fail to specify what these persons must do (and/or refrain from doing) to avoid these consequences.
31. Vague and board provisions are susceptible to both a subjective and an objective interpretation. The resulting lack of legislative certainty invites litigation and constitutional challenge. It also creates doubt and fear of contravening those provisions of the Bill that are unclear which would have a chilling effect on freedom of expression as well as other fundamental freedoms.
32. For these reasons, it is very problematic that the Bill is not sufficiently clear on what it requires – and by extension, which acts and/or omissions contravene its provisions.

***IN RE CLAUSE 3: Insertion of section 9A “Prohibition of retaliation”***

**The necessity of defining “retaliation”.**

33. It is vitally important to know which acts and/or omissions qualify as “retaliation”. Again, the lack of legal certainty not only invites litigation but creates doubt and fear of contravening unclear provisions of the Bill. This would have a chilling effect on freedom of expression and other fundamental freedoms, and also makes the Bill a target for constitutional challenge.
34. For these reasons, it is problematic that the Bill does not define “retaliation”.

**CONCLUSION**

35. In conclusion, we reiterate:
- 35.1 There is no hierarchy of rights and conflicting fundamental rights must be balanced on a case by case basis and reasonably accommodated in a constitutional manner (as the Constitution acknowledges diversity and pluralism in our democratic society).

- 35.2 The rights to freedom of religion and freedom of expression are crucially important for the functioning and flourishing of South Africa's constitutional democracy.
- 35.3 The significant findings of the Constitutional Court in the *Qwelane* matter, that:
- 35.3.1 Determining whether hate speech is present entails an objective assessment;
  - 35.3.2 Section 10(1)(a) to (c) of PEPUDA is read conjunctively/cumulatively;
  - 35.3.3 Private communications or conversations are excluded from the ambit of hate speech;  
and
  - 35.3.4 The inclusion of "hurtful" in the definition of hate speech is unconstitutional.
36. We further repeat and affirm the contents – questions, concerns, commentary, submissions and recommendations – of our June 2021 submissions
37. We trust that the above comments and inputs are of assistance to the Department. We look forward to the Departments response thereto in due course, if any.
38. Cause for Justice remains at the Department's disposal to assist in the further development and/or amendment of the Bill, and specifically in relation to promoting equality, preventing unfair discrimination and protecting fundamental freedoms within the parameters set by the Constitution.
39. We would appreciate any opportunity that the Department is willing and able to afford us to take further part in discussions and/or to make further contributions to the further development and/or amendment of the Bill.

Yours faithfully,

**Liesl Pretorius**

***Legal Advisor: Law and Policy***