



To: Mr. Ramaano
[REDACTED]

Women's Gaol
Constitution Hill
11 Kotze Street
Braamfontein
Johannesburg

01 October 2021

Written Submissions of the Accountability Lab South Africa (AL SA) to Parliament in response to The Prevention and Combating of Hate Crimes and Hate Speech Bill.

1. About Accountability Lab south Africa

- 1.1. **Accountability Lab South Africa** is building a new generation of active citizens and responsible leaders around the world. We train, mentor and resource citizens in creative ways to strengthen systems of accountability. Our goal is a world in which resources are used wisely, decisions benefit everyone fairly, and people lead secure lives.
- 1.2. Accountability Lab South Africa is a part of a Translocal Network of 9 labs around the world including Liberia, Nepal, Pakistan, Mali, Nigeria, Niger, Zimbabwe, DRC and Mexico.
- 1.3. We aim to make governance work for people by placing a deliberate emphasis on positive approaches and positive deviants- through campaigns like **Integrity Icon** and work directly with reformers within government. We place a particular emphasis on coalition and community building- connecting the dots between change-makers and facilitating collective action.
- 1.4. AL SA thanks Parliament for inviting written representations in the development of the Bill. We would, further, welcome Parliament's invitation for further written and/or oral representations in the development of the Bill in keeping with statute and established jurisprudence regulating the public

participation process, and hereby declare our availability to make such representations at the appropriate stage in the development process.

2. Summary of written representations

2.1. Since 2008, a year marked by a devastating wave of xenophobic violence, concerned members and groups from civil society in South Africa and abroad have been in discussions about the necessity of policy and legislation to respond to hate speech and hate crimes in South Africa. We also note the efforts of civil society, particularly from the LGBTQI+ community since at least 2007, calling for an integrated response to violence targeted against gender non-conforming people – women in particular – under the scourge of so-called “corrective rape”. Further to this, we note the pernicious scourge of extrinsic anti-Black racism highlighted in the incidents concerning, amongst others:

2.1.1. Penny Sparrow, 2016;

2.1.2. Vicki Momberg, 2016;

2.1.3. Alex Catzavelos, 2018.

2.2. AL SA notes the importance of a Hate Speech and Hate Crimes Bill in helping to give effect to South Africa’s obligations under the Constitution, international law and international human rights instruments, and thus welcomes the gazetting of the Prevention and Combating of Hate Crimes and Hate Speech Bill (referred to below as the Bill) for public comment.

2.3. At the same time AL SA submits that the enactment of such legislation as would place limitations on freedom of expression must be approached with great care so as to prevent any potential conflict with other rights provided for in the Constitution, international law, and in international human rights instruments and obligations.

2.3.1. To this end, AL SA calls on Parliament to conduct and publish:

2.3.1.1. the results of a socio-economic impact assessment of the potential implications of the enactment of the Bill;

2.3.1.2. all submissions made in response to the Bill in this public participation process; and

2.3.1.3. a reasons paper detailing Parliament’s rationale for adopting each clause of the Bill.

2.4. This submission intends to point out important themes and recommendations for your consideration, as well as provides specific reformulations to the text addressing points of serious concern, as follows:

2.4.1. The definition of harm is self-referential and therefore circular. Further, it does not adequately distinguish between “harm” – which may occasion statutory protection – and “offense” – which does not occasion statutory protection.

2.4.2. The categories of persons contemplated as enjoying protection against the offence of hate speech in line with Section 4 of this Bill is inconsistent with the categories of persons contemplated as enjoying protection against the offence of hate crimes in line with Section 3 of this Bill.

2.4.3. The prohibition against the electronic distribution of communications constituting hate speech as contemplated in this Bill is unreasonable, excessive and disproportionate – making the unqualified distribution of the communication itself an offence without providing for any objective inquiry into the intention of the electronic distribution of the communication by a competent court or tribunal.

2.4.4. The prohibition against the distribution of communications constituting hate speech as contemplated in this Bill by any means whatsoever is unreasonable, excessive and disproportionate – making the unqualified distribution of the communication itself an offence without providing for any objective inquiry into the intention of the distribution of the communication by a competent court or tribunal.

