SUBMISSION ON THE **PREVENTION AND COMBATING** OF HATE CRIMES AND HATE SPEECH BILL

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Content

Introduction

As a civil rights organisation, AfriForum supports the imposing of sanctions on actual hate speech. Vulnerable groups deserve protection from those who incite harm and violence against them through hateful language. However, the proposed Prevention and Combatting of Hate Crimes and Hate Speech Bill radically distorts the ordinary meaning of the term *hate speech* – if passed into law, it will have effectively criminalised constitutionally protected speech. Our submission will demonstrate that the Bill infringes on the right to freedom of expression.

This submission comprises two parts. Part One examines four issues:

1. the extent of the Constitutional right to freedom of expression
2. public policy reasons for protecting free speech
3. the Constitutional limits on freedom of expression
4. the current regulation of hate speech in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the PEPUDA) and how the Act has been modified by the Qwelane judgment.[1]

Part Two highlights four issues of the Bill that are unconstitutional or otherwise ill advised:

1. The Bill's definition of harm is overly broad.
2. The threshold for determining what constitutes hate speech is incorrect.
3. The Bill affords the National Director of Public Prosecutions the power to decide when to prosecute people for hate speech, without setting out the circumstances when it would or would not be appropriate to do so.
4. The use of imprisonment for hate speech should be narrowed to cases where a speaker incites harm against a protected group and the members of that group suffer actual harm as a result of the speech.

The submission concludes with a set of recommendations that would render the Bill constitutional.

[1] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, at paragraph 162.

Part One

The Constitution

Freedom of expression

For Legislation to be valid, it must survive scrutiny under our Constitution. Section 16(1) of the Constitution protects freedom of expression by proclaiming:

> Everyone has the right to freedom of expression, which includes—
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.

In *Dikoko v Mokhatla*, the Constitutional Court described freedom of expression as "the lifeblood of an open and democratic society cherished by our Constitution".[2]

In *Mandela v Falati*, the court ruled that:[3]

> In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of the 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.

In *SANDU v the Minister of Defence and Another*, the Constitutional Court held that:[4]

> [Freedom of expression] lies at the heart of a democracy. It is valuable for many reasons, including its 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. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

In *Phillips and Another v the Director of Public Prosecutions*, the court held that:[5]

> Under the new constitutional dispensation in this country, expressive activity is prima facie protected, no matter how repulsive, degrading, offensive or unacceptable society, or the majority of society, might consider it to be.

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2 *Dikoko* v *Mokhatla* 2006 (6) SA 235 (CC), at paragraph 92.
3 *Mandela v Falati* 1995 (1) SA 251 (W), at paragraph 259.
4 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), at paragraph 7.
5 *Phillips and Another v Director of Public Prosecutions* (Witwatersrand Local Division) and Others 2002 (5) SA 549 (W), at paragraph 554.

In other words, expressive activities cannot be excluded from the scope of the freedom guaranteed by s 16(1) of the Constitution on the basis of the content or meaning being conveyed.

Public policy considerations

Within the context of public policy, there are four main reasons why freedom of expression is so valuable:

1. It aids us in the search for **truth**.
2. It is vital for the functioning of a **democracy**.
3. It enhances **moral agency**.
4. It instils **tolerance**.

Truth

Allowing the free dissemination of beliefs, opinions and other forms of expression brings immense benefits. It allows for intellectual, cultural and scientific progress, while provoking discussion and aiding the search for truth. Since we are fallible, we cannot know with certainty that a particular opinion is false. When we suppress opinions that are believed to be false, we risk missing out on the truth.[6] If we stifle beliefs that are different from our own, we lose the opportunity to "challenge, reconsider and perhaps reaffirm" our own views.[7]

In *State v Mamabolo,* the court held that[8]

> [f]reedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, 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. It could actually be contended with much force that the public interest in the open market-place [sic] of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.

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6 Meyerson, D. 1997. *Rights limited: Freedom of expression, religion and the South African Constitution*. Kenwyen: Juta, p. 78.

7 Wolff, J. 1996. *An Introduction to political philosophy*. Oxford: Oxford University Press, p. 118.

8 *State v Mamabolo* (E.TV, Business Day and the Freedom of Expression Institute Intervening) 2001 (3) SA 409 (CC), at paragraph 37.

