

**TRANSMITTED BY EMAIL**

Date: 13 May 2022

TO: **Portfolio Committee on Justice and Correctional Services** Your ref: Cannabis for Private Purposes Bill

ATT: V Ramaano [vramaano@parliament.co.za](mailto:vramaano@parliament.co.za)

AND: S Mthonjeni [smthonjeni@parliament.co.za](mailto:smthonjeni@parliament.co.za)

AND: General [cannabisbill@parliament.gov.za](mailto:cannabisbill@parliament.gov.za)

FROM: Paul-Michael Keichel [paul-michael@greencounsel.co.za](mailto:paul-michael@greencounsel.co.za)  
Ricky Stone [ricky@greencounsel.co.za](mailto:ricky@greencounsel.co.za)  
Cormac Cullinan [cormac@greencounsel.co.za](mailto:cormac@greencounsel.co.za)

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Dear Honourable Members of Parliament,

**RE: CANNABIS FOR PRIVATE PURPOSES BILL – COMMENTS BY CULLINAN AND ASSOCIATES ‘EARTH MEDICINE’ PRACTICE**

**INTRODUCTION**

1. We hereby submit comments on your latest (amended) draft of the Cannabis for Private Purposes Bill (*“the Bill”*).

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**Expertise grounded in experience**

Cullinan & Associates Incorporated (2001/001024/21)

DIRECTOR: CP Cullinan

ATTORNEYS: B Adams, GD Daniels, M Groenink, K Handley, P King, SD Kvalsvig, R. Stone, HD Wessels, P Keichel

18A Ascot Road

Kenilworth 7708

Cape Town

[info@greencounsel.co.za](mailto:info@greencounsel.co.za)

T +27 (0) 21 671 7002

2. By way of introduction, Cullinan and Associates (“C&A”) is a law firm that historically focusses on environmental law, but which also specialises in the legalities of ‘*Earth Medicine*’, which includes legal issues related to cannabis and other ‘*entheogens*’. Further and materially in this regard: -
  - 2.1. Our managing director, *Cormac Cullinan*, in addition to decades of general and environmental law experience, has drafted regulations for Lesotho related to its emerging medicinal psilocybin (*‘magic mushroom’*) industry.
  - 2.2. Our *Ricky Stone* has been involved in cannabis litigation and providing general cannabis law advice for almost a decade and, notably, has represented the amaPhondo people and their representatives in making numerous submissions to government, whilst leading an effort on behalf of the Eastern Cape Rural Development Agency (“*ECRDA*”) to come up with its own viable (and constitutional) Cannabis Master Plan.
  - 2.3. Our *Paul-Michael Keichel*, the author of this letter, was part of the steering committee in the efforts of the ECRDA, and, on the letterhead of Schindlers Attorneys, his former employer, made submissions to your good selves on or about 8 October 2020 – here <https://www.schindlers.co.za/wp-content/uploads/2020/10/2020-10-08-Comments-on-Bill-1.pdf> (“*the previous submissions*”) - with his material experience being noted at paragraphs 3 to 5 thereof.
3. In the circumstances, we submit, with respect, that you ought to consider what follows and please *allow us the opportunity to make verbal presentation/s thereon.*

#### **PREVIOUS SUBMISSIONS AND THE AMENDED BILL**

4. With respect, the previous submissions (which we ask to be read as though incorporated herein by reference, so as not to be unnecessarily duplicated) were not properly and/or adequately considered and/or addressed by Parliament, this being evident in the written and verbal feedback that was publically provided since, and on a reading of the Bill, as it currently stands. Further and materially in this regard: -
  - 4.1. Whilst it is indeed Parliament’s prerogative to legislate as it sees fit, with the Constitution always as guidance, we must caution you, with the utmost respect, that many businesses, individuals and civil society organisations, some of which are our clients, are gearing-up to litigate against the state in the event that there is obvious unconstitutionality within the final product. Thus, if government does not wish to stagnate the cannabis industry for years more to come, because of being locked up in Court, then it is in our common interests to

get this right now, through admitting what has been done incorrectly and working constructively, and together, towards rectifying it fast.

