**NOTE: ISSUES RAISED IN PORTFOLIO COMMITTEE: PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL**

**1. Introduction**

The Portfolio Committee expressed the concern that the “characteristics” and “grounds” are, with reference to section 16(2)(c) of the Constitution, too extensive. The Department was requested to submit a note in respect of—

(i) the basis for the inclusion of the list of *“characteristics”* and *“grounds”* applicable to clause 3 and 4, respectively; and

(ii) whether the listed *“characteristics”* and *“grounds”* pass the proportionality test and a limitations analysis as contemplated in section 36 of the Constitution.

**2. Background information as rationale for the Bill**

2.1 Background to the development of the Bill

2.1.1 The *Ad Hoc* Joint Committee that approved the Promotion of Equality and Prevention of Unfair Discrimination Bill in January 2000, recommended that separate legislation with the objective of criminalising hate speech should be promoted.

2.1.2 South Africa signed the International Convention on the Elimination of All Forms of Racial Discrimination on 3 October 1994 and ratified it on 10 December 1998. Article 4 of the Convention requires that States have an obligation to declare hate speech and any act of or incitement to violence, which is directed at persons of a particular race, group of another colour or ethnic group, to be a criminal offence. A reading of the Convention confirms that the taking of steps towards criminalisation of hate crimes and hate speech, are long overdue in South Africa.

2.1.3 Rationale for hate crimes

(i) improving access to justice as many marginalised groups fail to report these crimes for fear of being further victimised by law enforcement officers and other government officials due to its non-recognition as a crime in the statute book;

(ii) helping create a common understanding of hate crime amongst those who are involved in the criminal justice system and will enable criminal justice officials to track particular trends of crime targeting certain groups in order to improve the security of marginalised groups;

(iii) helping to improve the confidence of marginalised groups in the police and the criminal justice system as they see these crimes are being investigated and prosecuted;

(iv) sending a very strong message that hate crimes are serious offences and will not be tolerated in South Africa;

(v) providing an opportunity to monitor efforts and trends in addressing hate crimes.

2.1.4 Rationale for hate speech

Advantages associated with the criminalisation of hate speech is that criminalisation—

(i) sets clear boundaries as to when freedom of expression extends beyond what is permissible in our constitutional democracy;

(ii) establishes a legislative structure in a democracy in which a rules based approach to a compromise of competing rights, is most effective;

(iii) is imperative for democracies born from past atrocities and serves as a protective measure against prejudice and offensive speech; and

(iv) send a clear message that instances of hate speech will not be tolerated.[[1]](#footnote-1)

(v) uninhibited free speech undermines social cohesion and promotes community segregation and in-group formation.

**3 Discussion**

3.1 Identification of “Characteristics”: An overemphasis on the extension of the characteristics and grounds beyond section 16(2)(c) and section 9(3) of the Constitution should not be the starting point, but rather an analysis of the Bill in light of the rationale and underlying policy considerations of legislation criminalising hate speech and hate crimes.

3.2 The Department wishes to emphasise that there is no uniform understanding of victim categories and methods of selection of victim categories. In identifying victims for the purposes of legislation such as the Bill, the Organisation for Security and Cooperation in Europe has, among others, stated as follows:

“Depending on the national and local context, members of groups that are already marginalized or discriminated against are more likely to be targeted in hate crimes than others. Victims are often selected based on the intersectional nature of identities, and such crimes can be motivated by multiple biases.[[2]](#footnote-2)

3.3 The question was raised in the Portfolio Committee how the list of *“characteristics”* was compiled. In this regard it may be noted that—

(i) there are no statistics or empirical data available, either from SAPS, the NPA or elsewhere, that could indicate how many hate crimes are committed on an annual basis in respect of each of the listed *“characteristics”*;

(ii) the starting point was the listed grounds in sections 9(3) and 16(2)(c) of the Constitution and PEPUDA; and

(iii) the Department also had to rely on interested parties to provide anecdotal information (it may be mentioned that similar information was submitted to the Portfolio Committee by interested parties during the public participation process).

3.4 The South African Human Rights Commission keeps statistical data, among others, on equality complaints that they receive. The following may be mentioned:

(i) In the 2020 – 2021 Annual Trends Analysis Report it was reported that the top five rights violations included complaints in respect of equality with an average of 682 cases over a 9-year period and in respect of dignity, an average of 404 cases over a 5-year period.