3. AL SA’s specific responses to specific provisions in the Bill follow in the sections below. Please note that proposed redactions to the original text are marked with [...] and proposed additions are **underlined**.

4. Ad Section 1: Definitions

4.1. AL SA welcomes the significance of defining “harm” under this Bill. However, we note that the proposed definition, in seeking to cast a wide net for the various ways in which harm may be experienced, is nevertheless self-referential and circular.

4.1.1. We further note that the definition of “harm” should not extend in scope to include or infer a protection against offense. No-one has a right to protection against offense to their person or sensibilities, only a right to be protected against quantifiable harm that may derive from harmful speech acts or conduct which may also be offensive.

4.1.2. AL SA therefore proposes a complete reformulation for the definition as follows:

4.1.2.1. Proposed formulation:

4.1.2.1.1. “harm” means any quantifiable emotional, psychological, physical, social or economic impairment or loss objectively established as being detrimental to the enjoyment of rights, including to property.

4.2. Ad Section 4(1)(a): Offence of Hate Speech

4.2.1. AL SA welcomes the extension of the protected categories of persons enumerated in Sections 4(1)(a)(ii)(aa – oo) against the offence of hate speech.

4.2.2. We note that this extension of protected categories correctly goes beyond the protected categories of persons provided for in terms of Section 9(3) of the Constitution.

4.2.3. We however note an inconsistency in the extension of protected categories of persons between Section 4(1)(a)(ii)(aa – oo), which pertain to the offence of hate speech, and the preceding Section 3(1)(a – q) which pertain to the offence of hate crimes.

4.2.4. In particular we note the exclusion of the following protected categories of persons from Section 4(1)(a)(ii)(aa-oo) which enjoy protection under Section 3(1)(a – q), namely:

4.2.4.1. *Occupation or trade*; and

4.2.4.2. *Political affiliation or conviction.*

4.2.5. We submit that this exclusion of these two categories from protection against the offence of hate speech is irrational and unjust.

4.2.6. By way of example:

4.2.6.1. Vulnerable persons and groups enjoying protection from the offence of hate crime would not enjoy equal protection from the offence of hate speech, which is itself contemplated to be a criminal offence in line with this Bill;

4.2.6.2. People enjoined in trades or occupations which do not enjoy broad social acceptance or protection such as sex-work would not be enjoy protection against emotional, psychological, physical, social or economic impairment or loss objectively established as being detrimental to the enjoyment of rights deriving from such speech acts as contemplated under Section 4 of this Bill, thereby vitiating the constitutional right to trade, occupation and profession enshrined in Section 22 of the Constitution, as well as the right to freedom of association as enshrined in Section 18 of the Constitution, amongst others;

4.2.6.2.1. Even while we acknowledge that a trade, occupation or profession such as sex-work does not enjoy legal protection under the laws and regulations of South Africa, we nevertheless remind Parliament that this Bill is not contemplated to extend protection to people on the basis of the legal status of their trade, occupation or profession, but on the basis of their vulnerability and availability to harm as a result of it.

4.2.6.2.2. We, therefore, submit that the State has a legal and constitutional obligation to protect such persons as engaged in **any** trade, occupation or profession from **both** the offences of hate crime and hate speech as contemplated in this Bill.

4.2.6.3. Further, people holding such political affiliations or convictions which do not enjoy broad social acceptance or protection would not enjoy protection against emotional, psychological, physical, social or economic impairment or loss objectively established as being detrimental to the enjoyment of rights deriving from such speech acts as contemplated under Section 4 of this Bill, thereby vitiating the

constitutional rights to freedom of religion, belief and opinion enshrined in Section 15 of the Constitution, freedom of association as enshrined in Section 18 of the Constitution, and the political rights enshrined in Section 19 of the Constitution, among others.

4.2.6.3.1. Even while we acknowledge that there may be political affiliations or convictions which do not enjoy legal protection under the laws and regulations of South Africa, we nevertheless remind Parliament that this Bill is not contemplated to extend protection to people on the basis of the legal status of their political affiliations or convictions, but on the basis of their vulnerability and availability to harm as a result of it.

