

**To:** The Select Committee on Security and Justice

For attention: Mr G Dixon

Per email: [gdixon@parliament.gov.za](mailto:gdixon@parliament.gov.za)

**Re:** Protection of Constitutional Democracy against Terrorist and Related Activities Amendment Bill [B15-2022] - FOR SA Submission

**From:** Daniela Ellerbeck

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**Date:** Monday, 5 December 2022 (Deadline: **Tuesday, 6 December 2022**)

CONTENTS:	PAGE NUMBER:
Introduction	1
About <i>FOR SA</i> , and our interest in the Bill	2
<b>Comments relating to the substance of the Bill</b>	<b>2</b>
Legal Framework	4
<b>Recommendations</b>	<b>6</b>

## INTRODUCTION:

Dear Mr Dixon,

1. We refer to the [invitation](#) by the **Select Committee on Security and Justice** (“the Committee”) to make written submissions on the [Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Bill \[B15B-2022\]](#) (“the Bill”).
2. We make the following submissions to the Committee with regard to the Bill. We would further appreciate an **opportunity to make verbal submissions** at the public hearings to be held on **Wednesday, 7 December 2022**.

### **ABOUT FOR SA, AND OUR INTEREST IN THE BILL:**

3. *Freedom of Religion SA NPC (2014/099286/08)* (“FOR SA”) is a legal advocacy organisation working to protect and promote the constitutional right to freedom of conscience, religion, thought, belief and opinion (“religious freedom”) in South Africa.
4. *FOR SA* currently has an endorsement base of religious leaders representing millions of people in South Africa. Its constituency spans across various denominations, churches and faith groups. (For example, in the Lockdown matter, *FOR SA* mandated by religious leaders and organisations representing between 11 million and 18.5 million people (including 10 million people from the African Indigenous and Spirituality Churches) from a cross-spectrum of churches, denominations and faith groups, to engage with Government and make submissions on their behalf.)
5. While *FOR SA* respects the need to bring the Protection of Constitutional Democracy against Terrorist and Related Activities Act<sup>1</sup> (“the principal Act”) in-line with international law, we are concerned that the Bill will have unintended consequences on various constitutional rights.
6. Given *FOR SA*’s mandate, our submission will only focus on the Bill’s proposed amendments to definitions and offences that unjustifiably impact on the constitutional rights to religious freedom (section 15), freedom of (religious) expression (section 16) and freedom of association (section 18).

### **COMMENTS RELATING TO THE SUBSTANCE OF THE BILL:**

#### **SPECIFIC CLAUSES:**

7. **Definition of “terrorist activity”** – Clause 1 proposes amending the definition contained in section 1 of the principal Act. However, of concern is the wide definition of “*terrorist activity*”.

7.1. The current definition runs over two (2) pages in length. It contains various broad phrases that are open to abuse. This is of specific concern given that recent events have seen where the Department of Health labelled civil society organisations involved in enabling public comments on the Department’s proposed health regulations as “*instigating terrorism*” and/or “*sabotage*”.<sup>2</sup>

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<sup>1</sup> Act 33 of 2004.

<sup>2</sup> See, for example, <https://www.medicalbrief.co.za/criticism-of-health-department-regulations-labelled-anti-progressive-sabotage/>

- 7.2. It is problematic that “‘terrorist activity’... means any act— (a) committed in or outside the Republic, which (viii) creates a serious public emergency situation or a general insurrection in the Republic and (b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly or indirectly, to— (iv) further the objectives of an entity engaged in terrorist activity.”
- 7.3. The above is **vague**, with no specified criteria for either a “**serious public emergency**” or a “**general insurrection**”. As such, it is open to abuse and it is possible that it may be interpreted, as done in the aforementioned example of the Department of Health, to refer to civil society organisations and/or advocacy groups that are involved in facilitating public awareness of, and participation in, the legislative process and/or other Governmental activities.
- 7.4. The penalty for being involved in whatever is deemed to be a “terrorist activity” includes life imprisonment.<sup>3</sup>
- 7.5. The expanded definition needs to be read with section 3 of the principal Act which makes it a criminal offence to *inter alia* assist an organisation deemed to be engaged in terrorist activity by *inter alia* providing skill or expertise, or soliciting support for it or to support it, or to collect or make a document or to possess a thing connected with the terrorist activity.
- 7.6. The penalty for assisting an organisation deemed to be engaged in “terrorist activity” includes 15 years’ imprisonment.<sup>4</sup>
- 7.7. An unintended consequence of the Bill could therefore be to criminalise the voices of those opposing Government actions and/or curb civil society’s dialogue and actions in what is a participatory democracy. Given that the religious community is often at the forefront of criticising Government and/or facilitating public participation in elections, the legislative process and other civil society activities, this is particularly concerning to religious organisations and leaders.
- 7.8. The principal Act criminalises involvement with and/or funding organisations that are deemed to be involved with “terrorist activity”. In light of the above, this is equally concerning to the religious community.