(ii) With regard to equality complaints it was indicated in the 2020 – 2021 Report that the complaints were distributed as follows, race (60%), any other ground (14%), disability (8%), sexual orientation (6%), religion (4%), ethnic or social origin (4%), age (1%), colour (1%), gender (1%), language and birth (1%).

3.5 Identification of “Grounds”: The list of “grounds” in the introduced version of the Bill is a duplication of the list of “characteristics” with the exception of occupation or trade and political affiliation or conviction. The exclusion of the aforementioned grounds was based on the concern that their inclusion will limit freedom of expression. However, the Department has proposed in the most recent working document that the grounds should be restricted to the most egregious forms of hate speech.

3.6 It should also be kept in mind that clause 4(1), as introduced, presented a very wide test of what constitutes hate speech. The proposed amendment of clause 4 in the working document is a more stringent test and it is submitted that this is in the interest of freedom of expression.

3.7 The purpose of legislation like the Bill is harm-preventative or deterrent, symbolic and in furtherance of social cohesion and, in the case of South Africa, this Bill, among others, will provide an effective remedy in law where no such relief is present. The purpose of the Bill is therefore substantially different from legislation like PEPUDA. An overemphasis on the expansion of the characteristics and grounds beyond section 16(2)(c) and section 9(3) of the Constitution should not be the starting point, but rather an analysis of the Bill in light of the rationale and underlying policy considerations of legislation criminalising hate speech and hate crimes.

3.8 Having established that the purpose of this Bill is different, it follows that categories of persons and groups whom the Bill seeks to protect can expand on the grounds listed in section 16(2)(c) and section 9(3) of the Constitution.

3.8.1 The arguments of the proponents of a narrow interpretation of the criminalisation of hate speech could be interpreted to mean that any form of statement that is hateful and which harms the dignity of a person, is somehow permissible when weighed against the freedom of expression clause in the Constitution. Such an interpretation implies that this protects the rights of persons making such statements over and above those of persons against whom they are made. There is no doubt that hate speech causes emotional damage and leaves people feeling humiliated and degraded. It encourages hostility and abuse and has a severe impact on a person’s sense of self-worth and acceptance. This may cause target groups to take drastic measures in reaction to such attacks.[[3]](#footnote-3)

3.8.2 Milo and others further make the point that freedom of expression is not a paramount right, but must be weighed against other rights in the Constitution. They quote O’Regan J, who said in *Khumalo and Others v Holomisa*[[4]](#footnote-4) that “although freedom of expression is fundamental to our democratic society, it is not a paramount value”. Further in this regard, Kriegler J remarked, in *S v Mamabolo*[[5]](#footnote-5) as follows:

“With us the right to freedom of expression cannot be said to automatically trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated, is that freedom of expression does not enjoy superior status in our law.”.

3.8.3 Milo et al (at pages 42 to 49) conclude that section 16, like all rights in the Bill of Rights, is subject to section 36 of the Constitution (the limitation clause). In terms of the limitation clause, “all rights may be limited provided that the limitation is in terms of ‘law of general application’ and ‘is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.’ This requires a balancing exercise, where the court must weigh up the infringement of the right against the purpose which the infringement seeks to achieve. This view is supported by Rautenbach, in “Introduction to the Bill Of Rights” where he states that “the limitation of forms of expression not covered by the exclusions in section 16(2) must satisfy the requirements of the general limitation clause in section 36(1).”. Section 16(2)(c) specifically excludes from the ambit of section 16(1) (i.e. the general clause protecting freedom of expression) the following:

“advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to harm.”

3.8.4 The question that arises is whether this clause of the Constitution prohibits legislation that is enacted to generally prohibit hate speech that does not necessarily constitute incitement to harm. In answering this question, regard must be had to what section 16(2) seeks to do. Section 16(2) represents what the drafters of the Constitution set as the Constitution’s own limitations to freedom of expression, that is, section 36 cannot be invoked in respect of any of the limitations set out in section 16(2).

3.9 As explained previously to the Portfolio Committee there is no uniform understanding of victim categories and methods of selection of victim categories. In identifying victims for the purposes of legislation like this Bill, academics and international bodies have stated as follows:

3.9.1 Depending on the national and local context, members of groups that are already marginalized or discriminated against are more likely to be targeted in hate crimes than others[[6]](#footnote-6).