- 4.2. Our continued engagements with various government departments and even the Office of the Presidency, through Private Sector Working Groups and/or NEDLAC, seem to reveal an overdue acknowledgment that the Bill, in its current form, is fundamentally flawed, unconstitutional, and ought thus *not* to be used as the mechanism off which to springboard the Honourable President Ramaphosa's pronouncements, as stated in his most recent State of the Nation Address. Yet, certain branches of government appear intent to persist with the Bill and we must record that we do not understand why.
  - 4.3. It seems that even government's own legal advisor, Mr. Sarel Robertse, recognises (presumably because of what was stated by the Constitutional Court in 2018) that cannabis use and trade ought to be regulated no more harshly than tobacco and alcohol and, yet, for example and in stark contradiction of that statement, the drafters of the Bill appear to wish to hold tightly onto frankly bizarre and unprecedented (prohibitory and rights-infringing) concepts such as limiting the number of plants that civilians can cultivate in private - thereby sneaking a (already deemed unconstitutional) presumption of dealing in through the back door – and begging the question as to who purports to be able to legitimately/lawfully enter private spaces to check how many bottles of whiskey/wine/beer, or boxes of tobacco, civilians have stored there.
  - 4.4. Similarly, you do not make those people justify to you, or the South African Police Service, why they may cultivate, possess and consume large quantities (*i.e.* in reference to your new provision made for those who '*self-medicate*' with cannabis). They do not need to present you with a psychiatrist's/doctor's report that they are drowning their sorrows, or elevating their joys, with booze, but are, instead, free to own and store sometimes literal truckloads to serve to their guests at their next braai.
5. The writer's previous public comments, general and on the latest draft of the Bill, can be found here - <https://www.news24.com/fin24/opinion/opinion-keep-off-the-grass-less-is-more-in-cannabis-regulation-20220309> - and here - <https://www.pressreader.com/south-africa/mail-guardian/20220311/281517934591515> - and here - <https://www.dailymaverick.co.za/opinionista/2022-02-17-contradictory-cannabis-laws-muddy-the-waters-of-legality-vs-criminality/>. Other C&A commentary can be found here - <https://mg.co.za/opinion/2022-03-01-it-seems-amampondo-cannabis-farmers-will-be-left-behind-in-the-green-gold-rush/> - and here - <https://www.dailymaverick.co.za/opinionista/2022->

[03-21-needed-a-legal-route-to-market-for-original-indigenous-custodians-of-south-africas-cannabis/](#).

Please read these as though incorporated herein by reference, so as to avoid unnecessary duplication. That stated, we wish, with respect, to make the following broad comments on the Bill: -

- 5.1. It is inappropriate to use the Bill (unconstitutional as it is – for so many already-recorded reasons) to reflect an intention, but not create any meaningful laws, to commercialise a trade in cannabis. We propose to go back to the drawing board entirely and to co-create a *“Cannabis for All Legitimate Purposes Bill”* that addresses the full spectrum of sanctioned and prohibited uses of cannabis and which does not, piecemeal, attempt to retrofit apartheid-era legislation that never presumed any legitimate uses for cannabis (whereas we now all know that there are many).
- 5.2. That stated, there are lawful interim measures that can and so should be taken, which might enable industry and the maximisation of human rights and freedoms in the meantime, such as, amongst other potential interventions (on which we would be pleased to further engage):
  - 5.2.1. formally confirming government’s intention to do away with this Bill and to regulate personal and private cannabis use under the umbrella of an all-encompassing Act of Parliament (there being no meaningful prejudice to the consequences of the 2018 Judgment being permitted to persist for a little bit longer);
  - 5.2.2. vitally, having the Executive branch of government instruct the South African Police Service and the National Prosecuting Authority to cease all petty cannabis arrests and prosecutions, *i.e.* with the exception for those related to large-scale illegal dealing operations, which the state has a legitimate interest in preventing; and
  - 5.2.3. *quickly* amending the Drugs and Drugs Trafficking Act 140 of 1992, to:
    - 5.2.3.1. suitably amend the definition of cannabis (or do away with the reference to it entirely, except insofar as large-scale illegal dealing) to allow for legal trade in cannabis and hemp; and
    - 5.2.3.2. suitably amend the limited flow-through reference to the Medicines and Related Substances 101 of 1965 to include references to, amongst others, the Plant Improvement Act 53 of 1976 and the Traditional

Health Practitioners Act 22 of 2007 (*i.e.* as further exceptions to the present prohibition on dealing in cannabis).