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<sup>3</sup> Section 18(1)(a)(i) of the principal Act.

<sup>4</sup> Section 18(1)(b)(i) of the principal Act.

7.9. The above definition, being open to abuse, could drastically limit the rights to:

7.9.1. **religious freedom**<sup>5</sup> which protects the right to hold opinions and beliefs and live these out publicly;

7.9.2. **freedom of expression**,<sup>6</sup> which protects all expression apart from propaganda for war, incitement of imminent violence, and the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm; and

7.9.3. **freedom of association**,<sup>7</sup> which protects the right to freely associate with those one wishes to associate with.

7.10. Narrowing the definition of what is “terrorist activity” to avoid abuse by a future Government is vital.

## **LEGAL FRAMEWORK:**

### **INTERNATIONAL LAW:**

8. In terms of section 39(1)(b) of the South African Constitution, a court “***must consider international law***” when interpreting the Bill of Rights.
9. In addition, section 233 of the Constitution requires that every court, when interpreting any legislation, “***must prefer***” any reasonable interpretation that is consistent with international law.
10. The right to religious freedom and freedom of association are, *inter alia*, protected in the various international covenants / treaties<sup>8</sup> and declarations.<sup>9</sup>
11. It would thus be prudent for the Committee to be take cognisance of South Africa’s international law obligations, when drafting legislation that directly affects fundamental rights.

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<sup>5</sup> Section 15 of the Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Section 16(1) of the Constitution of the Republic of South Africa, 1996.

<sup>7</sup> Section 18 of the Constitution of the Republic of South Africa, 1996.

<sup>8</sup> [Universal Declaration of Human Rights](#) – see articles 18, 19 and 20;

[The International Covenant on Civil and Political Rights](#) – see articles 18, 19 and 22;

[The African Charter on Human and People’s Rights](#) (Banjul Charter) – see articles 8, , 9, 10 and 17(3).

<sup>9</sup> [Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief](#) – see articles 1 and 6.

[Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban](#) – see articles 8 and 47.

## CONSTITUTION:

### 12. Duties of the State:

12.1. In terms of section 8(1) of the [Constitution](#), the Bill of Rights applies to all law, and binds the State, including Parliament.

12.2. Section 7(2) requires the State to respect, protect, promote and fulfil (all) the rights in the Bill of Rights.

13. Limiting a right: section 7(3) of the Constitution states that a right contained in the Bill of Rights can be limited by section 36, or “*elsewhere in the Bill*” – i.e. by an internal limitation clause as is the case in section 16(2).

14. Interpreting a law: Importantly, in the current situation of drafting a proposed law, section 39(2) of the South African Constitution requires that any law must be interpreted in a way that promotes “*the spirit, purport and objects of the Bill of Rights*”.

### **Religious freedom:**

15. The Constitution expressly protects the right to freedom of conscience, religion, thought, belief and opinion (commonly referred to as “religious freedom”) in section 15 of the Constitution - without any internal limitation (as is the case in section 31). This right applies to both individuals and juristic persons<sup>10</sup> such as, for example, religious institutions and organisations. This right can only be limited in accordance with section 36 of the Constitution. (To the extent that the Bill will therefore potentially limit the right guaranteed in section 15, it needs to pass the section 36 limitations test.)

### **Freedom of Expression:**

16. The Constitution expressly protects the right to freedom of expression in section 16, explicitly stating that this right includes the right to freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research.

17. Section 16(2) of the Constitution also clearly states what the right to freedom of expression does not extend to, i.e. what is not protected expression – namely only propaganda for war; or incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender

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<sup>10</sup> Section 8(4) of the Constitution of the Republic of South Africa, 1996.

or religion, and that constitutes incitement to cause harm (commonly referred to as “hate speech”).

**Freedom of Association:**

18. The Constitution expressly protects the right to freedom of association in section 18 as a basic human right, and this freedom also extends to, and protects, religious associations.
19. In the context of religious associations, freedom of association “*guarantees an individual the right to choose his or her associates, and a group of individuals their rights to choose their associates*”.<sup>11</sup>

**RECOMMENDATIONS:**

Clause 1 - Wide definition of terrorist activity:

20. FOR SA proposes that:

- 20.1. The definition of “*terrorist activity*” be narrowed by excluding “*viii) creates a serious public emergency situation or a general insurrection in the Republic*”.

*Alternatively, that:*

- 20.2. The criteria to be met for a “serious public emergency situation” and “general insurrection” be expressly stipulated in the Bill.

21. We trust that you will find these submissions of assistance.

Kind regards,

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**THE END.**

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<sup>11</sup> *Taylor v Kurtstag* at para 37.