3.9.2 The Organization for Security and Cooperation in Europe notes that, outside the “core groups” of race, national origin, ethnicity and religion, there is a lack of consensus in other jurisdictions as to which characteristics are protected under hate crime law. Its analysis of hate crime provisions in the 57 Member States of the OSCE identified “gender, age, mental or physical disability, and sexual orientation” as characteristics that are “quite frequently protected” and also noted a number of other characteristics that are “occasionally protected”, such as marital status, wealth, class, personal appearance, educational status, political affiliation or ideology, and military service.[[7]](#footnote-7)

3.9.3 The issue of how to determine which groups should be protected is not an easy one. Methods of victim selection include (i) a group identity; (ii) immutability (characteristics which cannot, or are incapable, of changing); (iii) history of discrimination or oppression; and (iv) vulnerability and difference. The characteristics and grounds selected for inclusion in the Bill are a mixture of these four victim selection models.

3.10 It has been indicated that the purpose of and rationale behind the Bill differ from the purpose of, for example, equality legislation like PEPUDA. The Department is therefore of the view that it is not necessary to explain why the list of characteristics and grounds in the Bill are an expansion or extension of the grounds in sections 16(2)(c) and 9(3) of the Constitution. There does not need to be a duplication of those sections in order for the grounds and characteristics identified in the Bill, to be justified.

3.11 Although a duplication of the grounds that are reflected in sections 16(2)(c) and 9(3) of the Constitution is not required, the Department has used those grounds to inform the characteristics and grounds that have been included in the Bill, as introduced. This is so because the grounds set out in those sections of the Constitution represent characteristics indicating vulnerability and proneness to marginalisation and often, harm.

3.12 It stands to reason that the grounds referred to in section 16(2)(c) of the Constitution (race, ethnicity, gender or religion) are accepted as non-negotiable and cannot be challenged. In other words, it need not be subjected to a limitation test as set out in section 36 of the Constitution. Any other addition outside of these grounds would have to be subjected to the limitations clause (see above).

3.13 The Department is of the view that a duplication of sections 16(2)(c) and 9(3) of the Constitution is not required, even if it is argued that the additional characteristics and grounds contained in the Bill should be justified within the four corners of the aforementioned provisions, the Constitutional Court in *Qwelane*[[8]](#footnote-8) (which dealt with PEPUDA, legislation passed in accordance with section 9 of the Constitution) stated:

“[128] Through a recent amendment to section 1(a) of the Equality Act, discrimination on the ground of HIV/AIDS status was included as a prohibited ground. The remaining potentially vexed inclusions are those that are wide-ranging and that may elicit apprehension about interference by the draconian “thought police”, like the concepts “conscience” and “belief”. There are well-grounded fears that their inclusion may impermissibly encroach upon the right to freedom of expression…. However, since this is not an issue that is before this Court for confirmation and, particularly in view of the absence of judgments on this point by the High Court and the Supreme Court of Appeal, it is not in the interests of justice to engage with this issue. ***It is best left to Parliament to deal with.***”

(Emphasis supplied)

3.14 On the question of adding analogous grounds the Court pointed out the following:

“[129] What bears consideration next is ***the inclusion of analogous grounds***. It must be emphasised that ***various thresholds must be cleared in order for grounds to constitute analogous grounds*** for the purposes of section 1 of the Equality Act. ***These thresholds resonate with the very purpose of combating hate speech through legislative regulation***. As was articulated in Whatcott:

***“Hate speech is an effort to marginalise individuals based on their membership in a group. Using expression that exposes the group to hatred, hate speech seeks to delegitimise group members in the eye of the majority, reducing their social standing and acceptance within society.”***

[130] It bears emphasis that ***the prohibition of hate speech seeks to protect against the dissemination of hatred that causes or incites harm, in that it undermines the dignity and humanity of the target group and undermines the constitutional project of substantive equality and acceptance in our society.*** Provisions prohibiting hate speech can be contrasted with our law around unfair discrimination. In that context, listed grounds are grounds where the “dignity assessment” is presumed to have already been done – our jurisprudence tells us that discrimination on the basis of a listed ground is presumed to be unfair. This is based on past experiences, historic suffering or systemic disadvantage….

[133] While it is essential that ***targeted groups are not overly broad***, it is equally clear that, since ***section 10(1)(b) [of PEPUDA] does encapsulate and require certain elements that underscore the importance of membership, systemic discrimination and the undermining of dignity, this does not leave the door open for the addition of analogous grounds that allow for an unjustifiable limitation of the right to freedom of expression.***

[134] For these reasons, ***the expansion of the listed grounds to include analogous grounds, does not render the definition of prohibited grounds unconstitutional. The extended prohibited grounds are narrowly crafted to fulfil the purpose of the hate speech prohibition.*** Accordingly, I conclude that the limitation is proportionate in an open and democratic society.”

