

## **SUPPLEMENTARY**

### **SUMMARY OF SUBMISSIONS TO PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES: PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL, 2018; and RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT (12 SEPTEMBER 2022)**

**Table 1 reflects general comments and the DoJ&CD's response; and**

**Table 2 provides a clause by clause summary of the submissions and the DoJ&CD's response.**

**Table 1:**

<b>NAME OF INSTITUTION/INDIVIDUAL COMMENTS/RECOMMENDATIONS</b>	<b>DoJ&amp;CD RESPONSE</b>
<b>African Christian Democratic Party</b> (a) Remains concerned that the provisions relating to “hate speech” will still violate other constitutional rights, including freedom of religion, belief and opinion (section 15), and freedom of speech/expression (section 16).  (b) The ACDP believes it is unnecessary to create an additional law that will have the effect of placing further strain (in terms of time, effort and money) on burdened courts and on the police, who will be tasked with the investigation of “hate speech” charges and obliged to make arrests, investigate and prosecute in terms of the Bill.	(a) The Qwelane judgment has a direct impact on the provisions of clause 4 to the extent that the test for hate speech will be stricter and therefore will give rise to a less restrictive impact on sections 15 and 16 compared to the version of the clause, as introduced.  (b) It is not clear whether the introduction of new legislation will have an increased impact on resources if one takes into consideration that complaints under the existing law have to be investigated, and where necessary, prosecuted in any event.
<b>A Albertyn (January 2019), D Carmichael-Green, D Cagnetta, S Chase, S Colville, Crystil Clear Ministries International, C M Cuthbert, S Daly, C C Daniels, C Cameron-Davies, P A de Kock, G D de Vries, Campus Crusade for Christ South Africa, J Dreyer, J P van Emmenis, Foundation Nation Restoration, Freedom of Religion South Africa (FOR SA), T Fourie, F Reichert, V Gcuma, M Groene wald, K</b>	

<p><b>Groom, K Hadebe, Harvest Christian Church, GH du Toit, C Hemphill, AP Hoare, VW Hollaway, P Hunter, C Hussey, I Richardson, JJ Jansen, A Kalam, Kingdom Family, M le Roux, E Libenberg, M Vorster, M Lampbrecht, Archbishop O McGregor, T Mehnert, M Mhlaba, G Mitchell, Pastor D Momberg, M Morris, JDM Moses, CJ Neethling, F Niemand, JPP Odendaal, P Holdstock, C Patterson, D Pfiffner, H Pieters, V Pillay, E Shaw, E Stroh, S Beukes, FQ Swanepoel, C Tarboton, R van Heerden, M van Loggerenberg, A Janse van Rensburg, P van der Westhuizen, G Venter, I Vermaak, M Vermeulen, Rev A Visagie, K Vosloo, Rev C Jonck</b></p> <p>Objects to the wide definition of “harm” in clause 1, and the creation of the crime of “hate speech”, in clause 4 of the Bill – particularly in light of existing laws that already prohibit “hate speech”.</p>	Noted.
<p><b>Association of Christian Media</b></p> <p>The Bill will create a chilling effect on freedom of expression and should not be proceeded with.</p>	Noted.
<p><b>Change.org</b></p> <p>Supports the Bill.</p>	Noted.
<p><b>FOR SA</b></p> <p>Expressed concern with regard to the increase in the workload of the SAPS and the courts through the creation of the new offence of “hate speech”.</p>	It is not clear whether the introduction of new legislation will have an increased impact on resources if one takes into consideration that complaints under the existing law have to be investigated, and where necessary, prosecuted in any event.
<p><b>Google South Africa</b></p> <p>Supports the extension of prohibited grounds.</p>	Noted.
<p><b>Institute of Race Relations</b></p> <p>(a) South Africa already has hate speech legislation on the Statute Book, while the common law has long penalised speech which is defamatory or an affront to dignity.</p> <p>(b) The Constitution guarantees equality before the law, and bars unfair discrimination by either the state or private persons on racial and 16 other listed grounds.</p>	(a) to (g) Pepuda presents civil law remedies for hate speech. Nothing prevents the Legislature from passing legislation that places an emphasis on the serious nature of hate crimes and hate speech.

