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To: Hon Mr Magwanishe, MP
Chairperson
Parliamentary Portfolio Committee on Justice and Correctional Services

For attention: **Mr Vhonani Ramaano**
Committee Secretary
Per e-mail: Hatecrimes@parliament.gov.za; vramaano@parliament.gov.za

Re: **Prevention and Combating of Hate Crimes and Hate Speech Bill [B9 – 2018] – *FOR SA* submission**

Date: 30 September 2021 (**Deadline for comment: Friday, 1 October 2021**)

INTRODUCTION:

Dear Hon. Mr Magwanishe, MP,

1. We refer to the invitation for written submissions by the Parliamentary Portfolio Committee on Justice and Correctional Services (the "Committee"), on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B 9–2018] (the "Bill").

2. While the current Bill before the Committee is certainly an improvement on the initial version of the Bill opened up for comment by the Department of Justice and Constitutional Development ("the Department"), *FOR SA* remains concerned about the following aspects of the Bill:

   2.1. The criminalisation of speech (i.e. the "hate speech" provisions in the Bill), particularly in light of existing laws that already prohibit "hate speech";

   2.2. The over-broad definition of "hate speech", which goes further than the Constitutional Court's definition of hate speech,[1] and which violates and will have a major chilling effect on the constitutional rights to freedom of expression (section 16 of the Constitution) and religious freedom (section 15 of the Constitution); and

   2.3. The "religious exemption clause" in the Bill (clause 4(2)(d)), which we believe should be strengthened to avoid certain unintended consequences.

3. We would appreciate the opportunity to make verbal submissions with regard to the Bill, if and when such opportunity presents itself.

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

4. *Freedom of Religion SA NPC (2014/099286/08)* (*FOR SA*) is a legal advocacy organisation mandated to protect and promote the religious freedom rights of all South Africans, regardless of their specific religious or ideological beliefs. *FOR SA* is, therefore, neutral and non-partisan

[1] As set out by the Constitutional Court in the matter of *Jon Qwelane versus the SA Human Rights Commission* [2021] ZACC 22.

in terms of any interpretation of doctrine, faith or belief to the extent that it complies with the rule of law.

5. *FOR SA* currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches and faith groups.

6. *FOR SA* has also appeared in various court cases that may have an (adverse) impact on religious freedom, and related rights. For example:

   6.1. ***Coulson v Neethling***[2], *FOR SA* appeared as an *amicus curiae* in this application before the Bellville Magistrate's Court (sitting as an Equality Court), which concerned the rights of business owners to act, and operate their businesses, in conformity with their religious convictions and beliefs;

   6.2. ***Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others***[3], as principal party in an application concerning the constitutionality of the common law defence of reasonable and moderate chastisement as it pertains to religious beliefs;

   6.3. ***Freedom of Religion South Africa NPC v Minister of Cooperative Governance And Traditional Affairs and Others***[4], as a principal party in an application concerning the constitutionality of the lockdown regulations' impact and restrictions on the right to religious freedom;

   6.4. ***Mthembu v Christian Life Private School***,[5] an application currently pending before the Johannesburg High Court (sitting as an Equality Court), which concerns the religious and associational rights of independent faith-based schools.

7. *FOR SA*'s interest in the Bill is limited only to those aspects that could have a bearing on the section 15 constitutional right to freedom of conscience, religion, thought, belief and opinion ("religious freedom") and related rights, specifically focusing on the right to freedom of (religious) expression (section 16 of the Constitution), and the right of religious communities to collectively practise their religion and form religious associations (section 31 of the Constitution).

[2] Case number 1/1/2-07/2013.
[3] 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2020 (1) SACR 113 (CC).
[4] Case number 2021/2619.
[5] Case number EQ 5/2020.

8. As an organisation, *FOR SA* believes that every human being is created in the image of God and as such, has intrinsic dignity and worth. Because God gives dignity and worth to all people, as human beings we ought to do the same. No person should suffer violence or hatred because of their race, nationality, sex, religion or any other characteristic.

9. *FOR SA* further esteems and affirms the constitutional promise that "*South Africa belongs to all who live in it, united in our diversity*".[6]

10. As such, we commend the Committee for what we believe to be a *bona fide* effort to prevent and combat "hate crimes" and "hate speech", and to create an environment where South Africans can peacefully co-exist despite our differences.

11. **We are concerned, however, that the Bill, particularly the "hate speech" component, is defined so broadly that it will violate other constitutional rights, including particularly freedom of expression (s 16) and religious freedom (s 15).**

EXECUTIVE SUMMARY OF SUBMISSIONS:

12. As an organisation working to protect and promote religious freedom in South Africa, *FOR SA* is concerned that the "hate speech" component in the Bill:

    12.1. Is **unnecessary** as existing law already effectively prohibit "hate speech", and for that reason will not pass muster under section 36 of the Constitution;

    12.2. Is **over-broad** as it goes further than the Constitutional Court's definition of hate speech in the matter of *Qwelane v South African Human Rights Commission*[7] ("*Qwelane*"), thereby resulting in an impermissible limitation on freedom of (religious) speech and making the "hate speech" component in the Bill unconstitutional;

    12.3. Fails to fulfil South Africa's obligations in terms of international law and fails to meet the United Nations' Rabat threshold test; and

    12.4. Could have a major **chilling effect** on *inter alia* the following constitutional rights which are fundamental to the pluralistic, democratic society envisaged by our Constitution:
        12.4.1. freedom of expression (s 16); and
        12.4.2. religious freedom (s 15).

[6] Preamble to the Constitution of the Republic of South Africa, 1996.
[7] (CCT 13/20) [2021] ZACC 22 (31 July 2021).

13. Should the current "hate speech" provisions in the Bill be allowed to remain, we submit that it is very possible that the Bill could be the subject of a constitutional challenge based on the Bill being unnecessary (and therefore failing to meet section 36's requirements), and being over-broad (due to its definition of "hate speech" going further than the Constitutional Court allowed). For these reasons, the Bill could be declared unconstitutional and invalid.

14. We **recommend** that the presumably unintended, but nonetheless unconstitutional, consequences of the definition of "hate speech" in its current form, be avoided or eliminated by:

14.1. Omitting the "hate speech" provisions from the Bill altogether; and

14.2. In the event that the "hate speech" provisions remain in the Bill:

14.2.1. Limiting the definition and scope of "hate speech" in the Bill, in line with the Constitutional Court's judgment in *Qwelane*.

14.2.2. Clarifying and strengthening the religious exemption clause in the Bill (clause 4(2)(d)), to ensure it adequately protects the constitutional right to religious freedom, and indeed the religious expression of everyone - not just clergy. In this regard, we propose the following amendment:

"the *bona fide* interpretation and proselytizing or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings, by a religious organisation or an individual, in public or in private, to the extent that such interpretation and proselytization does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)."

14.2.3. In particular (and without derogating from the other issues highlighted herein), the Bill should be amended to include, in the Preamble of the Bill, specific reference to sections 15 and 31 of the Constitution.

THE BILL's STATED OBJECTS:

15. The Bill's stated objectives include "*[t]o give effect to the Republic's obligations in terms of the Constitution and international human rights instruments*"[8] and "*to give effect to the Constitution*

[8] Preamble of the Bill.

and the Republic's obligations regarding prejudice and intolerance in terms of international law".[9]

16. When regard is had to the Preamble, it becomes clear that the particular international legal instruments contemplated by the Bill, are:

16.1. The Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban; and

16.2. The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), to which South Africa is a signatory.

17. While these documents are undoubtedly pertinent to the issue, it is important to note that both instruments are concerned with, and confined to, issues of discrimination and intolerance based on "*race, colour, descent, or national or ethnic origin*"[10] and does not extend further to all the "characteristics" mentioned in clauses 3(1) and 4(1)(a)(ii) of the Bill.

18. Furthermore, as set out in the International Legal Framework component of this submission (below from paragraph 20 onwards), these are also not the only international human rights instruments that are applicable and which the Republic has an obligation to fulfil.

THE "HATE SPEECH" COMPONENT:[11]

19. Our main concerns relating to the "hate speech" provisions in the Bill, are as follows:

19.1. It is **unnecessary** as there are already existing laws in place that prohibit "hate speech", and for that reason is unlikely to pass muster under **section 36** of the Constitution;

19.2. The proposed definition, and scope, of "hate speech" in the Bill, is **over-broad** in light of the Constitutional Court's definition of hate speech in the *Qwelane* matter, and therefore, **unconstitutional**; and

19.3. The criminalisation of "hate speech" could **severely limit other fundamental rights** in the Bill of Rights. Specifically, the criminalisation of "hate speech" could have a major chilling effect on:

19.3.1. freedom of expression (s 16); and

[9] Clause 6(5) of the Memorandum on the Objects of the Bill.
[10] See ICERD.
[11] Clause 4 of the Bill.