(Emphasis supplied)

3.15 The Constitutional Court in *Qwelane* stated that analogous grounds in terms of PEPUDA needed to meet a threshold which resonates with the purpose of combating hate speech through legislative regulation. Part of the enquiry into the analogous grounds includes the purpose of hate speech regulation and the identification of targeted groups. Finally, “***the expansion of the listed grounds to include analogous grounds, does not render the definition of prohibited grounds unconstitutional***.”. The Constitutional Court thus acknowledges, in terms of PEPUDA, that the prohibited grounds are capable of expansion, in particular acknowledging that “***the extended prohibited grounds are narrowly crafted to fulfil the purpose of the hate speech prohibition”***.

3.16 These principles, articulated in *Qwelane*, are critical to interpreting the Bill with reference to the characteristics and groups that are included in the Bill, read with the proposed amended definition of “harm” and the tests that are included in clause 4 of the Bill, which means that the ambit of the Bill’s application will be restricted to only the most egregious conduct and speech.

3.17 Section 36 limitation analysis: The general limitation of the rights in the Bill of Rights takes place within the framework of a two-stage approach. In *Ex parte Minister of Safety and Security*[[9]](#footnote-9), the Constitutional Court described the two-stage approach as follows:

"First, there is the threshold enquiry aimed at determining whether or not the enactment in question constitutes a limitation on one or other guaranteed right. This entails examining (a) the content and scope of the relevant protected right(s) and (b) the meaning and effect of the impugned enactment to see whether there is any limitation of (a) by (b). Subsections (1) and (2) of section 39 of the Constitution give guidance as to the interpretation of both the rights and the enactment, essentially requiring them to be interpreted so as to promote the value system of an open and democratic society based on human dignity, equality and freedom. If upon such analysis no limitation is found, that is the end of the matter. The constitutional challenge is dismissed then and there".[[10]](#footnote-10)

3.18 If there is indeed a limitation, however, the Constitutional Court explained further, “the second stage ensues. This is ordinarily called the limitations exercise. In essence this requires a weighing up of the nature and importance of the right(s) that are limited together with the extent of the limitation as against the importance and purpose of the limiting enactment.”[[11]](#footnote-11)

3.19 Section 36(1) of the Constitution sets out the factors to be taken into account in making a proportional evaluation of all the rights and interests involved. It provides as follows:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

3.20 The burden to justify a limitation, the Constitutional Court explained in *Minister of Home Affairs*[[12]](#footnote-12) at paragraphs 35 and 36, “calls for a different enquiry to that conducted when factual disputes have to be resolved. In a justification analysis facts and policy are often intertwined. There may for instance be cases where the concerns to which the legislation is addressed are subjective and not capable of proof as objective facts. **A legislative choice is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data. When policy is in issue it may not be possible to prove that a policy directed to a particular concern will be effective. It does not necessarily follow from this, however, that the policy is not reasonable and justifiable. If the concerns are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them**”[[13]](#footnote-13). *(emphasis supplied)*

3.21 “Where justification depends on factual material”, the Constitutional Court went on to explain, ‘the party relying on justification must establish the facts on which the justification depends. Justification may, however, depend not on disputed facts but on policies directed to legitimate governmental concerns. If that be the case, the party relying on justification should place sufficient information before the court as to the policy that is being furthered, the reasons for that policy, and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion. A failure to place such information before the court, or to spell out the reasons for the limitation, may be fatal to the justification claim. There may however be cases where despite the absence of such information on record, a court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge”[[14]](#footnote-14).

3.22 In conclusion, in light of the *NICRO* case, the Department is of the view that the policy and rationale underlying the characteristics and grounds in the Bill is reasonable and justifiable on a section 36 analysis. The concerns sought to be addressed in the Bill are of sufficient importance, the risks associated with them sufficiently high, and there is sufficient connection between means and ends, that may be enough to justify action taken to address them in the form of this Bill. (See Annexure A for a discussion on characteristics and grounds.)

3.23 The right to freedom of expression and the limitation thereof: There are a multitude of examples in which South African law imposes limitations on the right to freedom of expression which go beyond of the scope of the excluded categories in section 16(2), but which have nevertheless been found to be justifiable or are manifestly so, for example:

(i) The criminal prohibition on public demonstrations that do not follow certain procedures and the civil liability which may flow therefrom;

(ii) the common law and statutory crime of incitement, which is defined as the unlawful making of a communication to another with the intention of influencing him to commit a crime;

(iii) criminal prohibitions on expression in contempt of court “ex facie curiae”; and

(iv) the criminal prohibition on the advertising of harmful substances, even legal ones such as tobacco.