- 5.3. It is also our considered and respectful submission that we ought to do away with the (unenforceable) distinctions/definitions of (the component parts of) cannabis on the basis of the height/maturity/concentration of one or more of its component parts/cannabinoids. Far more viable would be to allow for the (mostly unlicensed, or minimally licensed, and free) cultivation of cannabis and hemp (really the same thing) and to only intervene from a legislative perspective at the level of differentiating between to what uses that cannabis will go. More specifically, but this not being a finite list (and with the prevention of established harms *necessarily* being your core focus – refer to s36 of the Constitution and your own current National Drug Master Plan):
- 5.3.1. you ought not, with respect, to care if high-THC/CBD cannabis (which is deemed, for whatever reason, to be unsafe/unsuitable for human or animal consumption) is therefore diverted into industry and processed as ‘*hemp*’;
  - 5.3.2. similarly, what of it if a cannabis cultivator, with no license from SAHPRA or anyone else, is able to somehow produce medical-grade cannabis that is then off-taken by a manufacturer of scheduled substances that *is* licensed by SAHPRA (that license-holder standing to lose their license if they do not manage regulated off-take quality control appropriately)?; and
  - 5.3.3. so long as *appropriate* minimum standards are set for cannabis that will be commercially diverted towards human and animal consumption (in respect of which there are anyway none when it comes to private cultivation) you ought not, with respect, to concern yourselves with the petty quantities of certain cannabinoids that find their way onto the shelves, when it is now beyond scientific challenge that even relatively high concentrations of these things are less harmful to users and others than tobacco and alcohol.
- 5.4. Finally, you ought not, with respect, to purport to exempt certain religious and cultural communities from laws that otherwise limit the rights of everyone else.
- 5.4.1. Please refer to section 36 of the Constitution, which pointedly refers to “*law of general application*” (which a law cannot be if it only applies to only specific classes of people on arbitrary grounds).
  - 5.4.2. Additionally, please also consider what the Constitutional Court had to say (around exemptions) when Ras Garreth Prince first attempted to be permitted to

consume his and the Rastafari's sacred herb -  
<http://www.saflii.org/za/cases/ZACC/2002/1.html>.

- 5.4.3. It would be unworkable/unenforceable and unconstitutional, the latter for reason of elevating the purported interests of certain communities over those of society at large (going further than the interests of due 'accommodation'). With respect, let us decide what is good for South Africans as a whole and stick to that. What is deemed to be unacceptably bad for a white atheist and thus prevented cannot suddenly be deemed acceptably good for a black Rastafari and permitted. That would *per se* offend section 9 of the Constitution and open government up to further legal (constitutional) challenges.

### **CONCLUSION**

6. With respect, let us go back to the drawing board together and start again, instead of incrementally trying to fix this fatally flawed Bill, steeped in outdated assumptions, apartheid-era thinking, and an un-checked obsession with criminal prohibition, that tries to fix societal and medical problems through the criminal justice system (*i.e.* which takes a sledgehammer to a nut and does far more harm than it ever could, or does, prevent in this instance).
7. We at C&A avail ourselves to assist your good selves in this process, as will achieve the rapid and viable growth of a cannabis industry and fulfil government's keystone constitutional mandate, in terms section 1(a) read with section 36, to: ensure human dignity and equality; advance human rights and freedoms; and only limit those rights in the strictest and most obviously necessary of circumstances.
8. We look forward to hearing back from you as to how we can be of further service and thank you for your consideration and time in advance.

Yours sincerely,

*Paul-Michael Keichel*

**CULLINAN & ASSOCIATES INC.**

Per: PAUL-MICHAEL KEICHEL