19.3.2. religious freedom (s 15).

A: International Legal Framework:

INTERNATIONAL LAW:

20. In terms of section 39(1)(b) of the South African Constitution, a court ***"must consider international law"*** when interpreting the Bill of Rights.

21. 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.

22. 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, including the right to religious freedom.

23. In addition to the (a) International Convention on the Elimination of All Forms of Racial Discrimination and the (b) Declaration adopted at the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban and ICERD, cited in the Bill's Preamble, the following international instruments are applicable:

23.1. The Universal Declaration of Human Rights ("UDHR")[12]:

Religious Freedom:

Article 18 states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Freedom of Expression:

Article 19 states that everyone has the right to freedom of opinion and expression; freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

23.2. The International Covenant on Civil and Political Rights ("ICCPR")[13]:

Religious Freedom:

[12]Although not ratified by South Africa, this can be argued to be binding on the Republic as customary international law, because it is the foundation of international human rights law.
[13] Ratified by South Africa on 10 Dec 1998.

Article 18 of the ICCPR provides that everyone has the right to religious freedom and that this includes the freedom to meet in community with others to manifest such belief in worship, observance, practice and teaching. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Freedom of Expression:

Article 19 states that everyone must have the right to hold opinions without interference and the right to freedom of expression. The right to freedom of expression is expressly stated as having to include the freedom to seek, receive and impart information and ideas of all kinds.

Article 19(3) however, explicitly states that the right to freedom of expression may only be subject to restrictions necessary for respect of the rights or reputations of others; for the protection of national security, or of public order, or of public health or morals.

Article 20, akin to section 16(2) of the SA Constitution, prohibits propaganda for war, and the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

23.3. The African Charter on Human and People's Rights (Banjul Charter)[14]:

Religious freedom:

Article 8 guarantees freedom of conscience and free practice of religion. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

Freedom of expression:

Article 9 states that every individual shall have the right not only to receive information, but also to express and disseminate his opinions within the law.

Duty of the State to promote traditional values:

Article 17(3) states that it is the State's duty to promote and protect morals and traditional values recognised by the community.

[14] Ratified by South Africa on 9 Jun 1996.

Duty to individual to respect fellow people:

Article 28 states that every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

23.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief[15]:

The Declaration notes that religion or belief is one of the fundamental elements in a person's conception of life, and that freedom of religion or belief should be fully respected and guaranteed.

Religious Freedom:

Article 1 states that everyone must have the right to freedom of thought, conscience and religion. This right must include the freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. Freedom to manifest one's religion or belief may be subject only to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

Article 6 further elaborates on some of the contents of the right to religious freedom, saying it includes the freedom to *inter alia*:

- Write, issue and disseminate relevant publications in these areas;
- Teach a religion or belief in places suitable for these purposes;
- Establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

Belief Discrimination:

Article 2 defines "*intolerance and discrimination based on religion or belief*" as any distinction, exclusion, restriction or preference based on religion or belief which has as its purpose, or as its effect, the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis. ("Belief discrimination").

[15] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 at para 40, where the Constitutional Court considers the Declaration and seems to indicate it considers it binding on South Africa.

Article 4 then places a duty on the State take effective measures to prevent and eliminate belief discrimination in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life, and that they must make every effort to enact, or rescind, legislation to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.

24. We now turn to the two (2) international human rights instruments referred to in the Bill's Preamble, and which are the international law obligations upon which the Bill is supposedly based:

24.1. International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD")[16]:

Article 4 places a duty on the State to condemn all propaganda and organisations based on ideas or theories of racial superiority, or which attempt to justify or promote racial hatred and discrimination in any form. States must not permit public authorities or institutions to promote or incite racial discrimination and are required to declare as an offence punishable by law:

- all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin (and also the provision of any assistance to racist activities, including the financing thereof);

- participation in organisations or activities (which promote and incite racial discrimination).

Importantly, article 5 requires the State to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of *inter alia* the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression.

24.2. Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban:

Article 8 recognises that religion, spirituality and belief play a central role in the lives of millions of women and men, and in the way they live and treat other persons. Religion,

[16] Ratified by South Africa on 10 Dec 1998.

spirituality and belief may and can contribute to the promotion of the inherent dignity and worth of the human person and to the eradication of racism, racial discrimination, xenophobia and related intolerance.

Article 14 urges states to recognise the particularly severe problems of religious prejudice and intolerance that many people of African descent experience, and to implement policies and measures that are designed to prevent and eliminate all such belief discrimination.

Article 47 urges states to guarantee the rights of persons belonging to national or ethnic, religious and linguistic minorities, individually or in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference, and to participate effectively in the cultural, social, economic and political life of the country in which they live, in order to protect them from any form of racism, racial discrimination, xenophobia and related intolerance that they are or may be subjected to.

Article 79 calls upon States to promote and protect the exercise of the rights set out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (discussed above at paragraph 23.4).

Articles 91 and 92 voice concern about the use of new information technologies, such as the Internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, xenophobia, racial discrimination and related intolerance, and recognises the need to promote the use of this technology to contribute to the fight against racism, racial discrimination, xenophobia and related intolerance.

International law conclusion:

25. The emphasis on protecting the fundamental rights to religious freedom and freedom of expression, can clearly be seen in the above international human rights instruments. Explicit protection of the fundamental right to religious freedom is the norm, and includes – as an integral component of that right - the right to manifest one's religious convictions and beliefs in public through observance and practice.

26. From the above examination of international law, it is clear that the right to freedom of expression in international law contains two parts: firstly, States have an obligation to protect

the right to freedom of expression. Secondly, States have to prohibit (not necessarily criminalise) hate speech.[17]

27. Even though the aforementioned International Convention on the Elimination of All Forms of Racial Discrimination requires the State to declare the dissemination of ideas based on racial superiority or hatred, as an offence punishable by law, this does not necessarily require the offence to be a **criminal** offence. Indeed, one could argue quite persuasively, that both the common law crime of *crimen iniuria* and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("PEPUDA" or "the Equality Act") effectively fulfil this obligation.

28. Furthermore, these two (2) international instruments also explicitly recognise the importance of the right to religious freedom and protect it.

29. Where it comes to concerns about the use of technology for purposes of, for e.g., spreading racial hatred, it is recognised that these technologies can equally assist with the promotion of tolerance and respect for human dignity, and the principles of equality and non-discrimination. The objective, therefore, of the international instruments the Bill itself refers to and relies upon, is more speech - not less.

30. As is obvious, both international law instruments the Bill is based on, concern racial discrimination **only**. The Bill, therefore, goes much wider than the Republic's obligations under these instruments - not only because it extends the grounds from race to a variety of others, but also because it adopts this idea of "less speech is better", contrary to what is espoused in the instruments it relies upon. It then goes further still and criminalises speech, while simultaneously ignoring the other obligations the Republic has under other international instruments to protect fundamental rights such as religious freedom and freedom of expression.

UN RABAT PLAN OF ACTION:

31. The UN Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, brings together the conclusions and recommendations from several expert workshops convened by the Office of the UN High Commissioner for Human Rights ("OHCHR").[18] The Rabat Plan of Action, which suggests a

[17] *Qwelane* at para 88.
[18] See https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx

high threshold for defining restrictions on freedom of expression, incitement to hatred, and for the application of article 20 of the ICCPR, was adopted at a meeting of experts in 2012[19].

The UN Rabat Plan of Action states that "*Criminal sanctions related to unlawful forms of expression should be seen as a last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply*."[20] (Own emphasis.) As set out in the UN Strategy and Plan of Action on Hate Speech, one of the key principles the Strategy and Action Plan is founded upon, is that the "*United Nations supports more speech, not less, as the key means to address hate speech*". (Own emphasis.)

Rabat threshold test:

The Rabat Plan of Action highlights that article 20 of the ICCPR requires a high threshold for restricting freedom of expression, precisely because limitation of freedom of expression must remain an exception and warns about the "*abuse of vague domestic legislation*".

This one-pager outlines the six-part Rabat threshold test for restricting freedom of expression. It suggests that each of the following six (6) parts of the following threshold test needs to be fulfilled in order for a statement to amount to a criminal offence:

(1) **Context**: It is recommended that an analysis of the context should place the speech within the social and political context prevalent at the time the speech was made and disseminated. Were the statements likely to incite discrimination, hostility or violence against the target group in this context?
(2) **Speaker**: The speaker's standing in the context of the audience to whom the speech is directed.
(3) **Intent**: Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR, because article 20 anticipates intent. Article 20 provides for "*advocacy*" and "*incitement*" instead of mere "*distribution*" or "*circulation of material*".
(4) **Content and form**: The content of the speech is a critical element of incitement. Analysis of the speech's content may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments used in the speech.
(5) **Extent of the speech act**: The extent of the speech - its reach, public nature, magnitude and size of its audience - needs to be considered. The means of dissemination used, are also relevant, for example a single leaflet, or broadcast in the mainstream media, or via the

[19] See https://www.ohchr.org/EN/Issues/FreedomOpinion/Articles19-20/Pages/Index.aspx
[20] Paragraph 34.