<p>(c) Pepuda includes a broad prohibition of hate speech.</p> <p>(d) To ensure the proper interpretation and enforcement of Pepuda, high courts and magistrates courts across the country have been designated as equality courts and trained in how to apply the statute. These equality courts are civil, rather than criminal, ones and cannot order imprisonment. In dealing with hate speech, however, they may order the payment of damages for any 'impairment of dignity' or any 'emotional and psychological suffering'. They may also require 'an unconditional apology' and make any 'appropriate order of a deterrent nature'.</p> <p>(e) Civil defamation rules thus provide a potent weapon against racial invective damaging to reputation. The common law has also evolved to deal with cases of defamation on Facebook or communicated via the Internet.</p> <p>(f) South Africa also has common law rules making defamation a criminal offence in certain instances.</p> <p>(g) Also important is the common law of <i>crimen injuria</i>, under which Penny Sparrow was also convicted and punished. <i>Crimen injuria</i> is the unlawful, intentional, and serious violation of the dignity of another. For successful prosecution, the victim must be aware of the offending behaviour and must feel degraded or humiliated by it. In addition, the behaviour in question must be serious enough as to offend the feelings of a reasonable person.</p> <p>(h) Some legal writers have suggested that the insult in issue must be directed at an individual, rather than a group, before liability can arise. However, this overstates the key judgment on the matter, which was handed down by the Transvaal Provincial Division in 1975. Here, the court was primarily concerned with whether the dignity of the victim had been affected by an insult against the Afrikaans language. Within this context, the judge commented: 'There may, of course, be cases in which an insult to a person's language, or race, or religious persuasion, or national group may, in the circumstances, constitute also an impairment of his <i>dignitas</i>'.</p>	<p>(h) Noted.</p>
---	-------------------

(i) The ANC alliance should stop pretending that the reprehensible racial utterances and conduct of the few are representative of the many, when clearly this is not so. It should also abandon its own racial rhetoric, commit itself unambiguously to the constitutional value of non-racialism, jettison policies that depend on racial classification and racial preferencing – and set about promoting the growth, investment and employment that are most needed to promote social cohesion and help the poor and disadvantaged get ahead.	(i) Noted.
--	------------

Table 2:

NAME OF INSTITUTION/INDIVIDUAL COMMENTS/RECOMMENDATIONS	DoJ & CD RESPONSE
<b>Clause 1</b>	
<b>FOR SA</b> (a) The definition of “harm” is overbroad and will turn almost any expression into a crime simply on the basis of being offensive. ( <b>PEN SA, S Chase</b> ).  (b) The definition of “victim” is wide and leaves the interpretation of the clause 4 open to abuse.	(a) An amendment will be proposed to the definition to bring it in line with the Qwelane judgment.  (b) The definition is aimed at clarifying that clause 4 is, among others, aimed at stipulating that not only individuals, but also a group of persons may be subjected to hate speech.
<b>Internet Service Providers’ Association</b> The term “information system provider: should be defined with reference to the ECT Act.	The term is not used in the Bill and it is therefore not necessary to define the term.
<b>Herstigte Nasionale Party, Harvest Christian Church</b> Expressed it’s objection to the wide definition of “harm”.	Noted.
<b>Clause 3</b>	
<b>Banking Association of South Africa, PH Hijul</b> Expressed concern with regard to the fact that a “hate crime” is a crime to	The Department will submit a proposal to the Committee for consideration

be committed in addition to the “base line” offence. Expressed the concern that “motive” is difficult to prove.	to address the concern.
<b>FOR SA</b> (a) Argues that the ambit of the clause is too wide and only qualified by the motive of the alleged transgressor.  (b) Expresses the concern that the grounds that have been identified do not include the grounds of “marital status” and “pregnancy”.	(a) This concern has been addressed elsewhere in the main summary.  (b) The Department will be guided by the Committee with regard to the grounds to be included in the Bill.
<b>FW De Klerk Foundation (February 2019)</b> (a) Argues that changeable characteristics such as “political affiliation or conviction” and “occupation and trade” should be removed from the list.  (b) Also recommends that “juristic person” should be removed from the definition of “victim”.	(a) The Department will be guided by the Committee with regard to the grounds to be included in the Bill.  (b) It is a principle in law that fundamental rights, as far as is possible, also apply to juristic persons.
<b>Nelson Mandela University</b>  The group of persons identified in clauses 3 and 4 is critical to the offences of hate crime and hate speech. Victim groups should be delineated on the basis of real vulnerability.  The traditional method when selecting victim groups for a hate crime definition is immutable or inherent characteristics. Alternative methods include group vulnerability, existing group disadvantage and marginalisation, minority status, and group hostility.  Anomalies with the characteristics in the Bill: (a) constitutional grounds of marital status, pregnancy, conscience and belief have been omitted  (b) directive in s 34 of PEPUDA to extend the grounds to include socio-economic status and family responsibility and status, which have been omitted in the Bill  (c) inclusion of occupation or trade and political affiliation or conviction	Agreed – the most common and vulnerable characteristics and groups have been included.  Noted.  (a) It has been suggested earlier that these grounds are included.  (b) Four grounds were listed in s 34 of PEPUDA - HIV/AIDS, nationality, socio-economic status and family responsibility and status. Two have been included and the latter two excluded. The Department will be guided by the Committee in this regard.  (c) Trade and occupation have been included to protect, among others, sex