Democracy

Freedom of expression is the cornerstone of a functioning democratic state. It exposes people to opposing viewpoints and allows them to make informed and legitimate decisions about their political and private lives.[9]

As Judge O'Regan stated in *Khumalo and Others v Holomisa*:[10]

> […] without [freedom of expression], the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.

Agency

The legal philosopher Ronald Dworkin wrote:[11]

> Morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true or false in matters of justice and faith. Government 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.

When people are exposed to a range of conflicting opinions on a subject, they are given the opportunity to exercise their rational faculties, to weigh up the arguments on both sides and to form their own view on the matter.

If citizens are under the impression that the media that they are exposed to underwent a filtering process to remove all inappropriate forms of expression, then they are less likely to be critical of the material that they consume. Societies that allow for a broad selection of opinions create an environment that strengthens people's analytical skills and trains them to question the views that are presented to them.[12]

Tolerance

In *SANDU v the Minister of Defence and Another*, the Constitutional Court held that[13]

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9 De Waal, J., Currie, I. & Erasmus, G. 2001. *Bill of Rights handbook*. Lansdowne: Juta, p. 310.

10 *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC), at paragraph 21.

11 Dworkin, R. 1996. *Freedom's law: The moral reading of the American Constitution*. Oxford: Oxford University Press, p. 200.

12 Strossen, N. 1995. *Defending pornography: Free speech, sex and the fight for women's rights*. New York: Scribner, p. 263.

13 *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), at paragraph 8.

> [t]he corollary of 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.

In her seminal paper on the dangers of suppressing racist speech, Denise Meyerson wrote:[14]

> To drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature. It is precisely those […] who, after all, believe there is a truth about the awfulness of racism, who should be optimistic about the power of debate and argument to demonstrate that truth. They came to their views by reason, and since they do not believe themselves to be intellectually superior, should trust in reason rather than the police force as the better weapon against falsehood.
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> It is only too easy for censorship laws to be put to different uses from those originally intended and if we are happy for them to be deployed in one way, we make it much easier for them to be deployed in other, more frightening, ways later. And a final consideration here is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced, as we are, to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly.

Constitutional limitations on freedom of expression

Although freedom of expression is a fundamental right, its scope is limited in our Constitution. Section 16(2) of the Constitution states that the right to freedom of expression does not extend to:

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The authors of *Constitutional Law of South Africa* state:[15]

> The starting point in assessing the constitutionality of hate speech legislation is to establish whether or not the prohibited expression falls within the meaning of FC s 16(2)(c). If the prohibition is

[14] Meyerson, D. 1990. No platform for racists: What should the view of those on the left be? *South African Journal on Human Rights* 6(3), p 394–397. Available at http://heinonline.org/HOL/Page?handle=hein.journals/soafjhr6&start_page=394&collection=journals&id=408.

[15] Milo, D., Penfold, G. & Stein, A. 2017. Freedom of expression. In Woolman, S. & Bishop, M. (Eds.). *Constitutional law of South Africa*. Cape Town: Juta, p. 85.

synonymous with, or more limited than, the type of hate speech contemplated in FC s 16(2)(c), the legislation will pass constitutional muster.

In *Islamic Unity Convention v Independent Broadcasting Authority and Others,* the Constitutional Court held that[16, 17]

> [s]ection 16(2)(c) is directed at what is commonly referred to as hate speech. What is not protected by the Constitution is expression or speech that amounts to 'advocacy of hatred' that is based on one or other of the listed grounds, namely race, ethnicity, gender or religion and which amounts to 'incitement to cause harm'. There is no doubt that the State has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression. Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right in section 16.
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> Where the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution.

In *Moyo v Minister of Justice and Constitutional Development and Others*, the Supreme Court of Appeal held that[18]

> [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.
>
> Even expressive acts that create reasonable fear are deserving of constitutional protection. Unless they are accompanied by threats of violence on which the person making the threat is capable of acting, or they constitute unprotected expression defined in s 16(2) of the Constitution, fear-creating expressive acts are lawful, even if they are aggressive and hostile. This court, in *Hotz v UCT* expressed itself on this subject as follows:

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16 *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC), at paragraph 33.
17 *Ibid*., at paragraph 34.
18 *Moyo v Minister of Justice and Constitutional Development and Others* [2018] ZASCA 100, at paragraphs 31–32.