Internet, the frequency, the quantity and the extent of the communications. Other considerations are whether the audience had the means to act on the incitement, whether the statement (or work) was circulated in a restricted environment, or widely accessible to the general public.

(6) **Likelihood, including imminence:** Courts will have to determine whether there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.

32. Furthermore, as set out in the UN Rabat Plan, criminalisation of speech must be a last resort – the UN prefers an approach of more speech as a means to counter hate speech, rather than restricting speech.

33. Should South Africa proceed with the attempt to criminalise speech, it needs to ensure that the Bill meets the Rabat threshold test – and that this test's criteria is expressly set out. Failing to do so, will lead to a violation of the ICCPR.

B: South African Legal Framework:

CONSTITUTION:

34. Duties of the State:
    34.1. In terms of section 8(1) of the Constitution, the Bill of Rights applies to all law, and binds the State, including Parliament.
    34.2. Section 7(2) requires the State to respect, protect, promote and fulfil (all) the rights in the Bill of Rights.

35. Limiting a right:
    35.1. 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).

36. 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*".

37. Hierarchy of rights: The Constitution also knows no hierarchy of rights.[21] Again, the State has a duty to protect and promote all the rights in the Bill of Rights, without preferring one over another.

Religious freedom rights:

38. 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[22] 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:

39. 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.

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

CONSTITUTIONAL COURT DECISIONS:

41. We now turn to various decisions by our highest court interpreting the rights to religious freedom and freedom of expression:

Religious Freedom:

42. The Constitutional Court has repeatedly given judgments that cover the ambit of the right to religious freedom contained in section 15 of the Constitution, its relationship with other

[21] See, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 84; *The Citizen 1978 (Pty) Ltd and Others v Mcbride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) at para 148.
[22] Section 8(4) of the Constitution of the Republic of South Africa, 1996.

fundamental rights and the need to reasonably accommodate one another in our diverse society.

43. Amongst others, it has held that the right to religious freedom includes not only "*the right to entertain such religious beliefs as a person choose, [but] the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination*"[23] and that "*freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs".*[24] [Own emphasis.]

44. Furthermore, the Constitutional Court has also explained the close link between the right to religious freedom and the right to human dignity, by saying that "*[t]he right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity"*[25] and that the … "*State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law"*[26]*.*

45. On just how closely connected this right is with the institution of democracy and with a free society, the Court has said that "*[t]he constitutional right to practise one's religion … is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society"*[27].

46. This right also includes the right to verbalise beliefs which some may find offensive – e.g. "*those persons who for reasons of religious belief disagree with or condemn homosexual conduct, are free to hold and articulate such beliefs*" [28].

Freedom of expression:

47. Our Constitutional Court has said that "*[f]reedom of expression lies at the heart of a democracy*"[29].

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[23] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), at para 36 citing *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC).
[24] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 92.
[25] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 36.
[26] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC)at para 35.
[27] *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) at para 25.
[28] *National Coalition for Gay and Lesbian Equality And Another v Minister Of Justice and Others 1999 (1) SA 6 (CC)* at para 137.
[29] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 7.

48. The Court has held freedom of expression to be a "*web of mutually supporting rights*"[30], because it is closely related to other constitutional rights such as freedom of religion, dignity, freedom of association, the right to vote and to stand for public office (section 19 of the Constitution) and the right to assembly (section 17 of the Constitution).[31]

49. Our Constitutional Court has said that *"[t]hese rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively, even where those views are controversial. The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views*."[32]

50. Likewise, the Court has held that freedom of expression has an "*instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally*" [33].

51. It has further held that this right "*is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression — the free and open exchange of ideas — is no less important than it is in the United States of America… Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed*.[34]

52. The Court has also held that we are obliged to delineate the bounds of the constitutional guarantee of free expression generously and that unless an expressive act is excluded by section 16(2), it is protected expression.[35]

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[30] *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 (3) SA 617 (CC) at para 27.
[31] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 8.
[32] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 8. (Own emphasis.)
[33] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 7.
[34] *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37. (Own emphasis.)
[35] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) para 47.

53. Finally, in the recent *Qwelane*[36] judgment, the Court specifically traversed under which circumstances freedom of expression can be limited. It also defined hate speech and harm(ful), both definitions are relevant as these terms are used in the Bill.

54. Definitions:

54.1. "'harmful' *can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group*."[37]

54.2. "hate speech" is speech that "*travels beyond mere offensive expression and can be understood as "extreme detestation and vilification which risks provoking discriminatory activities against that group*".[38] Thus, "*[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech... offensive speech is protected by freedom of expression*."[39]

55. What is important, is that the Constitutional Court specifically confirmed that (merely) "*hurtful*" speech does not qualify as hate speech.

56. In the circumstances, the Court declared section 10 of PEPUDA unconstitutional, and Parliament was given 24 months to amend its provisions relating to hate speech, accordingly. In the meanwhile, section 10 reads as follows: "…*no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred*". (Own emphasis.)

57. It is *FOR SA's* submission that the Constitutional Court's reworked section 10, brings PEPUDA's definition of hate speech, closer to the definition of hate speech in section 16(2)(c) of the Constitution which prohibits "*the advocacy of hatred … that constitutes an incitement to cause harm*". Our Courts have repeatedly held that, in order for a statement to qualify as hate speech, both elements need to be present – i.e. an advocacy (or stirring up) of hatred towards a certain person or group based on one of the prohibited grounds (e.g. race, sex, gender, sexual orientation, conscience, religion and belief), and an incitement to cause harm.

58. *FOR SA* pauses to point out that it is important to note that *Qwelane* deals with PEPUDA, which is a civil statute, not a criminal statute - unlike the Bill, which proposes criminalisation of speech.

[36] (CCT 13/20) [2021] ZACC 22 (31 July 2021).
[37] *Qwelane* at para 154. [Own emphasis.]
[38] *Qwelane* at para 81. [Own emphasis.]
[39] *Qwelane* at para 103. [Own emphasis.]

59. Before someone is convicted of a crime and sent to jail, we need to ensure that a higher (not identical or lower) threshold than a mere civil law (like PEPUDA) is met. In the current context, this will look *inter alia* like including the Rabat Plan threshold test in the Bill and requiring a direct causal link between the statements and the harm before someone can be sent to jail under the Bill (as opposed to merely suffering a civil liability under PEPUDA).

60. What is clear from the above, is that freedom of expression is a crucial right for our democracy, and that unless expression falls within the ambit of section 16(2) and the Constitutional Court's definition of hate speech, it is protected speech – even if it is hurtful or offensive.

61. Should a law curtail the right to freedom of expression outside of these bounds, it will be unconstitutional.

C: Substantive submissions on the Bill:

NEED FOR, AND POTENTIAL EFFECTIVENESS, OF THE PROPOSED BILL:

62. It is submitted that "*hate speech*" is already prohibited in existing South African law, which has proved itself effective in dealing with occurrences of hate speech. (See paragraph 66 below for practical case examples.)

63. It is thus unnecessary to create an additional law that will place further strain (in terms of time, effort and money) on our already burdened courts and on the police, who will be tasked with the investigation of "hate speech" charges and obliged to make arrests, etc. in terms of the Bill. For this reason, *FOR SA* submits that the Bill will not pass muster under section 36 of the Constitution for its limitation of a right so foundational to our democracy as freedom of expression (or intrinsic to human dignity as religious freedom), because there are less restrictive means available to achieve the Bill's purpose[40]. As set out in paragraphs 25 and 30 above, there is no international law obligation on South Africa to criminalise hate speech. With PEPUDA, the obligation to declare it an offence, has already been fulfilled.

64. The Preamble to the Bill itself acknowledges that "hate speech" is already prohibited in South African law, through:

[40] The Preamble of the Bill states the Bill's purpose as being to *"give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations".*

64.1. The **internal limitation in section 16 of the Constitution**, which explicitly excludes the following types of speech from the constitutional guarantee to free speech:

64.1.1. *"Propaganda for war;*

64.1.2. *Incitement of imminent violence; or*

64.1.3. ***Advocacy of hatred** that is based on race, ethnicity, gender or religion, and **that constitutes incitement to cause harm***." [Own emphasis].

