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For attention: Mr Gurshwyn Dixon

The Select Committee on Security and Justice

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Dear Sir

Attached herewith please find our submission on Hate Crimes Bill from the Association of Muslim Accountants & Lawyers of South Africa (AMAL).

Kindly Acknowledge receipt hereof

Thank You

Secretary General

Ashraf Parker

23 May 2023

**WRITTEN SUBMISSIONS TO THE SELECT COMMITTEE ON
SECURITY AND JUSTICE OF THE NATIONAL COUNCIL OF PROVINCES
ON THE PREVENTION OF HATE CRIMES
AND HATE SPEECH BILL (B9B-2018)**

Opposing the bill on the prevention and combating of hate crimes and hate speech: Islamic viewpoint

Introduction:

1. The “Prevention and combating of hate crime and hate speech bill” has provided the Islamic community compounding and contradicting issues with regards to the to the subject of LGBTQIA+ community. In Islam and for a Muslim it is strictly prohibited to be in and engaged in same-sex relationship. When explaining the term prohibition, we need to understand and clarify that the act of homosexuality is not allowed, however, we do not judge nor hate a person based upon their views and their choices that they have chosen to have made. Islam respects personal choice. To teach our faith, we need to express our views openly without fear or favour to our youth. There is considerable apprehension that this Bill may limit freedom of speech and silence religious communities. We believe that the Bill has extended the limitations placed on freedom of speech beyond constitutional limits and instils fear in religious communities by imposing restrictions upon their freedom of speech and legislatively coercing them to remain silent on matters of faith. The Muslim community may be conceived and construed to be spreading hate crime and hate speech towards the LGBTQIA+ communities when preaching their faith, and this may result in an untenable situation

2. In Islam, emphasis is placed on the preservation of a more traditional family structure, this means a mother, father and the children that originates from both parents. In Islam the act of procreation is viewed as a critical factor in the matrimonial relationship which can only take place between a husband (male and female). Orthodox Islam does not extend the act of marriage to a same-sex relationships which excludes the act of procreation in a traditional sense.

3. Section 15 and 16 of the Constitution of the republic of South Africa provides protection to Muslims to freely practice and manifest their religion and religious openly and without prejudice towards them.¹ Muslims believe that homosexuality is against their beliefs and Muslims should be able to express their religious views about homosexuality to their co religionist and family without fear and without inciting others to violence. By allowing this Bill to be introduced, it can impose undue limits to the right to preach, teach and disseminate the teachings of Muslims and deny the right to freedom of religion. Our submission is that this Bill should not be allowed to be enacted as it is unconstitutional in its very essence as it restricts the very freedom it seeks to promote. Furthermore, it is restrictive in nature and curtails freedom of religion. In this paper we will endeavour to prove that this Bill must not be passed as we are of the opinion that it will not pass constitutional muster.

This submission will be divided into three primary categories:

3.1 the first aspect looks at section 3 of the Bill, the 'offence of hate crime'. In this section we will be explaining how Islam does not cause harm or hate towards individuals but the tenets of the Islamic faith do not justify or condone homosexuality and is viewed as against the teachings of the religion and how the teachings do not amount to hate crime, nor does it subscribe or incite hate crimes.

3.2 The second aspect that will be discussed is section 4 of the bill, 'the offence of hate speech', similar to hate crime, hate speech is subject to various interpretations and can be construed in many different ways. The interpretation of hate speech is not linear and monolithic. The Quran explains that the act of

¹ Section 15 and 16, The Constitution of the Republic of South Africa Act 108 of 1996

homosexuality is explicitly prohibited. A topic often openly discussed by Muslim preachers and family. With this then in mind, how does a Muslim openly discuss this with other Muslims without it amounting to hate speech as it is part of the faith.

3.3 The final aspect is using section 4(2) of the Bill to highlight points of aspects one and two. This section explains that one can allow for certain hate speech to be justified if it is in good faith and without causing harm to the selective group that feel prejudiced.

4. The offence of Hate Crime

4.1 Section 3 of the Bill explains that actions amounting to hate crime can only occur when the person or group is driven by their own bias or lack of acceptance towards the targeted individual or group. As explained in the Islamic faith we are taught not to judge others based on their beliefs and opinions. As Muslims we can co-exist in a pluralist society in harmony., However, there are limitations placed upon us as Muslims. homosexual acts are strictly prohibited in the Islamic faith and not being able to communicate the teachings of our religious beliefs and instructions places undue hardship and limitations on our freedom to propagate and manifest our religious belief. We look at the Constitution in this regard Particularly section 15(1) states that “everyone has the right to freedom of conscience, religion, thought, belief and opinion”².