> 'A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity'.
>
> The court recognised however, that in guaranteeing freedom of speech, the Constitution also places limits upon its exercise. Thus where it goes beyond a passionate expression of feelings and views and becomes the advocacy of hatred based on race or ethnicity and constitutes incitement to cause harm, it oversteps those limits and loses its constitutional protection.

In *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies,* the Supreme Court of Appeal held that[19]

> [i]n summary, the starting point for the enquiry in this case was that the Constitution in s 16(1) protects freedom of expression. The boundaries of that protection are delimited in s 16(2). The 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. Public debate is noisy and there are many areas of dispute in our society that can provoke powerful emotions. The bounds of constitutional protection are only overstepped when the speech involves propaganda for war; the incitement of imminent violence; or the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

In 2000 South Africa enacted the PEPUDA to regulate hate speech. Section 10(1) of the PEPUDA states:

> No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to–
>
> (a) be hurtful;
> (b) be harmful or to incite harm;
> (c) promote or propagate hatred.

In *Qwelane v South African Human Rights Commission and Another,* the Constitutional Court held that this section of the Act was unconstitutional and held that, in the interim, section 10(1) must read as follows:[20]

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[19] *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA), at paragraph 31.

[20] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, paragraph 162.

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.

Part Two

The Bill's definition of *harm*

Section 1 of the Bill states:

> "[H]arm" means any emotional, psychological, physical, social or economic harm.

Emotional harm

A host of words can make people feel angry, afraid, anxious, bitter, disgusted, embarrassed, insecure, jealous, overwhelmed, resentful, sad, shocked and worried. Emotional harms are felt subjectively and they tend to be fleeting.

The cases *Moyo v Minister of Justice and Constitutional Development and Others* and *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies* make it clear that speech that provokes strong emotional responses or even instils fear is protected speech. Therefore, mere emotional harm is the wrong standard.

In *Qwelane v South African Human Rights Commission and Another,* the Constitutional Court stated held that[21]

> … "harmful" can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group.

Social harm

Unlike psychological, physical and economic harm, the term *social harm* is a nebulous concept and may cover a range of yet-to-be-determined harms. Since its scope is unknown, it should be removed from the definition.

The Bill's definition of *hate speech*

Section 4 of the Bill states:

> (1) (a) 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,
> (iii) based on one or more of the following grounds:

[21] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, paragraph 145.

(aa) age;
(bb) albinism;
(cc) birth;
(dd) colour;
(ee) culture;
(ff) disability;
(gg) ethnic or social origin;
(hh) gender or gender identity;
(ii) HIV status;
(jj) language;
(kk) nationality, migrant or refugee status;
(ll) race;
(mm) religion;
(nn) sex, which includes intersex; or
(oo) sexual orientation,

is guilty of an offence of hate speech.

Public vs private communication

In *Qwelane v South African Human Rights Commission and Another*, the Court held that:[22]

> Our most private communications – and being able to freely communicate in one's private and personal sphere – form part and parcel of the "inner sanctum of the person" and are in the "the truly personal realm". […]
>
> 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 – that public hateful expression undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination and violence. Furthermore, the purpose of hate speech prohibitions is "to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. It is improbable that most private conversations will have this effect.

Conjunctive test

In *Qwelane v South African Human Rights Commission and Another,* the Court settled a long-standing debate about whether the provisions of section 10(1) of the PEPUDA ought to be read

[22] *Ibid*., at paragraphs 117 and 118.

conjunctively or *disjunctively*. The court determined that they must be read *conjunctively*.[23] This means that it would be unconstitutional to use the word *or* between sections 4(1)(i) and (ii) of the Bill. It is a necessary requirement to use the word *and* between the sections.

Listed grounds

The authors of *Constitutional Law of South Africa* state that[24]

> [section] 16(2) does not cover all forms of hate speech, but only those that are based on the specified grounds of race, ethnicity, gender or religion. [It] does not, therefore, include hate speech based on analogous grounds such as homophobic speech.

Section 4(1)(aa)–(oo) of the Bill lists the grounds specified in section 16(2)(c) of the Constitution, but then goes on to add age, albinism, birth, colour, culture, disability, social origin, gender identity, HIV status, language, nationality, migrant or refugee status and sex (which includes intersex) and sexual orientation.