64.2. **Section 10 of PEPUDA**:

"*Prohibition of hate speech*

(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation." [Own emphasis].

65. In addition, ***crimen iniuria*** (i.e. the wilful injury to someone's dignity) is already a **common law crime** in South Africa.

66. The above laws have already been effectively enforced in the following cases:[41]

66.1. ***Qwelane***: The Constitutional Court found the late Mr Qwelane guilty of "hate speech" in terms of **PEPUDA** for offensive statements made towards the LGBT community.

66.2. ***ANC v Penny Sparrow***: In terms of **PEPUDA**, the Equality Court ordered Sparrow to pay a fine of R150 000 to the Oliver and Adelaide Tambo Trust, for calling black people "monkeys" on social media.

66.3. ***State v Penny Sparrow***: She was thereafter charged with ***crimen iniuria*** and having pleaded guilty, given the choice between 12 months in prison or a R5 000 fine. She was

[41] This is not intended to be an exhaustive list of all "hate speech" cases in South Africa, but an illustrative list showing that existing laws are not only working, but doing so effectively.

additionally sentenced to two years' imprisonment, wholly suspended five years, during which time she must not be convicted again of *crimen iniuria*.

66.4. ***SAHRC v Khumalo***: Khumalo was found guilty of "hate speech" in terms of **PEPUDA** for statements he made on the internet concerning white people. The Court interdicted Khumalo from repeating such statements, and ordered him to apologise to all South Africans. In addition, the matter was referred to the NPA.

66.5. ***SAHRC v Vicki Momberg***: Momberg was found guilty on four counts of ***crimen iniuria*** in connection for racist statements and was sentenced to three years' imprisonment, suspended by one year.

66.6. ***SAHRC obo SAJBD v Masuku & COSATU***: Masuku was found guilty of "hate speech" in terms of **PEPUDA** for anti-Semitic statements. The Court ordered Masuku to give an unconditional apology to the Jewish community, which apology must also be published.

67. As can be seen from the above, these "hate speech" laws are already effectively being enforced in South Africa by:

67.1. The South African Human Rights Commission (SAHRC), which can investigate a "hate speech" incident of their own accord, or following a complaint laid with the Commission. Cases considered by the SAHRC may result in further court action, should the Commission decide that this is warranted;

67.2. The Commission for Gender Equality (CGE), which has similar powers to the SAHRC in relation specifically to gender related matters;

67.3. The Equality Courts (created in terms of PEPUDA) which enforce the prohibitions against unfair discrimination and "hate speech" in terms of the Act, and can apply a considerable range of sanctions, including corrective community service and fines; and

67.4. The divisions of the High Court of South Africa.

68. It is hard to conceive how the provisions in the Bill could have assisted with the enforcement, the prosecution, judgment and ultimate punishment in any way in any of the above matters by the above entities.

69. **The question arises: if, by the Bill's own admission, "hate speech" is already prohibited in South African law, and these laws are proving effective in dealing with it, why the need for an additional law on "hate speech"?**

70. Statistics show that in 2016, the Equality Courts received 588 complaints regarding racism and discrimination (compared to 844 complaints in 2015, and 612 complaints in 2012). "Hate speech" complaints to the SAHRC, have not seen a marked increase in the last few years.[42] In the circumstances, it is hard to believe the claim that "*government is being overwhelmed with hate speech complaints*" and that for that reason, an additional law is required.

71. It is no secret that the South African Police Service (which, in terms of the Bill, would be the body responsible for collecting data on these offences, in addition to enforcement of the law) is understaffed and under-resourced, and hardly coping with their current investigation load.

72. The same can be said of our criminal courts, which are already strained under the flood of criminal charges coming before them on a daily basis, and have massive backlogs. The Bill will place additional burdens on our courts, which will be tasked with the interpretation and application of legislation that effectively duplicates what is already in place.

73. Finally, this Bill calls for a "**criminal justice-centric response"** to what is, essentially, a **socio-cultural issue**. Criminalising "offensive" behaviour will not in itself bring change. What is required, is a multi-sectoral approach, including specifically raising public awareness and education on these sensitive issues.

74. It has been said that the South African society's overwhelming repudiation of recent regrettable incidences of hate speech, particularly on social media, is indicative of the growing maturity of the South-African democracy in general, and specifically, in exercising the right to freedom of expression. The best remedy for "hate speech" may well not be criminalisation, but more rigorous protection and promotion of the right to free speech, including the right (and duty!) to reprimand offenders and facilitate societal penalties.

75. In line with this approach, the African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution on repealing criminal defamation laws in Africa. It provides as follows: "*Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners*

[42] Page 8 of *Rapport*, 8 January 2017.

[from] practising their profession without fear and in good faith." This is particularly so when less restrictive remedies are available in the form of civil defamation, and the right of reply.[43]

76. PEPUDA likewise addresses "hate speech" and unfair discrimination through corrective measures ultimately aimed at transformation, rather than criminalising persons who have committed "hate speech".

77. It is submitted that this approach is preferable to a "criminal justice-centric" approach, which involves the arrest and (often, costly, time-consuming and arbitrary) prosecution of an individual who may at the end of the day not even be found guilty of "hate speech".

78. Experience in the United Kingdom has shown that there are numerous Christian street preachers who have been arrested and prosecuted for alleged "hate speech", only to be acquitted later on. This illustrates that prosecuting authorities often misapply the law, and that we should therefore be slow to "criminalise" speech which ultimately may turn out to be legal, and to make "criminals" out of innocent people too quickly.

79. In conclusion, it is submitted that adequate laws against "hate speech" are already in place, and that an additional law is thus **unnecessary and will only serve to confuse what is a working system / process**. If there is a genuine need for additional measures to deal with "hate speech", it can be achieved by amending the Equality Act and/or training and empowering the bodies or forums responsible for enforcing the "hate speech" laws already in place.

THE DEFINITION, AND SCOPE, OF "HATE SPEECH" IS OVER-BROAD:

80. Freedom of expression is one of the most important rights in a democracy,[44] because it is the right (vehicle) by which all other rights are defended and affirmed. In *Mandela v Felati*[45]**,** the Court explained it thus: "*In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of freedom of speech. It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure*."

[43] Bhardwaj & Winks 2013; ACHPR/Res169(XLVIII)2010: Resolution on Repealing Criminal Defamation Laws in Africa http://old.achpr.org/english/resolutions/Resolution169_en.htm (accessed on 19 November 2016).
[44] *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC) at para 33; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 at para 24; and *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7.
[45] 1995 (1) SA 251 (W) at 259.

81. Section 16 of the Constitution guarantees freedom of speech (not freedom from offence) as a fundamental human right. In terms of section 16(2), the only speech that is not protected by this guarantee, is:

81.1. *"Propaganda for war;*
81.2. *Incitement of imminent violence; or*
81.3. *Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm*."

82. It is this last aspect relating to the advocacy of hatred, commonly known as "hate speech", that the Constitutional Court thoroughly traversed the requirements for in its *Qwelane* judgment (see paragraphs 53 through 61 above) .

83. Freedom of expression, like freedom of religion[46], specifically includes the right to say things which are offensive and even hurtful:

83.1. In the *Masuku* case, the Supreme Court of Appeal ("SCA") emphasised that "***a hostile statement is not necessarily hateful in the sense envisaged under s 16(2)(c)***"[47] and again that "***[t]he fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection ….***"[48] (This matter was appealed to the Constitutional Court, who has not yet delivered judgment).

83.2. Similarly, in the case of *Moyo v Minister of Justice and Constitutional Development and Others*[49] the SCA likewise held that: "*[U]nless hate speech, incitement of imminent violence or propaganda for war as proscribed in s 16(2) of the Constitution are involved, no one is entitled to be insulated from opinions and ideas that they do not like, even if those ideas are expressed in ways that place them in fear. Indeed, in present day South Africa many will be afraid of the political and social possibilities that are advocated for daily in high stakes debates that characterise a transforming society with a violent, racist past. Obviously this may place many South Africans in a condition of subjective or 'reasonable' fear. But that does not entitle them to expect the State to lock up those whose chosen forms of expression placed them in a subjective state of fear or might reasonably (but not in fact) have placed them in fear."* [Own emphasis.]

[46] See paragraph 46 above.
[47] *Masuku* at para 19.
[48] *Masuku* at para 32.
[49] 2018 (2) SACR 313 (SCA) at para 31.

