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Our reference: Anti-Money Laundering Bill

Date: 7 October 2022

**Standing Committee on Finance  
National Assembly  
Parliament of the Republic of South Africa  
CAPE TOWN**

**For attention: Hon Mr MJ Maswanganyi, MP**

By email: [awicomb@parliament.gov.za](mailto:awicomb@parliament.gov.za)  
[tsepanya@parliament.gov.za](mailto:tsepanya@parliament.gov.za)

Honourable Mister Chairperson,

**RE: INTENTION TO MAKE SUBMISSIONS ON THE GENERAL LAWS (ANTI-MONEY LAUNDERING AND COMBATING TERRORISM FINANCING) AMENDMENT BILL [B18-2022]**

1. We refer to the above matter and specifically to the notice issued by the Honourable Mr MJ Maswanganyi, MP on behalf of the Standing Committee on Finance ("the Committee") on 27 September 2022, inviting public comments on the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Bill ("the Bill").
2. Cause for Justice ("CFJ") hereby expresses its desire and intention to participate in the law-making process by way of written and oral submissions to the Committee in respect of the Bill.

### **BACKGROUND TO CAUSE FOR JUSTICE AND INTEREST IN MATTER**

3. CFJ is a non-partisan/apolitical non-profit human rights and public interest organisation with the primary objective to advance 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<sup>1</sup> give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, and (2) ensuring constitutional state action. Furthermore, as a non-profit 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. Please note that CFJ intends to make submissions in relation to provisions in respect of the NPO Act only.
5. We address the following matters in this correspondence:

**A Inadequate public participation process**

**B Critical preliminary questions**

**B1** Less restrictive means to achieve purpose

**B2** Additional compliance burden and criminal sanctions

**B3** Likelihood of legislative amendments achieving their purpose

**C Participation in public hearings**

**A INADEQUATE PUBLIC PARTICIPATION PROCESS**

6. The Committee (Parliament) is constitutionally bound to ensure adequate public participation takes place in respect of the Bill. The call for public comments opened on Tuesday, 27 September and will close on 12:00 (noon) on Monday, 10 October. This is a mere nine and a half business days.
7. During this short period of time –
  - 7.1 The South African public schools holiday break took place – from 1 to 10 October. Many South Africans – no doubt including many who will be directly (and indirectly) affected by the amendments proposed in the Bill – take leave from work during school holidays, in many instances as a matter of choice and in many instances due to a lack of choice, to take care of their children themselves due to the school closure. Of those 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

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<sup>1</sup> 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.

work commitments on such short notice, in order to participate in the public consultation process. CFJ is no exception in this regard. Although the Bill came to our attention within the first week after the issuing of the notice, the mere nine and a half business days afforded for public comments are inadequate for us to meaningfully engage with the Bill and deliver submissions in respect thereof.

- 7.2 South Africa has been experiencing ongoing loadshedding, including during office hours. This has a severely detrimental impact on work capacity and productivity. CFJ's three-person legal drafting team in respect of the Bill is particularly badly affected – this debilitating situation is further exacerbated as our team works from three different loadshedding zones. Coordinating collaborative work engagements to properly research and consider the implications of the Bill and then draft substantive submissions, is extremely difficult due to slow (or no) internet connectivity and device batteries that simply cannot outlast the duration of blackouts.
8. It is crucially important that all South Africans be given an adequate opportunity to comment on the Bill. By allowing an inordinately short period for public comments, the Committee is falling foul of its constitutional obligation to facilitate effective public participation in the law-making process. This would make the Bill unconstitutional on procedural constitutional grounds.
9. **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 30 days.**

## **B CRITICAL PRELIMINARY QUESTIONS**

10. The inadequately short comment period has not afforded us sufficient time to critically consider the merits of specific clauses in any detail. In order to consider and comment on the constitutionality of the Bill, we would need to address at least three major overarching questions, amongst others. The time allotted for public comment is inadequate for these purposes.

### **B1 Less restrictive means to achieve purpose**

**Question 1: *Are the measures in the NPO Act, which will now become compulsory, the least restrictive means to achieve the purpose of preventing money-laundering and combatting terrorism financing in the NPO sector?***

11. Preventing money-laundering and combatting terrorism financing is a necessary and legitimate government purpose and would serve the public interest. However, it must be assured that the means proposed to address these public ills (in this instance, the amendments proposed in the Bill), do not go further than is necessary to achieve its purpose.

12. Section 36(1) of the Constitution provides 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, 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.*

13. The Bill seeks to amend certain sections of the NPO Act, including making registration mandatory and requiring all NPOs to comply with existing provisions of the Act and proposed new provisions in the Bill (or face criminal sanctions). This is a drastic change from the current the status quo: from encouraging voluntary registration and compliance to compelling against the threat of imprisonment and fines.

14. The proposed amendments will impose legal obligations and limit constitutional rights of NPOs, their governors and office-bearers, the majority of whom are unlikely to ever be involved in money-laundering or financing terrorism.

15. The limitation of rights entails a delicate balancing exercise which should attempt to maximise respect for, promoting, protecting and fulfilling the rights in the Bill of rights. Therefore, where less restrictive means are available to limit rights, only such means will pass constitutional muster.

16. If we were to be afforded sufficient time to consider the Bill and engage with applicable legal precedent and academic writing, we would want to include in our submissions to the Committee a reasoned and authoritative answer to Question 1 above.