The Constitution limits the specified grounds to race, ethnicity, gender and religion. Further grounds are listed in the equality clause, which supports the view that the Constitution deliberately limits hate speech to the four listed grounds. To add further grounds without infringing on the right to free speech, the Bill can be appropriately modified by including them under the correct threshold.

Constitutional thresholds: Imminent violence, hatred and incitement to cause harm

Section 16(2) of the Constitution makes it clear that the right to freedom of expression does not extend to incitement of imminent violence, or to the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The Constitution recognises that some forms of speech do not warrant constitutional protection, but the threshold for limiting speech is set at the high-water marks of imminent violence and incitement to cause harm.

Incitement to cause harm

The ordinary meaning of the phrase *incitement to cause harm* "suggests that one should not look to the harm caused by the speech itself but rather to the impact of the speech on third parties, i.e. does the speech encourage, stimulate or call for others to cause harm[.]"[25]

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[23] *Ibid*., at paragraph 104.

[24] Milo, D., Penfold, G. & Stein, A. 2017. Freedom of expression. In Woolman, S. & Bishop, M. (Eds.). *Constitutional law of South Africa*. Cape Town: Juta, p. 83.

[25] Milo, D., Penfold, G. & Stein, A. 2017. Freedom of expression. In Woolman, S. & Bishop, M. (Eds.). *Constitutional law of South Africa*. Cape Town: Juta, p. 82.

Criminal sanctions

The Bill creates the following criminal sanction:

> 6 (3) Any person who is convicted of an offence referred to in section 4 is liable, in the case of –
>
> (a) a first conviction, to a fine or to imprisonment for a period not exceeding three years, or to both such fine and imprisonment; and
>
> (b) any subsequent conviction, to a fine or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

The perturbing effect on speech that is caused by the Bill would be enormous, since the risk of being imprisoned would deter people from expressing anything that may result in a criminal sanction. The overly broad definition of hate speech would deter robust discussions about contentious topics.

In their commentary, the authors of *Constitutional Law of South Africa* state that[26]

> [p]art of what balancing means is that, while our courts acknowledge that expression can cause harm, the fundamental value of freedom of expression means that it can only be restricted where harm is actually caused or is likely to occur. Mere speculation of harm is insufficient to warrant overriding this fundamental right.

The criminal sanction of imprisonment should only be placed on speech that actually results in harm. In cases where a speaker attempted to incite harm against others, but such harm did not actually occur, it would be more appropriate to interdict their speech, impose a fine or require an apology.

In *Qwelane v South African Human Rights Commission and Another*, the Court described the hate speech prohibition in the PEPUDA as a statutory delict different from any crime.[27] In terms of sanctions, an equality court has the power to order the payment of damages,[28] an unconditional apology,[29] the revocation of a person's license[30] and the payment of costs.[31] However, it does not have the power to impose a criminal sanction.

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[26] Milo, D., Penfold, G. & Stein, A. 2017. Freedom of expression. In Woolman, S. & Bishop, M. (Eds.). *Constitutional law of South Africa*. Cape Town: Juta, p. 12.

[27] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22, at paragraph 95.

[28] Section 21(2)(d) and (e) of the PEPUDA

[29] Section 21(2)(j) of the PEPUDA.

[30] Section 21(2)(l) of the PEPUDA.

[31] Section 21(2)(o) of the PEPUDA.

Furthermore, the process of defending oneself in court places a financial burden on the accused, even in cases where the accused wins the case, the legal costs involved in fighting a case can be crippling.[32]

Prosecutorial discretion

Section 4(3) of the Bill states:

> Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having authority or a person delegated thereto by him or her.

Section 7 of the Bill states:

> The National Director of Public Prosecutions must, after consultation with the Director-General: Justice and Constitutional Development and the National Commissioner of the South African Police Service, issue directives regarding all matters which are reasonably necessary or expedient to be provided for, and which must be complied with by all members of the prosecuting authority who are tasked with the institution and conduct of prosecutions in cases relating to hate crimes and hate speech, in order to achieve the objects of this Act, including the following:
>
> (a) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including—
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> [...]
>
> (i) the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped;

The Bill requires the Director of Public Prosecutions to issue directives on the institution of hate speech prosecutions. To avoid arbitrariness, it is vital that these directives treat all people who reside in South Africa as equal before the law, without fear or favour.[33,34]

> Prosecutorial discretion has often been used to prosecute minorities and other victims of racism, rather than to protect such victims from further insult. In England the first individuals prosecuted under the Race Relations Act were black power leaders, and the law has subsequently been used more frequently to curb the speech of racial minorities and other activists, than to limit the expression of racists. Ironically, the English statute intended to restrain the neo-Nazi National Front has been utilised to ban expression by the Anti-Nazi League [...] South Africa had 'hate speech

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32 Strossen, N. 1995. *Defending pornography: Free speech, sex and the fight for women's rights*. New York: Scribner, p. 67–68.