83.3. This approach was settled in by the Constitutional Court in its *Qwelane* judgment (discussed above in paragraphs 53 to 61), where the Court expressly said that: "*[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech... offensive speech is protected by freedom of expression*."[50]

84. Loosely worded laws are arbitrarily enforced – again, the UN Rabat Plan expressly warns against vague laws. Boundaries should be clearly (and unambiguously) defined to effectively serve the aims of this Bill, while still allowing open discourse, exchange of ideas and information and protecting against (ideological) censorship. Thus, *FOR SA* submits that the Bill should expressly include the Rabat Plan threshold discussed above at paragraph 31.

85. Parliament is also now in a position where the Constitutional Court has defined hate speech[51] and reworded section 10 of PEPUDA to prohibit expressions that *"are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred".* Should the Bill adopt a wider and more liberal definition or prohibition of "hate speech" that the Constitutional Court in its *Qwelane* judgment, *FOR SA* submits that alone will lead to the Bill being unconstitutional.

86. Comparing the prohibitions / definitions of "hate speech" in the Constitutional Court's *Qwelane* judgment and the Bill, it is clear that the prohibition in the Bill is wider:

86.1. In terms of the Constitutional Court, speech will only qualify as "hate speech" if it goes beyond mere offensive expression and enters the realm of "*extreme detestation and vilification which risks provoking discriminatory activities against that group*"[52]. (This is closely linked to section 16(2)(c) of the Constitution which requires, in the first instance, an "*advocacy of hatred*".) This implies more than just a neutral or casual statement. It includes a coercive element, deliberate intent and effort to convince another to adopt a particular attitude or position. It requires "calling for" or "making a case for" hatred. This accords with the Rabat Plan's threshold which excludes mere "*distribution*" or "*circulation of material*", because article 20 of the ICCPR provides for "*advocacy*" and "*incitement*" (see paragraph 31 above).

[50] *Qwelane* at para 103. [Own emphasis.]
[51] See *Qwelane* at para 81 where the Court defined hate speech as "*speech that travels beyond mere offensive expression and can be understood as 'extreme detestation and vilification which risks provoking discriminatory activities against that group'*".
[52] *Qwelane* at para 81.

86.2. In light of the above definition, the Court only prohibited speech that is "*based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."* (Again, both elements are required.)

86.3. Due to the requirement of both elements in the Constitutional Court's prohibition of hate speech, it is a much higher threshold than the Bill's proposed prohibition[53], which requires either element (harmful / to incite harm ***OR*** promote or propagate hatred), as opposed to both.

86.4. The Constitutional Court in *Qwelane* also expressly said that hate speech is solely a *public* matter: "*Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because that would be incongruent with the very purpose of regulating hate speech*.[54]"

86.5. The Bill fails to exclude private communication from the ambit of its reach, and as a result, on this leg too, is wider than the Constitutional Court allows.

86.6. In light of the above recent jurisprudence, should this Bill maintain its current prohibition / definition of hate speech, it will likely be open to a constitutional challenge on that point alone, and Parliament will find itself passing legislation which is in conflict with what the judiciary has already held.

87. Related definitions in the Bill that are too broad and lend themselves to abuse, are as follows:

87.1. "*Harm*" is defined as including "*any emotional, psychological, physical, social or economic harm",*[55] and elsewhere as including "*physical, psychological, social, economic or any other consequences of the offence for the victim and his or her family member or associate*".[56] This definition of harm too, is broader than the Constitutional Court's definition of harm(ful) in the *Qwelane*, where the Court said that "'harmful' *can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group*."[57] This broad notion of "harm" in the Bill is sufficient

[53] Clause 4(1)(a)(i) of the Bill reads: "*Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to— (i) be harmful or to incite harm; or (ii) promote or propagate hatred, based on one or more of the following grounds… is guilty of an offence of hate speech."*
[54] *Qwelane* at para 118.
[55] Clause 1 of the Bill.
[56] Clause 5(1) of the Bill.
[57] *Qwelane* at para 154. [Own emphasis.]

to turn almost any expression into a crime simply on the basis of it being offensive, and make almost any person and/or organisation[58] a "*victim*" of "hate speech";

87.2. "*Victim*" is defined as meaning *"a person, including a juristic person, or group of persons, against whom an offence referred to in section 3 or 4 has been committed"*.[59] In this regard the following:

87.2.1. As a result of the over-broad definitions in the Bill, an actual victim is not necessarily required before a person can be charged with and found guilty of "hate speech".[60] This is in stark contrast with traditional defamation or slander cases, where a real person has to be slandered or defamed, and leaves the Bill wide open to abuse; and

87.2.2. In light of the definition of *"harm"*[61], it appears that "*victim*" also specifically includes a "*family member or associate*", which again is undefined, and capable of multiple interpretations.[62] This stretches the definition of "*victim*" far too wide, again making the Bill wide open to abuse!

88. Finally, we respectfully submit that the scope of application of the Bill is over-broad and will lead to unintended and/or absurd consequences. In terms of the Bill, it is not only the "original" author or communicator who could be found guilty of, and punished for, the crime of "hate speech", but anyone who distributes the "hate speech" in such a way that it is accessible to the public or the "victim".[63] Notionally, therefore:

88.1. An employee who, in the course and scope of his/her duties as such, is asked to publish or share a piece written by someone else, on the internet or on social media, could potentially be charged with "hate speech" and if found guilty, suffer the same punishment; and

88.2. A person who, on a private WhatsApp group (e.g. family group), shares a picture that could potentially be seen as emotionally, psychologically, physically, socially or economically harmful[64] towards another person (for e.g. a picture that makes fun of

[58] Clause 1 of the Bill defines "victim" as including a juristic person.
[59] Clause 1 of the Bill.
[60] Clause 4(1)(a) of the Bill only states that the intention to be harmful is required, not actual harm occurring.
[61] Clauses 1 and 5(1) of the Bill.
[62] See for e.g. clauses 3(1) and s 5(1) of the Bill.
[63] Clause 4(1)(b) to (c) of the Bill.
[64] Clause 4(1)(a) of the Bill read with the definition of harm contained in clause 1 of the Bill.

Afrikaans people, or Americans), could potentially be found guilty of "hate speech". (Even if it is someone outside the group were to somehow see the picture and think it is offensive or could be offensive.)

89. In view of the aforegoing, it is clear that the definition and prohibition of "hate speech" in the Bill places much greater limitations on freedom of speech than either the Constitution itself (in section 16(2)(c)), or the Constitutional Court in *Qwelane*. As such, it is over-broad and for this reason, unconstitutional.

90. In this regard also, we mention that the *Qwelane* case successfully challenged the constitutionality of the "hate speech" section[65] of PEPUDA, precisely because of PEPUDA being broader and vaguer than the Constitution.

91. Given the successful direct challenge to the constitutionality of the "hate speech" provisions in PEPUDA in the *Qwelane* case, *FOR SA* respectfully submits that, in order to avoid unnecessary expenditure of money, time and effort, it is prudent to ensure that the Bill's definitions (of hate speech, harm etc.) and prohibition of hate speech strictly accord with the Constitutional Court's decision in *Qwelane*. Again, to ensure compliance with international law obligations, *FOR SA* recommends that the Rabat Plan's threshold test be expressly included as having to be satisfied for the right to freedom of expression to be limited.

92. Should the Bill's current "hate speech" provisions be allowed to remain, it is very possible that the provisions of this Bill, likewise, could be challenged for being over-broad and for that reason, unconstitutional and invalid.

CHILLING EFFECT ON FREEDOM OF EXPRESSION:

93. The second problem with the current definition of "hate speech" in the Bill, is the major chilling effect that the criminalisation of speech could have on the fundamental right to freedom of expression,[66] which as already stated above, "***lies at the heart of a democracy***".[67]

94. As already stated above, the UN's position is for more speech, not less, as the answer to combat hate speech.

[65] Section 10 of PEPUDA.
[66] Section 16 of the Constitution.
[67] *Masuku* at para 17.

95. Specifically, the Rabat Plan says that "*Criminal sanctions related to unlawful forms of expression should be seen as a last resort measures to be applied only in strictly justifiable situations."*

96. *FOR SA*'s position is that South Africa already has sufficient legal sanctions available in the form of PEPUDA and *crimen iniuria* to combat hate speech. The **criminal sanctions the Bill therefore seeks to introduce** in this case are unnecessary and therefore **not strictly justifiable as required by the Rabat Plan**.