4.2.6.3.2. We, therefore, submit that the State has a legal and constitutional obligation to protect such persons as engaged in **any** political affiliation or conviction from **both** the offences of hate crime and hate speech as contemplated in this Bill.

4.2.7. AL SA therefore proposes the re-inclusion of these categories of persons contemplated as enjoying protection against the offence of hate speech in Section 4(1)(a)(ii) as follows:

4.2.7.1. Proposed formulation:

4.2.7.1.1. (ll) occupation or trade:

4.2.7.1.2. (mm) political affiliation or conviction.

4.3. Ad Section 4(1)(b): Electronic Distribution of Hate Speech

4.3.1. AL SA welcomes the intention of Parliament to prevent the electronic propagation of hate speech as contemplated in this Bill under this provision.

4.3.2. *However*, we submit that this provision disproportionately and unreasonably restricts legitimate dialogue and debate which may reasonably reinforce the objects of this Bill.

4.3.2.1. The present formulation makes **any** intentional distribution of communications constituting hate speech as contemplated in this Bill through electronic means an offence **regardless** of the intention or **reason** for such distribution.

4.3.2.2. This is plainly unreasonable, excessive and disproportionate because:

4.3.2.2.1. It disregards the varied and objectively reasonable reasons for which a communication constituting hate speech may be electronically distributed including but not limited to:

4.3.2.2.1.1.1. Privately or publicly expressing an objection to the view or opinion expressed in the prohibited communication itself;

4.3.2.2.1.1.2. Exposing the person(s) holding the view or opinion expressed in the prohibited communication;

4.3.2.2.1.1.3. Demonstrating that the view or opinion expressed in the prohibited communication is one that is held at all;

4.3.2.2.1.1.4. Educating others that the view or opinion expressed in the prohibited communication is objectionable and/or prohibited; etc.

4.3.3. We submit that it is not enough that the speech act itself may be interpreted as hate speech, but that the intention of the person making the speech act must demonstrably be to commit, validate, endorse or propagate hate speech as contemplated in Section 4(1)(a) of this Bill.

4.3.4. Recalling the unreasonable, excessive and disproportionate limitations on the right to freedom of expression under the erstwhile apartheid government, and its implications for the rights to freedom of opinion, belief, expression, association and assembly, we remind Parliament of its obligation to provide for the widest possible interpretation of the right to freedom of expression in its legislative function.

4.3.5. We further submit that the offence of the intentional propagation of hate speech should be an objective inquiry that is left to a competent court or tribunal to determine.

4.3.6. AL SA therefore proposes the reformulation of Section 4(1)(b) as follows:

4.3.6.1. Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a) **with the intent of propagating hate speech** through an electronic communication system which is –

4.4. Ad Section 4(1)(c): Any Distribution of Hate Speech

4.4.1. AL SA welcomes the intention of Parliament to prevent any further propagation of hate speech as contemplated in this Bill beyond solely electronic means under this provision.

4.4.2. *However*, for the same reasons expressed in paragraph 4.3, above, we submit that this provision unreasonably, excessively and disproportionately restricts legitimate dialogue and debate which may reasonably reinforce the objects of this Bill.

4.4.3. AL SA therefore proposes the reformulation of Section 4(1)(c) as follows:

4.4.3.1. Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated, [...] which that person knows constitutes hate speech as contemplated in paragraph (a), which is accessible by or, or directed at, a specific person who can be considered to be a victim of hate speech **with the intent of committing or propagating hate speech**, is guilty of an offence.


5. Conclusion

5.1. AL SA reiterates its thanks to Parliament for inviting written representations at in response to the Bill.

5.2. AL SA further calls on Parliament to publish a reasons paper consolidating the arguments presented by all engaging in the public consultation process and articulating its reasons for adopting each clause ultimately enacted.

5.3. AL SA would, further, welcome Parliament's invitation for further written and/or oral representations in the development of the Bill in keeping with statute and established jurisprudence regulating the public participation process, and hereby declare our availability to make such representations at the appropriate stage in the development process.

Yours Sincerely,



Sekoetlane Phamodi
Country Director
Accountability Lab South Africa