33 Johannessen, L. 1997. A critical view of the constitutional hate speech provision. *South African Journal on Human Rights* (13)1: 135–150 (p. 141). DOI: https://doi.org/10.1080/02587203.1997.11834940.

34 Woolman, S. & Bishop, M. (Eds.). *Constitutional law of South Africa*. Cape Town: Juta, pp. 84–85.

legislation' which the previous government used to suppress legitimate political speech and to silence political opposition.

Where far-reaching powers are conferred on an administrative official, the legislature must provide clear instructions on how such powers are to be exercised […] The unfettered grant of power has serious consequences for the rule of law: a person must be able to understand the basis upon which a decision by a government official may lawfully be taken.

Recommendations

Given that the Bill introduces criminal sanctions, there is less room to limit the right to freedom of expression than may be allowable under the PEPUDA.

A legitimate purpose of the Bill would be to protect people from imminent violence and incitement to cause harm. This can be achieved without unduly infringing the right to freedom of expression by using the limitations set out in section 16(2) of the Constitution to define hate speech.

Section 1 of the Bill must define harm as follows:

> "Harm" means a deep emotional and psychological harm that severely undermines the dignity of the targeted group, or a physical, or an economic harm.

The following definition must replace the current definition in section 4 of the Bill:

4. (1) (a) Any person who unlawfully and intentionally, publicly advocates for –

(i) the incitement of imminent violence against any person or group of persons for any reason, including reasons based on:

(aa) age;
(bb) albinism;
(cc) birth;
(dd) colour;
(ee) culture;
(ff) disability;
(gg) ethnic or social origin;
(hh) gender or gender identity;
(ii) HIV status;
(jj) language;
(kk) nationality, migrant or refugee status;
(ll) race;
(mm) religion;
(nn) sex, which includes intersex; or

(ii) hatred towards any other person or group of persons based on race, ethnicity, gender, or religion, or sexual orientation, and that constitutes incitement to harm

is guilty of the offence of hate speech.

and

6. (3) When determining the sentence for any person convicted of an offence referred to in section 4, a court may impose one or more of the following penalties by requiring the offender to:

(a) be imprisoned for a period not exceeding three years, only in cases where the offender incited harm against a person or group of persons and the person or group of persons suffered actual harm;
(b) make an unconditional apology;
(c) perform acts of community service;
(d) pay to the victim or an organisation that represents the victimised group–

(i) an amount not exceeding R100 000 in the case of a first conviction; or
(ii) an amount not exceeding R500 000 in the case of any subsequent conviction.

Conclusion

It is evident that the costs of adopting the definitions of harm and hate speech that are proposed by the Bill would be heavy; it is also unclear if there would be any benefit in doing so. As Judge Barker once said:[35]

> [T]o deny free speech to engineer social change in the hope of accomplishing a greater good for one section of our society erodes the freedoms of all.

We began by drawing a distinction between actual hate speech (which is constitutionally unprotected speech that incites harm or violence against vulnerable groups) and hate speech as defined by the Bill (which prohibits protected speech).

We examined the importance of the right to freedom of expression by demonstrating its role in a functioning democracy, the search for truth and the personal development of citizens. We argued that the prohibition in the Bill is a severe infringement on the right because of the penalty that it imposes and the perturbing effect it has on freedom of expression.

We proceeded to argue that the state can take less restrictive measures by:

1. changing the definitions of harm and hate speech that are used in the Bill to render it constitutional;
2. addressing the problem of arbitrary prosecutions under the Bill; and

[35] *American Booksellers Association v Hudnut*, 598 F Supp 1316, 1317 (D. Ind. 1984).

3. using restorative justice measures to deal with most instances of hate speech and reserving imprisonment for cases where the targeted person or group of people suffered actual harm as a result of harm being incited against them.