97. Should the Bill be passed in its current form, the effect would be that virtually any speech that anyone could potentially subjectively perceive as offensive, could qualify as "hate speech" punishable by a fine and/or up to three (3) years' imprisonment for a first offence and up to five (5) years' imprisonment for a repeated offence.[68]

98. By contrast, section 16 of our Constitution guarantees the right to "freedom of speech" – not the right to "freedom from offence". This constitutional guarantee is a recognition that we live in a pluralistic society where people who hold diverse beliefs and views on matters, should be free to express their views openly and without fear of punishment. The "price tag" of this freedom is that we need to be willing to tolerate views that are different to our own – even views that we may find to be personally offensive, disturbing or shocking. Again, this was affirmed by the Constitutional Court in *Qwelane*, where the Court said that "*[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech... offensive speech is protected by freedom of expression*."[69]

99. George Orwell once famously said: "*If liberty means anything at all, it means the right to tell people what they don't want to hear!*" This is what free speech in a truly free society really means. Without the freedom to offend, free speech and free thoughts cannot truly exist. Ideas are indeed sometimes dangerous things, especially ideas that seek to challenge the *status quo* or existing orthodoxy.

100. The question is not whether the views were perfectly correct, or were hurtful, insulting and offensive, but whether the enforcers of the criminal law should be empowered to tell the difference. Where does the greater risk lie: Allowing citizens to speak controversially and offensively, or allowing the State to censor what it considers to be controversial and offensive?[70]

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[68] Clause 6(3) of the Bill.
[69] *Qwelane* at para 103. [Own emphasis.]
[70] Legal philosopher Ronald Dworkin stated in *Freedom's Law: The Moral Reading of the American Constitution (1996), at 200*: "*Governments insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.*"

101. In this regard, we would do well to reflect on our own history and the fact that "*the regime of racism in South Africa was maintained not only by brutality – guns, violence, restrictive laws. It was upheld by elaborately extensive silencing of freedom of expression*" (Nadine Gordimer).

102. Twenty-seven years into constitutional democracy, we dare not go back to a time when the State told us what we may and may not speak, what we may and may not hear, and where censorship (rather than free speech) was at the order of the day.

103. If the State were to start dictating what is and is not acceptable speech based on content or opinion, that would amount to blatant viewpoint discrimination which is unacceptable within a democratic and pluralistic society such as ours.

104. Further, once the State is given the power to determine what speech is acceptable and what is not, it becomes a slippery slope and the question is, where will it stop? Having banned "offensive" words that are perception-based, is there any principled stopping point except one based on the discretion or whim of the State?

105. The right to free speech (including religious speech) is a vitally important right in our constitutional democracy, and as such it should be jealously guarded. Freedom of expression ensures a society with a culture of critical conversation, encouraging everyone to tolerate the views of others and protecting the right of dissenters.[71]

106. If certain speech were to be criminalised, the effect would be that freedom of speech would be suppressed due to the fear of someone taking offence at something said and then filing a criminal complaint with the authorities. As a result, debate on issues such as what is true and untrue, right and wrong, just and unjust, would effectively be shut down and the constitutional promise of free speech for all would be reduced to an empty promise on a piece of paper.

107. As such, hate speech laws are actually very illiberal, but potentially also very dangerous. In the words of former US Federal Judge Michael McConnell. "*Speech is constitutionally protected – not because we doubt the speech [may] inflict harm, but because* ***we fear censorship more****.*"[72] Thus, while it is true that people may 'misuse' their right to free speech and even use it to offend, this is a risk that open and democratic societies must take.

[71] Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa, p 10.
[72] Own emphasis.

CHILLING EFFECT ON FREEDOM OF RELIGION:

108. The third problem with the current definition of "hate speech" in the Bill, is the major chilling effect that it could have on the fundamental right to freedom of religion, belief and opinion.[73]

109. As stated above in paragraphs 38, 42 – 46, this right includes *"the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*"[74].

110. While we commend the inclusion of a "religious exemption clause"[75] in the current version of the Bill, **we are concerned by statements made by the Deputy Minister of Justice and Constitutional Development, the Hon. John Jeffery MP, that the "exemption clause" would probably only apply to statements made from the pulpit and not to statements made by individuals**.[76] This statement is gravely concerning and without any merit.

111. Firstly, on the plain wording of the religious exemption clause, there is no room for such distinction or limitation.

112. Moreover, section 15 of the Constitution (guaranteeing the right to freedom of religion, including religious speech) belongs to everyone, everywhere in the Republic. It therefore belongs as much to the pastor in the pulpit as it does to the person who shares his religious convictions and beliefs on the street, in the workplace or in any other setting or forum. To limit the application of the religious exemption clause to sermons, implies that the conscience, convictions and beliefs of individual believers are somehow less sacred and worthy of protection than their pastors'. This clearly is not supported by either the Constitution or the case law.

113. *FOR SA* agrees that no one (whether a pastor, or an individual believer) in whatever setting (whether in the pulpit, or elsewhere) should be allowed to make statements that advocate hatred and incite violence. We strongly condemn any such instances of "hate speech" – whether against another religion, members of the LGBT community or any other group of persons.

114. However, the definition of "hate speech" in the Bill has already been stretched far beyond that written in the Constitution, which was deliberately limited so that freedom of speech and

[73] Section 15 of the Constitution.
[74] *S v Lawrence; S v Segal; S v Solberg* (CCT 38/96; CCT 39/96; CCT 40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176, at para 92.
[75] Clause 4(2)(d) of the Bill.
[76] At Parliament on 30 May 2018, the Department of Justice and Constitutional Development, represented by the Deputy Minister, briefed the Parliamentary Portfolio Committee on Justice and Correctional Services regarding the Bill. It was during this briefing that the Deputy Minister indicated his understanding was that the religious exemption clause would only apply to statements made from the pulpit. A transcript of the briefing can be found at https://pmg.org.za/committee-meeting/26535/

expression would be largely unhindered. By contrast, the definition in the current Bill includes speech that anyone could potentially find offensive – even if it is not directed at them. To then single out speech from the pulpit for protection, yet leave all other religious speech in other settings exposed, is a double blow to a fundamental human right. This is particularly true because around the world, "hate speech" laws are increasingly used against Christians for simply professing the Bible and expressing their sincere religious convictions and beliefs (including Christian street preachers, Christians in the marketplace, etc).

115. Should the Deputy Minister's interpretation be applied / upheld, the over-broad definition of "hate speech" in the Bill continues to pose a severe threat to religious freedom, because it could be employed to muzzle (and/or have the unintended effect of muzzling) believers across different faith groups from expressing (whether from the pulpit, to a public or private audience) their sincerely held religious convictions and beliefs.

116. It is very possible, as experience has already shown, that the expression of these beliefs may be (mis)interpreted by those who hold to different convictions and beliefs, as *"**[intending] to be harmful** or to incite harm*".[77]

117. By way of example, in terms of the proposed definition of "hate speech":

    117.1. If a person were to say to their neighbour that, according to the Bible, Jesus is the Way, the Truth and the Life and the only way to the Father,[78] it is entirely possible that he/she could be charged with "hate speech" based on his/her perceived intolerance towards a particular "*religion*" and, if found guilty, be sentenced to three (3) years in jail. (The same argument could apply in respect of certain Scriptures from the Koran, or any other holy text, being quoted);

    117.2. If someone were to share a post on social media that says that while God loves all people, He does not approve of sex outside of marriage (whether heterosexual or homosexual), that person could potentially be charged with "hate speech" based on his/her perceived intolerance of another person's "*sexual orientation"*, even where there is no actual victim!

118. Experience in the USA, UK and other Western democracies has shown that liberal activists, driving anti-religion and anti-natural family agendas, frequently employ "hate speech" laws to hinder or stop the communication of religious content which they regard as unfavourable,

[77] Clause 4(1)(a)(i) of the Bill.
[78] John 14:6.

offensive or "harmful" to their cause. In fact, in Europe this has become so problematic that even mainstream Christian beliefs and values expressed publicly and privately have led to Christians being arrested and prosecuted (and in many instances, only later to be acquitted. This illustrates that the prosecuting authorities often misapply the law).

INTERNATIONAL EXAMPLES OF "HATE SPEECH" LAWS USED AGAINST CHRISTIANS:

119. We attach hereto, marked Annexure "**A1**", an extract from Paul B Coleman's book "Censored: How European 'Hate Speech' Laws are Threatening Freedom of Speech" (Kairos Publications, 2012).