3.24 It is noteworthy that none of the examples referred to above are instances in which freedom of expression has had to be weighed against the counterbalancing values of another constitutional right.

3.25 Where, however, the limitation is sought in order to protect the right to human dignity, the case for justification will be particularly strong. This is reflected in the cases in which the courts have specifically upheld the civil and criminal prohibitions against expression that impairs the reputation of another and the civil prohibition against expression that impairs the *dignitas* (self-worth or self-respect) of another.

3.26 The justification of limits on the freedom of expression under section 36 is by no means an insurmountable obstacle, even when the counterbalancing interests are not in themselves constitutional rights. In cases involving the protection of dignity, it may be expected that the justification of appropriately tailored legislation will not be unduly difficult. It is this need to balance other people’s rights with the right to free expression through “appropriately tailored” legislation, which this Bill seeks to achieve.

3.27 Introduced Bill *versus* proposed amendments: The introduced Bill aimed to criminalise hate speech that is harmful or incites harm or promote or propagate hatred. What constitutes hate speech in terms of the introduced version of the Bill is a wide test to the extent that it qualifies as such if the speech complies with one of two sets of criteria. The disjunctive “or” introduced two separate tests. The definition of “harm” was also a wide definition.

3.28 The proposed amendments to the definition of “harm” and clause 4(1) are significant to the extent that—

(i) it is intended to bring more clarity to what is meant with “harm”;

(ii) the definition of “harm” should be read with clause 4(1) of the Bill; and

(iii) the test for speech to qualify as hate speech will, as proposed in the working document, have to comply with both sets of criteria, namely, it must harmful or incites harm and it must promote or propagate hatred.

**4. Conclusion**

4.1 It is submitted that—

(i) the Bill aims to send a clear message that incidents of hate crimes and hate speech will not be tolerated by the State;

(ii) there are limited statistics relating to hate crimes and hate speech being committed against persons or groups of persons based on the listed characteristics and grounds listed in clauses 3 and 4 of the Bill, respectively;

(iii) the listed characteristics and especially the grounds should not be over-emphasised at the cost of the aim of the Bill, namely, to address the plight of persons against whom these type these offences have been committed in a manner that negatively affects their dignity; and

(iv) grounds that are analogous to those that are contained in sections 9(3) and 16(2)(c) of the Constitution and in PEPUDA could be included in clauses 3 and 4 of the Bill because the rationale and underlying policy of this Bill is markedly different to those provisions and PEPUDA.

4.2 Annexure A includes anecdotal evidence and data from regional and international bodies.

1. “When Political Expression Turns Into Hate Speech: Is limitation through legislative criminalisation the answer?” by M Vosloo (LLM dissertation) (UNISA, 2011)). [↑](#footnote-ref-1)
2. Understanding the Needs of Hate Crime Victims - Organization for Security and Cooperation in Europe (OSCE) (2020). [↑](#footnote-ref-2)
3. Milo, Penfold and Stein in Constitutional Law of South Africa (Second Edition, Volume 2 (Chapter on Freedom of Expression) at pages 42 to 75. [↑](#footnote-ref-3)
4. *Khumalo and Others v Holomisa* [2002] ZACC 12. [↑](#footnote-ref-4)
5. *S v Mamabolo* [2001] ZACC 17. [↑](#footnote-ref-5)
6. Understanding the Needs of Hate Crime Victims - Organization for Security and Cooperation in Europe (OSCE) (2020). [↑](#footnote-ref-6)
7. “A Comparative Analysis of Hate Crime Legislation: A Report to the Hate Crime Legislation Review” by James Chalmers and Fiona Leverick University of Glasgow (July 2017). [↑](#footnote-ref-7)
8. *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22. [↑](#footnote-ref-8)
9. *Ex parte Minister of Safety and Security: In re: S v Walters* [2002] ZACC 6. [↑](#footnote-ref-9)
10. LAWSA at 23-38 (Volume 5(4)) Second Edition. [↑](#footnote-ref-10)
11. LAWSA at 23-38 (Volume 5(4)) Second Edition. [↑](#footnote-ref-11)
12. *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)* 2005 (3) SA 280 (CC). [↑](#footnote-ref-12)
13. LAWSA at 23-38 (Volume 5(4)) Second Edition. [↑](#footnote-ref-13)
14. LAWSA at 23-38 (Volume 5(4)) Second Edition. [↑](#footnote-ref-14)