<p>as group characteristics – not immutable characteristic and debatable whether it fits into other methods for victim selection</p> <p>(d) PEPUDA test for analogous grounds omitted – consider selecting a few groups for specific protection and then include an analogous grounds provision</p> <p>(e) Characteristics broader than recognised elsewhere (most common victim identity groups in the OSCE region are: race, ethnicity, religion, sexual orientation, citizenship, gender, language, disability, and transgender) and this is extended by the perceived characteristics and the victim’s association with or familial ties.</p> <p>(f) Extensive lists of victim groups will impair the effectiveness of hate crime legislation. By naming certain groups and excluding others, hierarchies of victims are created, which undermines equality.</p>	<p>workers, who are vulnerable and marginalised.</p> <p>(d) The suggestion to include an analogous grounds provision cannot be transferred from civil law to criminal law because of the principles of certainty and legality, particularly in the area of criminal law.</p> <p>€ Noted. The risk is then run that the list is under-inclusive and cannot be extended by an analogous ground provision, hence the tendency toward over- rather than under-inclusivity.</p> <p>(f) The concern regarding inequality between certain groups and individuals is noted.</p>
<b>Clause 4(1)(a)</b>	
<p><b>African Christian Democratic Party</b></p> <p>Section 4(1) of the Bill extends the scope of “hate speech” and lowers the threshold of what qualifies as “hate speech” to speech/expression that is “threatening, abusive or insulting” and which has the potential to “bring into contempt or ridicule”. These terms are undefined, and create the possibility for multiple interpretations and unfair applications. It is further evident that the focus of the impact of “hate speech” is largely subjective. It centers on the feelings and perceptions of the “victim”, who does not even need to be an actual victim.</p>	<p>The Qwelani judgment has a direct and more restrictive impact on the ambit of clause 4.</p>
<p><b>Association Christian Media</b></p> <p>(a) Definition of “hate speech” is overly broad and will likely lead to spurious litigation, criminal charges and threats by special interest groups.</p> <p>(b) Submits that “hate speech” should not be defined wider than section 16(2) of the Constitution. The definition contained in the Bill will have a “chilling effect” on all reporting and public debate, even in opposition of</p>	<p>(a) See response to concern that has been expressed by the ACDP.</p> <p>(b) The Department will be guided by the Committee with regard to the list of “prohibited grounds”.</p>

<p>“hate speech”.</p>	
<p><b>ADF International</b></p> <p>(a) The definition of hate speech is incompatible with domestic and international law obligations to protect freedom of speech and religion; runs the risk of creating frivolous litigation and is likely to have a chilling effect on speech and discourse. Dangerous to introduce a criminal offence in areas of ethical, moral, religious, and political disagreement.</p> <p>(b) On the issue of free speech: The Bill introduces a criminal offence that is so broad that anyone can make a claim against an individual who expresses an idea, opinion or observation which offends. The offence could lead to the sanction of an individual who has made a critical statement on a controversial topic without inciting violence. Countries with similar legislation show that the legislation impacts more than those who are prosecuted under it.</p> <p>(c) On the issue of freedom of religion: The Bill undermines religious freedom, which requires the protection of individuals to express and adhere to their beliefs without fear of prosecution in both public fora and in the context of worship.</p>	<p>(a) and (b): The Bill aims to criminalise only the most egregious forms of speech amounting to hate speech, and not simply offensive speech. It has been submitted elsewhere that the exceptions provided for in clause 4(2) aim to recognise and protect freedom of expression and are wide enough. The discretion to prosecute mitigates against frivolous litigation and sanctions for those who make critical statements on a controversial topic.</p> <p>(c) Clause 4(2)(d) protects the interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings. This is wide enough to protect individuals in public and private fora. Clause 4(2) provides sufficient protection freedom of religion if (i) it is bona fide/genuine and (ii) it does not amount to hate speech (i.e. does not advocate hatred that constitutes incitement to cause harm).</p>
<p><b>NAB</b></p> <p>Definition of hate speech too broad. It is already defined in PEPUDA and promulgating legislation with another definition may lead to legal uncertainty. Emphasis should rather be placed on existing institutions to capacitate them to deal with hate speech incidents.</p>	<p>PEPUDA introduced civil remedies in respect of hate speech. Nothing prevents the Legislature from introducing criminal sanctions for “hate speech”.</p>
<p><b>FOR SA, F W de Klerk Foundation, Helen Suzman Foundation</b></p> <p>(a) The provision is unnecessary as existing laws are in place to prohibit “hate speech”.</p> <p>(b) Clause 4 will have a chilling effect on freedom of expression and freedom of religion, belief and opinion (<b>S Chase, Chrystal Clear Ministries International</b>).</p>	<p>(a) The concern has been addressed elsewhere in the main summary.</p> <p>(b) The Qwelani judgment has a direct and more restrictive impact on the ambit of clause 4.</p>