120. The cases cover a full spectrum: from police investigations to criminal convictions with no further opportunity to appeal. While the collection of cases is by no means exhaustive, it is representative of the many other prosecutions brought under domestic "hate speech" laws. **Crucially, all of the cases mentioned, involved speech that stopped well short of inciting violence.**

121. There are numerous cases in which Christian **street preachers** (i.e. lay men, not clergy) in the United Kingdom, have been prosecuted for alleged "hate crimes" and later acquitted. This **illustrates** not only the **need for the current "religious exemption clause" to be strengthened to protect every believer, not just clergy**, but also that the prosecuting authorities often misapply the law. Examples include:

    121.1. Following the (unlawful) arrest of evangelist Mike Jones for preaching against abortion and homosexuality in 2015, a settlement agreement was reached with the Humberside Police in April 2017. In terms of the agreement, the Police has to pay Jones the amount of £3 000,00 as compensation for religious harassment;

    121.2. In March 2017, Mike Overd and Michael Stockwell were convicted by the Bristol Magistrate's Court of the "crime" of stating that Jesus is the only way to God, and ordered to pay £2 016,00 each, in fines and costs. In this case, the two street preachers were arrested and charged with a Public Order offence after a public prosecutor claimed that publicly quoting parts of the King James Bible in modern Britain should "be considered to be abusive and is a criminal matter";

    121.3. In May 2015, Rob Hughes was arrested for allegedly breaching public order law after a confrontation with a member of the public who wrongly accused him of using

"homophobic" language. He was released after being held in custody for 11 hours, with the police acknowledging that he had been wrongly arrested and falsely imprisoned;

121.4. In January 2014, Tony Miano, a former Los Angeles Deputy Sheriff, was arrested on a charge of alleged breach of peace with "homophobic" aggravation whilst preaching on Dundee High Street. He had mentioned sexual sin (including adultery, promiscuity and homosexual practice). All charges were subsequently dropped, as nothing in his preaching constituted "hate speech";

121.5. In December 2010, Anthony Rollins was arrested under section 5 of the Public Order Act and put in handcuffs after street preaching in Birmingham, because a bystander complained that he read out a Bible passage on homosexuality. Police were later ordered to pay him £4 250,00 in compensation;

121.6. In May 2010, Dale McAlpine was arrested and charged under section 5 of the Public Order Act after telling a police officer that homosexual acts were sinful. Mr McAlpine later won £7000,00 plus costs from Cumbria Police in settlement for a claim of wrongful arrest, unlawful imprisonment and breach of his human rights; and

121.7. In August 2009, Miguel Hayworth was questioned and detained by police in Kent after reading from a passage in the Bible that states that homosexual behaviour is sinful. He was later released, allowed to continue preaching and offered compensation for false imprisonment.

122. Some of the cases in the UK / Europe against **private businesses** have been quite extraordinary:

122.1. In another example from 2011, the police investigated a café owner for displaying Bible verses on a television in his café;

122.2. In Spain in 2010, a pro-family television network was fined 100,000 euros for running a series of advertisements in support of the traditional family and showing "only actual footage" of a "gay pride" parade; and

122.3. In another example from 2009, Ben and Sharon Vogelenzang were put on trial in a criminal court because they criticised Islam during a discussion about religion with a Muslim lady. The five-minute conversation, which was calm and polite, took place in a hotel in Liverpool owned by the Vogelenzangs. It included discussion over whether Jesus is the Son of God or a prophet of Islam. The Muslim lady later complained to the

police and the couple were shocked when they were arrested and charged. They were put on trial at Liverpool Magistrates Court, but after a two-day hearing, the judge dismissed the case and criticized the police for their handling of the incident. The Vogelenzangs had however already suffered such economic loss that they were forced to sell their business, because it had collapsed.

123. There are other instances in which Christians in the United Kingdom and elsewhere have **lost their jobs** after making comments which may be considered "hateful", though the courts have later ruled in their favour, for example:

123.1. In March 2017, Sarah Kuteh, a Christian nurse in the UK was dismissed by her employer, Darent Valley Hospital in Dartford, Kent, for talking to patients about her faith and occasionally offering prayer, while helping them to prepare for surgery. Sarah's job involved asking about patients' faith, as part of a pre-assessment questionnaire;

123.2. In November 2016, French politician Christine Boutin was convicted of "hate speech" by the Court of Appeals in Paris for having called homosexuality an "abomination" (as does the Bible in for e.g. Leviticus 18:22). Although Boutin was very careful in the interview to explain that, as a Christian, she does not condemn any homosexual person but rather, the act of homosexuality, the Court did not agree and ordered a fine of €5 000,00, as well as €2000,00 in damages to be paid to three gay associations (i.e. approximately R105,000 in total). (See link to article her – https://www.lifesitenews.com/news/french-court-fines-politician-for-using-word-from-bible-to-describe-homosex);

123.3. In November 2016 in the UK, Victoria Allen, a teaching assistant was disciplined by her employer after expressing her Christian beliefs about same-sex relationships, in response to questions asked by a pupil. The matter was settled out of court, with the school accepting that every individual has the freedom to express their views about the nature of marriage in accordance with the law. They sincerely apologized for any upset Victoria may have felt during the disciplinary process;

123.4. In February 2016, Felix Ngole, a 38-year old Christian student, was removed from a social work course at Sheffield University, UK after he made comments on his personal Facebook page in support of Biblical teaching on marriage and sexual ethics. Felix was told that, by posting his comments on Facebook, he "may have caused offence to some individuals" and had "transgressed boundaries which are not deemed appropriate for

someone entering the Social Work profession." Felix is now seeking further legal action after losing his appeal against the decision;

123.5. In August 2016, Richard Page, a Christian magistrate in the UK, was dismissed as a magistrate and suspended from his post as a non-executive director of the NHS Trust, for saying that a child's best interests lie in being raised by a mother and a father. Richard, who has served as a magistrate in Kent for 15 years and is a well-respected member of the family court, expressed the view during a closed-door consultation with colleagues in a routine adoption case. Having heard all the evidence, Richard decided that his legal duty to act in the best interests of the child meant that he could not agree with placing the child with a same-sex couple;

123.6. In June 2015, Sarah Mbuyi, a Christian nursery worker in the UK was dismissed after explaining her Christian view of marriage in response to a question from a homosexual colleague. The Watford Employment Tribunal found unanimously that Sarah had been directly discriminated against based on her belief that homosexual practice is contrary to the Bible. Sarah's belief was described by the Tribunal as one which is "worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others"; and

123.7. In August 2015, Margaret Jones, a Senior Deputy Registrar at Bedford register office, UK was dismissed after she indicated that her Christian beliefs prevented her from performing same-sex weddings in light of the passage of the Marriage (Same Sex Couples) Act 2013. Margaret's dismissal was unanimously reversed by a panel of Central Bedfordshire Council Members. The panel decided that the council had not fully investigated ways of accommodating Margaret's beliefs.

124. There are even cases against pastors and churches. For example:

124.1. Even in the case of an actual pastor preaching from the pulpit, one is not safe, as illustrated by the case of Swedish pastor Åke Green, who was convicted and sentenced to one month in prison (in 2004) for preaching a sermon in which homosexual behavior, amongst other things, was criticized on the basis of the teachings of the Bible. Pastor Green's offence was expressing "contempt" or "disrespect" for a group of people. The case finally ended up in the Supreme Court, who acquitted pastor Green.

124.2. In 2012 in Ireland, a humanist accused a bishop of incitement to hatred for giving a homily that referred to Ireland's increasingly "godless culture". The humanist

complained to the police that the sermon was hostile to those who do not share the church's aims. In response, the police launched an investigation and passed on the file to the prosecutor;

124.3. In 2012 also, authorities banned a church in Norwich, in England, from distributing literature that argued the theological correctness of its religion when compared to Islam. The church members had been peaceably handing out the same leaflet in the same area for four years without prior incident until the authorities held that such literature promoted "hatred"; and

124.4. At Easter time a few years ago (2009), policemen from the "Race and Hate Crime Unit", following a complaint by a member of the public, investigated a church minister for handing out flyers advertising an Easter service. The leaflet simply featured a picture of a flower and said, "New Life, Fresh Hope" and gave information regarding the service.

125. There are many similar cases in the USA which reinforce our concern that "hate speech" laws are often used against people for simply professing the Bible and expressing their sincere religious convictions and beliefs. These can be made available on request.

SOUTH AFRICAN EXAMPLES OF "HATE SPEECH" LAWS USED AGAINST CHRISTIANS:

126. The same anti-religion agenda is at work **in South Africa, where pastors and individual Christians are already unfairly being charged with "hate speech" for believing, preaching and teaching, the Bible**. For example[79]:

126.1. In the case of Creare Training Centre (a school that trains and equips students for Christian ministry), the then Deputy Minister of Justice, Andries Nel, laid a complaint against Creare with the South African Human Rights Commission (SAHRC), accusing Creare of "promoting violence against homosexual people" because of its Biblical belief and teaching that while God loves all people, He does not approve of homosexuality (or indeed, any sex outside of marriage). In this case, the SAHRC found that while Creare's view was a Biblical one, it was unacceptable and a violation of human rights;

[79] The list of examples is by no means a closed or conclusive list, but an illustrative list of how already existing "hate speech" laws have been used to target Christians in South Africa.