## **B2 Additional compliance burden and criminal sanctions**

**Question 2: *Is the burden of placing additional compliance obligations on law-abiding citizens and non-profit entities, that choose to operate outside of the scope of the NPO Act, and concomitant penalties and criminal justice consequences for non-compliance, a constitutionally justifiable cost of reducing/eliminating money-laundering among those who conduct criminal enterprises by way of non-profit entities outside of the scope of the NPO Act?***

17. It is common cause that the NPO sector is over-extended and under-resourced.<sup>2</sup> Additional compliance requirements would mean more work for NPOs, taking up more valuable capacity and resources.
18. Many law abiding non-profit entities choose not to apply for voluntary registration in terms of the NPO Act for a wide variety of reasons. CFJ is one such non-profit entity. In some instances, a reason for choosing not to register in terms of the NPO Act would be to minimise the time, funds and other resources spent to meet legal and administrative compliance requirements. If the Bill is passed in its current format, it would force these entities to register under and/or comply with the requirements in the Act or face criminal sanctions.
19. We seriously doubt whether the consequences of these measures (both the cost to the entities and the cost to society, as many more NPOs would need to apply human and financial resources towards compliance with the NPO Act, rather than doing good public benefit work) are appropriate and proportional (i.e. constitutionally defensible) when compared to the potential benefit to be achieved by them – i.e. reducing money-laundering done by criminal enterprises through the NPO sector. If the proposed amendments will not yield a significant net benefit (i.e. that the benefits to be achieved by reducing/eliminating money laundering through the NPO sector materially outweigh/exceed the costs to this sector and society), the proposed amendments will not constitute reasonable and justifiable limitations of the rights of law-abiding non-profit entities and their governors and office bearers.
20. If we were to be afforded sufficient time to consider the Bill and engage with applicable legal precedent, socio-economic research and academic writing, we would want to include in our submissions to the Committee a reasoned and authoritative answer to Question 2 above.

### **B3 Likelihood of legislative amendments achieving their purpose**

**Question 3: What is the level of assurance that making the NPO Act compulsory will in fact translate to prevention of money-laundering enterprises in the NPO sector?**

21. One of the specifics we consider to be necessary to investigate is whether the proposed amendments will in any event be effective at addressing the identified public ills. If what the Bill proposes is not highly likely to translate into effectively preventing and combatting money-

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<sup>2</sup> For more information, see:

- 1) Inyathelo. "How To Banish Burnout At Nonprofit Organisations." *Ask Inyathelo* (25 November 2021). Available at: <http://askinyathelo.org.za/how-to-banish-burnout-at-nonprofit-organisations/>.
- 2) Maboya, Mmabatho, & Tracey McKay. "The financial sustainability challenges facing the South African non-profit sector." *The Journal for Transdisciplinary Research in Southern Africa* [Online], 15.1 (2019). Available at: <https://td-sa.net/index.php/td/article/view/693/1116>.

laundering and financing terrorism in practice, the amendments would serve no legitimate purpose – and would unreasonably and unjustifiably limit the rights of NPOs, their governors and office bearers, by placing an unconstitutional burden on them.

22. If we were to be afforded sufficient time to consider the Bill and engage with applicable legal precedent, socio-economic research and academic writing, we would want to include in our submissions to the Committee a reasoned and authoritative answer to Question 3 above.
23. We hereby request the Committee to thoroughly investigate this issue and to this end, require the Department of Finance and/or the Department of Planning, Monitoring and Evaluation to provide 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 combatting money-laundering by criminal enterprises operating within the NPO sector. We submit that the Committee should scrutinize and interrogate such evidence and arguments very carefully (and even seek independent expert opinions and advice to corroborate whatever evidence it is provided with by government).

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**24. In summary –**

- 24.1 These questions, and others, require a considered appraisal and investigation by the public in order to formulate a view on and make meaningful submissions on the Bill. 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.
- 24.2 The time afforded for public comment is wholly insufficient to enable us (and others) to do the work necessary to engage properly with the Bill, consider its implications fully, formulate a view on its constitutionality and draft substantive submissions to give expression to our views and inputs on the Bill.

**REQUEST: We re-iterate our request for a general extension of at least 30 days. Alternatively, we request the Committee to remove those parts of the Bill that deal with the NPO Act, with the agreement of the Department or of its own accord.**

**C PARTICIPATION IN PUBLIC HEARINGS**

25. According to the notice issued by the Committee on 27 September 2022, public hearings will be held virtually on Tuesday, 11 October 2022.

26. **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 11 October or on any other later date(s).

## **CONCLUSION**

27. We trust that these brief preliminary inputs will be of assistance to the Committee and look forward to the Committee's response thereto (if any) in due course.
28. 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.
29. In addition to the above, we re-iterate our request for the Committee to:
- 29.1 Re-open or grant a general extension of the call for comments for at least another 30 days (alternatively, remove the parts of the Bill dealing with the NPO Act); and
  - 29.2 Grant us an opportunity to make oral submissions at the public hearings in respect of the Bill.

Yours faithfully,

**Liesl Pretorius**  
**Legal Advisor and Parliamentary Liaison**

**and**

**Ryan Smit**  
**Executive Director and Legal Counsel**