<p>(c) The requirement of a “clear intention to be harmful or incite harm” is problematic. It is not clear what test will be used in this regard.</p> <p>(d) Expressed the concern that the “hate speech” provision will be used against Christians.</p>	<p>(c) The concern that has been raised relate to questions of fact that will be determined on a case by case manner.</p> <p>(d) Freedom of religion is an important fundamental right and it is difficult to see why a specific religion may be subjected to persecution.</p>
<p><b>PH Hijul</b></p> <p>A person convicted of hate speech also run the risk of being convicted of a hate crime.</p>	<p>The Department will propose an amendment to the Committee for approval.</p>
<p><b>Institute of Race Relations</b></p> <p>The hate speech provisions in the Bill are much better than before but still go well beyond these limits. The Bill’s list of 15 prohibited grounds extends far beyond the four grounds listed in Section 16(2) of the Constitution. In addition, the Bill seeks to prohibit and criminally punish speech which has ‘a clear intention to be harmful or incite harm, or to promote or propagate hatred’. This wording is far wider than that contained in Section 16(2)(c) of the Constitution. This clause, as earlier noted, withholds constitutional protection solely from speech which amounts to the ‘advocacy of hatred that is based on race, ethnicity, gender or religion, <i>and</i> that constitutes incitement to cause harm’.</p> <p>Any statute limiting free speech in circumstances going beyond Section 16(2) is invalid unless it complies with the ‘justification’ criteria in Section 36 of the Constitution. Section 36 provides, in essence, that a guaranteed right may be limited only to the extent that the limitation is ‘reasonable and justifiable in an open and democratic society’ and in the light of all relevant factors – including whether ‘less restrictive means could have been used to achieve the purpose of the limitation.</p> <p>“In the criminal context, thus, it is particularly vital that the definition of hate crime used to arrest, prosecute and put people behind bars for up to three to five years should be entirely in keeping with what the Constitution requires. The <i>Qwelane</i> ruling – handed down in a civil law context and with many weaknesses in its reasoning – cannot suffice to confirm the constitutionality of the hate speech definition in the Bill.”.</p>	<p>The Department has consistently stated that it is the Legislature’s prerogative to supplement or extend the common law. The Department will be guided by the Committee with regard to the list of “prohibited grounds”.</p>



<b>Clause 4(1)(b)</b>	
<p><b>FOR SA</b> Expressed concern that any person who communicates something, not being the author, will be subject to prosecution.</p>	<p>Paragraph (b) does not make the unqualified distribution of communication an offence. It requires an intentional distribution of a communication that amounts to hate speech in others words incorporating the elements contained in paragraph (a), namely, intentional publication with the intention to be harmful or to incite harm, and promote or propagate hatred.</p>
<b>Clause 4(2)</b>	
<p><b>African Christian Democratic Party</b> (a) In the event that the “hate speech” sections are retained, it is recommended that section the exemption clause, and in particular (d) be tightened to make it very clear that all expressions of belief are protected.</p> <p>In this regard it is recommended that the words “hate speech” be defined in accordance with the provisions of section 16(2) of the Constitution. This will ensure that the controversial issues of “hate speech” as contained in this Bill are exactly in line with the Constitution.</p> <p>(b) The ACDP urged the members of the Committee to be mindful of this sentiment and in the circumstances to consider the following amendments:</p> <ol style="list-style-type: none"> <li>1. Delete the ‘hate speech’ provisions from the Bill altogether and pass the ‘hate crimes’ part of the Bill; or</li> <li>2. Await the outcome of the Supreme Court of Appeal on the constitutionality of the definition of ‘hate speech’ in section 10 of the Equality Act; and,</li> <li>3. Amend the “hate speech” provisions in the Equality Act to the extent necessary; or,</li> </ol> <p>if the Committee decides to retain the ‘hate speech’ provisions in the Bill,</p> <ol style="list-style-type: none"> <li>4. Limit the definition and scope of ‘hate speech’ in the Bill to bring it in line with section 16(2) of the Constitution;</li> <li>5. Amend the religious exemption clause to ensure that it adequately protects the constitutional right to freedom of religion and religious expression by both clergy and individuals in both public and private</li> </ol>	<p>(a) and (b). It is submitted that the ambit of paragraph (d) is wide enough to include clergy and individuals. The Department has pointed out to the Committee that the proposed offence may go wider than section 16(2) of the Constitution.</p> <p>However, the Committee may consider the list of grounds and provide the Department with guidance in this regard.</p>

