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To: NATIONAL ASSEMBLY: SELECT COMMITTEE ON SECURITY AND JUSTICE

For attention: Mr Gurshwyn Dixon
Committee Secretary

E-mail: gdixon@parliament.gov.za

Re: CYBERCRIMES BILL [B 6B-2017]:

Presentation by FREEDOM OF RELIGION SOUTH AFRICA (FOR SA)

Date: 11 November 2019

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1. We refer to your letter dated 7 November 2019, inviting *Freedom of Religion South Africa (FOR SA)* – who has made (written and oral) submissions on previous versions of the Bill – to appear and make submissions on the Cybercrimes Bill [B 6B-2017] (“the Bill”) before the Select Committee on Security and Justice on Wednesday, 13 November 2019.

FOR SA’s interest in the Bill:

2. FOR SA is a **legal advocacy organisation** working to protect and promote the constitutional right to religious freedom (s 15 of the Constitution), and represents over 6 million people from across the faith spectrum.
3. Our interest in the Bill lies in the potential implications of the Bill for the constitutional right to **freedom of religion**, and particularly **freedom of (religious) expression** in South Africa.
4. As such, our comments are restricted to **Chapter 2, Part II: Malicious Communications (sections 13 – 17)** of the Bill.

Our submissions on the Bill:

5. The amended sections 13 – 17 of the Bill are a welcome improvement. In particular, **we welcome:**

5.1. The definitions in section 13;

5.2. The removal of “harmful” messages (section 17(2)(c) in the previous version of the Bill) and “fake news” (section 17(2)(d) in the previous version of the Bill) from section 15 altogether; and

5.3. The improvements to section 16 (relating to “revenge porn”).

6. We remain **concerned** however that Part II relating to “Malicious Communications” is **unnecessary in light of existing legislation** (such as the Film and Publications Amendment Act, 11 of 2019; Protection from Harassment Act, 17 of 2011; the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000; and the Intimidation Act, 72 of 1982) which already contain similar provisions, as well as existing legal remedies (such as interdictory relief, and claims for damages) which can be employed to prevent or sanction “malicious communications”. In the circumstances, it should **ideally be removed from the Bill**.

7. Should the Committee be of the opinion however that the sections should remain in the Bill, and indeed criminalise certain categories of speech, we respectfully recommend that the **sections be amended** as per our suggestions below – particularly with a view to narrowing and aligning it with similar provisions in existing legislation (including the Constitution):

7.1. By sticking to the same (and only) categories of prohibited speech as set out in section 16(2) of the Constitution, namely:

7.1.1. Propaganda for war;

7.1.2. Incitement to imminent violence; and

7.1.3. Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

(In this regard, see our submission dated 8 March 2019).

Alternatively:

7.2. By amending section 13 as follows: “**related person**” means any (identified or unidentified) member of the family or household of a person or any other (identified) person in a close relationship with that person; [our suggested insertions underlined].

7.3. By inserting the word “imminent” before “*violence*” in each of the following:

7.3.1. Section 14(b);

7.3.2. Section 15(a)(i) and (ii);

7.3.3. Section 15(b), in the phrase after (iii) and before (aa); and

7.3.4. In the final phrase after section 15(b)(cc);

in circumstances where section 16(2)(b) of the Constitution specifically prohibits “incitement of imminent violence” – not just any “violence”.

This threshold has recently effectively been confirmed (albeit in the context of a constitutional challenge to s 1(1)(b) of the Intimidation Act, 72 of 1982) by the Constitutional Court in the case of ***Moyo and Another v Minister of Police and Others; Sonti and Another v Minister of Police and Others*** [2019] ZACC 40, where the Court held as follows:

“If a proper reading of the section does not include incitement of imminent violence, but only covers intentional conduct that creates an objectively reasonable fear of harm to person, property or security of livelihood, then it would criminalise protected free speech and probably also peaceful forms of protest...” (at para [69]. See also paras [65] – [68] of the judgment).

7.4. For the same reason, and so as to avoid being unnecessarily over-broad (with potential unintended consequences), inserting the word “imminent” before “*the causing of any damage*” in each of the following:

7.4.1. Section 14(a);

7.4.2. Section 15(a)(i) and (ii);

7.4.3. Section 15(b) in the phrase after (iii) and before (aa); and

7.4.4. In the final phrase after section 15(b)(cc).

(In this regard and in particular, see **Moyo** at para [65] referring to “*imminent violent injury*” not only to person, but to property).

7.5. By amending section 15(1) as follows: “*A person commits an offence if he, she or it unlawfully and intentionally*” in circumstances where “**person**” – in terms of the definitional section 1 – includes a juristic person. [our suggested insertion underlined].

We trust that these submissions will be of assistance to you. Should you have any queries, please do not hesitate to contact us.

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