126.2. In another instance, atheist activists laid a complaint with the Commission for Gender Equality (CGE) against a well-known evangelical church in Cape Town, on the (completely unsubstantiated) basis that their Biblical teaching that people are not born gay, is "hate speech" and promotes violence against gay and lesbian people. The case has since been dismissed by the CGE;

126.3. In another instance last year, LGBT activists laid a complaint with the SAHRC against a pastor of the Dutch Reformed Church of South Africa who stated on his Facebook page that, according to the Bible, all sexual intimacy outside of the context of marriage between one man and one woman, is sinful. The case is currently still pending with the SAHRC; and

126.4. A case was also instituted in the Equality Court against a reputable Christian ministry after one of its leaders was asked to deliver a sermon at a Christian independent school. During his sermon, he explained that marriage, according to the Bible, was a permanent union between one man and one woman – not between a man and a man. The transgender brother (who was not in the audience) of a learner who was in the audience, heard of the sermon, took offence and instituted the case against the Christian ministry and its leader, in the Equality Court. The SAHRC represented the complainant, who asked the Court to order that the Christian ministry may never make such a statement in a public context again.

127. This Bill, which seeks to broaden the definition of "hate speech" and thereby limit the right to freedom of expression, is deeply problematic in a constitutional democracy such as ours. True democratic freedom demands individual freedom. Citizens cannot be truly free unless they are able to say what they believe and to live according to their beliefs, freely and without fear of harassment or punishment by the State.

128. In a proper democracy, religious convictions and beliefs should be respected and accommodated, not suppressed or punished. No one should be forced to choose between obeying their conscience or obeying the law, especially where they face the penalty of harsh consequences if they choose to obey their conscience or religious convictions.

129. In the Constitutional Court case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*[80], the Honourable Judge Sachs held as follows:

[80] (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 137.

"The fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the State to turn these beliefs - even in moderate or gentle versions - into dogma imposed on the whole of society."

130. Our democracy, and indeed the constitutional rights to freedom of religion, belief and opinion (section 15) and freedom of expression (section 16), demand a society in which people can freely express their deepest convictions and beliefs, without fear of being criminally charged with advocating violence or "hatred" against others.

131. In light of the above, we submit that, should the "hate speech" provisions in the Bill remain, it will be both **appropriate and necessary to strengthen the "religious exemptions clause" in order to accommodate, adequately protect and give effect to the constitutional right to freedom of religion, belief and opinion (s 15).**

THE "HATE CRIMES" COMPONENT:[81]

132. It is a sad reality that not everyone in South Africa appreciates the beauty of our pluralistic and diverse society, and that this very disdain of difference sometimes drives people to commit the most heinous of crimes against those who are different" to them.

133. This reality, however, does not necessarily require the creation of a substantive offence of "hate crime", as the Bill purports to do.

134. According to the Deputy Minister of Justice and Constitutional Development, the Hon. John Jeffery MP, certain advantages will flow from the developing of specific legislation on hate crimes: "*It will provide additional tools to investigators and prosecutors to hold the perpetrators of hate crimes accountable and provide a means to monitor efforts and trends in addressing hate crimes*".[82]

[81] Clause 3 of the Bill.
[82] Address by the Deputy Minister of Justice at the AGM of the Hate Crimes Working Group, Scalabrini Centre, Cape Town on 11 February 2015 (at www.gov.za/speeches/address-deputy-minister-justice-and-constitutional-development-hon-john-jeffery-mp-annual).

135. Firstly, all (violent) crimes need to be investigated and prosecuted, and all criminal offenders be held accountable, with the same vigour and tenacity, irrespective of the (perceived) motivation that fuelled the crime. If the issue is a lack of law enforcement (for whatever reason e.g. lack of capacity or resource, lack of competence or training, bias on the part of responsible officials, etc.) as the above statement seems to suggest, this is where Government should be focusing its attention rather than creating a new law (which may suffer the same fate, for the same reasons).

136. Secondly, it is an established principle of South African criminal law that an offender's criminal liability is based not on his motive, but on his criminal conduct and his guilty state of mind (in the form of intention or negligence). In terms of the Bill however, motive is the essence of the crime, and the determining factor in whether a person is guilty of a "hate crime" or not. As such, the Bill goes against decades of established case law, and will cause great confusion and legal uncertainty (for the public, police, prosecuting authorities as well as magistrates / judges tasked with the hearing and deciding of "hate crime" cases coming before them).

137. Thirdly, this is not to say that motive is irrelevant. On the contrary. In South African criminal law, the offender's motivation is already a crucial element when considering the seriousness of a crime and consequently, the type and length of the sentence that the person already convicted of a crime, should receive. As such, it is arguable that, instead of creating a separate offence for "hate crimes", motivation (i.e. prejudice or bias based on any of the characteristics mentioned in the Bill) should be taken into account as an aggravating factor in crimes that are already recognised as such in our law.

138. Finally, rank ordering motives and charging certain crimes differently on the basis thereof, may well violate the right to equality, and to equal protection and benefit of the law, guaranteed by section 9(1) of the Constitution. If there is no alternate rationale for prosecuting certain people more harshly for the same crime, except for the characteristics of the victim, then different accused persons are not treated equally before the law.

139. Turning now to the specific wording of clause 3 of the Bill, it is submitted that:

    139.1. The inclusion of the words "*under any law*" in the definition of "hate crime",[83] is problematic. In terms of the current wording, "minor" civil offences (e.g. traffic violations, breach of contract) could potentially be turned into "hate crimes", with unintended and absurd results;

[83] Clause 3(1) of the Bill.

139.2. Several critical words in the definition of "hate crime", including "*prejudice*", "*intolerance*", "*family member*" and "*victim's association*" are undefined and as such, vague and capable of multiple or misinterpretation and/or unfair application;

139.3. It is not clear why "*family member*"[84] and/or "*victim's association*"[85] and/or *"associate"*[86] should be included in the scope of actual or perceived characteristics. The scope of the definition is far too broad, and could lead to unintended and absurd results; and

139.4. The selection of characteristics for inclusion in clause 3 of the Bill, appears arbitrary and is confusing:

139.4.1. While some of the "prohibited grounds" cited in section 9 of the Constitution have been included (namely race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, belief, culture, language and birth), some of the "prohibited grounds" in section 9 have, without explanation and presumably inadvertently, been omitted from the Bill (namely pregnancy, marital status, age and conscience). These should be included in clause 3(1) of the Bill;

139.4.2. Other characteristics, which do <u>not</u> form part of the "prohibited grounds" in section 9 of the Constitution, have however been included in the Bill (namely HIV status, gender identity [which is in any event unnecessary in the light of "*gende*r" already included in the list], albinism and occupation or trade). It is not explained on what basis these characteristics have been selected for inclusion in the "closed list" of clause 3(1) of the Bill, but other characteristics such as for e.g. economic status, cognitive ability, have been omitted; and

139.4.3. It is not clear why "*sex*" should specifically be stated to include "*intersex*",[87] and we submit that this should not be so, as the Constitution does not specifically include such elaboration which is in any event capable of multiple interpretations or misinterpretation.

140. In conclusion, while motive does matter and malicious intent is something that should (and must) be punished by the law, creating a new offence based entirely on the motive of the offender, is superfluous. It is also costly as it absorbs unnecessary judicial and police resources, and further strains a criminal system which is already at capacity.

[84] Clause 3(1) of the Bill.
[85] Clause 3(1) of the Bill.
[86] Clause 5(1) of the Bill.
[87] Clause 3(1)(p) of the Bill.

141. The time, effort and cost involved in the creation and enforcement of a new offence should rather be spent on training and empowering the police, prosecutors and magistrates / judges to competently and efficiently exercise their responsibility to protect of our society against violence and other criminal acts.

***FOR SA's* RECOMMENDATIONS:**

142. We recommend that the presumably unintended, but nonetheless unconstitutional, consequences of the definition of "hate speech" in its current form, be avoided or eliminated by:

142.1. Omitting the "hate speech" provisions from the Bill altogether; and

142.2. In the event that the "hate speech" provisions remain in the Bill:

142.2.1. Limiting the definition and scope of "hate speech" om the Bill to bring it in line with s16(2) of the Constitution as per the jurisprudence; and

142.2.2. Clarifying and strengthening the religious exemption clause contained in the Bill to ensure it adequately protects the constitutional right to Freedom of Religion, and religious expression of everyone - not just clergy. In this regard, we recommend that the clause be amended as follows:

"the *bona fide* interpretation and proselytizing or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings, by a religious organisation or an individual, in public or in private, to the extent that such interpretation and proselytization does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)."

142.2.3. In particular (and without derogating from the other issues highlighted herein), the Bill should be amended to include, in the Preamble of the Bill, specific reference to sections 15 and 31 of the Constitution.

Kind regards,

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