spheres; and 6. Insert a clause allowing for restorative justice approach by the courts.	
<b>ADF International</b> (a) The religious exemption clause would only apply to sermons and not to statements made by individuals. Narrow protection that fails to protect members of the religion/faith.  (b) Affords authorities a wide discretion in determining what statements are “bona fide”, and thus protected, and which are not. Issue with legal certainty.  (c) Bill must be revised to ensure there is robust protection for freedom of expression and freedom of religion or belief.	(a) Incorrect that clause 4(2)(d) would only apply to sermons. It protects the interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings. This is wide enough to cover statements made by individuals.  (b) The Qwelane judgment made it clear that an objective test should be applied. The “bona fide” test has been applied in law for a very long time and there is ample judicial interpretation which mitigates the risk of criminalising bona fide speech.  (c) Clause 4(2) provides sufficient protection for free speech and freedom of religion if (i) it is bona fide/genuine and (ii) it does not amount to hate speech (i.e. does not advocate hatred that constitutes incitement to cause harm).
<b>NAB</b> Current wording of exceptions may lead to confusion. References ICASA and BCCSA codes which provide for exemptions to broadcast which assesses media content in context to determine whether it has scientific/artistic/religious etc. merit.  Suggests that clause 4(1)(a) be amended to: any bona fide artistic creativity, performance or expression, to the extent that <b><u>when judged within context</u></b> , such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm, based any one or more of the grounds referred to in subsection (1)(a).	The Department does not agree with this suggestion – it does not take the matter further or clarify the wording. The bona fide requirement necessarily requires an assessment to be made in the context of the activity as to whether it is bona fide/genuine or not.
<b>Clause 6(1)</b>	
<b>Banking Association of South Africa, Catholic Institute of Education, B and G Tuffin</b> Expressed concern regarding the sentences to be imposed in respect of	The Department is of the view that the sentences are appropriate especially

<p>“hate crimes”.</p>	<p>in view thereof that it should be the underlying offence that has to be taken into consideration when sentencing options are considered.</p>
<p><b>Institute of Race Relations</b></p> <p>The penalties set out in the Bill – with their emphasis on lengthy prison terms lasting as long five years for any repeat offence – are unnecessarily draconian. This is especially so when more suitable penalties are readily available in the form of apologies, community service, and appropriate fines. Penalties of the latter kind would be more in keeping with the principles of restorative justice.</p> <p>Since hate motivations already count as aggravating factors warranting harsher punishments, there is no need for new legislation seeking to provide for this. In particular, there is little logic in introducing a Bill which <i>bars</i> the courts from regarding a hate motive as an aggravating factor in particularly serious cases, such as murder and rape, where minimum sentencing rules apply.</p> <p>This provision makes it clear that the accused on, say, a hate crime murder charge can still be convicted of murder if all the elements of that crime, other than the prejudiced motivation, have been proved beyond a reasonable doubt. This prevents the murderer from walking free – while the prosecutor will doubtless then seek to fall back on the existing law, which requires proof of aggravating factors only on a balance of probabilities. But why then introduce the hate crime provisions in the Bill at all?</p>	<p>The Department is of the view that the sentences being proposed in respect of hate speech is not too harsh. Especially in view thereof that “hate speech” as a new offence will be introduced. The courts in terms of clause 6(3) will have the option to impose a fine or a prison sentence or both. It is submitted that within this framework the courts will consider sentencing with reference to the facts and surrounding circumstances of every individual case.</p>