4.2 Section 15 does not only specifically protect the religion of Islam in general, but also protects the historical accuracy and teachings of the religion. What is meant by the previous statement is that looking at the Quran, the holy scripture that is

² Section 15, The Constitution of the Republic of South Africa, 1996

followed by the Islamic faith, we see that the act of homosexuality is condemned, as this is proven by a specific verse, such as the Story of the people of Lut. In this verse we see that the act of homosexuality is punished by God by destroying the cities of Sodom and Gomorrah³. One cannot see this as hate crime as this is the teachings of a religious book and no emphasis is directed at harming the LGBTQIA+ community. Whilst the act of homosexuality is condemned by Islam, Islam does not in any way propagate any violence to be perpetrated against homosexuals. Punishment for such acts may only be carried out by religious government which does not exist in our constitutional dispensation as such Muslims recognise that we are in a pluralist society where we coexist, but this does not detract from the fact that we may still preach that such acts are forbidden in our religion without such preaching being construed as criminal or hate speech.

4.3 For a more detailed consideration of section 15 of the constitution we need to look at the critical writing of Nicholas Smith, a scholar who has undertaken an exposition of section 15 for a fundamental understanding to gain considerable insight into its dynamics. Smith explains although commonly known as 'the right to freedom of religion,' it is evident that section 15 safeguards more than just the beliefs of officially recognized religions. ⁴ Smith defines religious freedom as including various aspects such as the right to hold religious beliefs, spread religious teachings, and express religious convictions through worship and practice ⁵. In other words, the ability to make manifest one's religious beliefs through ritual and practice. Additionally, he explains freedom of conscience as a related right to hold and act upon personal moral beliefs that are not necessarily based on religion, allowing individuals to act in accordance with those beliefs. It

³ (The Qur'an, 27:56)

⁴ Also see Emily Cooper <https://openbooks.uct.ac.za/uct/catalog/view/30/46/1515> for a fairly detailed exposition of the scope and application of section 15. (Accessed on 23 May 2023). Also see dr David Bilchitz *The Tension Between Freedom of Religion and Equality in Liberal Constitutionalism* https://hsf.org.za/publications/focus/focus-62/David%20Bilchitz_Freedom%20of%20Religion%20and%20Equality.pdf. Accessed on 23 May 2023

⁵ Nicholas Smith 'Freedom of Religion under the Final Constitution' (1997) 114 SALJ 217 at 219.

can be argued that section 15 incorporates both positive and negative elements. The positive element grants individuals the freedom to embrace and engage in the beliefs they choose, while the negative element prohibits the state from coercing individuals to accept or reject a particular ideology. Importantly, the Constitution does not mandate a strict separation between government and religion, as illustrated by section 15(2)⁶.

4.4 In terms of the above explanation, a court may not convict a person who is practicing their religion, even though there may be a suspected offence of hate towards the LGBTQIA+. However as expressed throughout this article whilst explaining the teachings of the Islamic faith to other Muslims, the act of Homosexuality is forbidden while the person who takes part in this act is allowed to do so as long as there is no contradicting influence and acceptance when it comes to expressing the Islamic faith openly and to other Muslims. Looking at more expressive overviews we need to highlight whether expressing the Islamic faith can cause an LGBTQIA+ individual to feel that their right to equality or their right to express their own beliefs have been however, this is not the case.

4.5 Conflict and tension often arise between competing rights as is often the case with freedom of religion and equality. For example, the Islamic faith prohibits the act of homosexuality. A homosexual individual could argue that this infringes their right not to be discriminated against on the grounds of sex, sexual orientation and gender. The religious organisation would respond that the right to freedom of religion includes the right to practise that religion as per its dictates. It is argued that freedom of religion allows religious communities to organise themselves according to their beliefs, one of which is the belief that the act of homosexuality is prohibited. As a fundamental right, section 15 acknowledges

⁶ Nicholas Smith 'Freedom of Religion under the Final Constitution' (1997) 114 SALJ 217 at 219.

that as a Muslim homosexuality and teaching of the LGBTQIA+ organization is against its r faith, so therefore Muslims should be allowed to express their views freely. This it is argued does not constitute a hate crime and harmful speech.⁷.

5. **The offence of hate speech**

5.1 Section 4(1) of the Bill in essence explains that the deliberate publication with the intent to promote, or advocate in a manner that could reasonably be seen as intending to: cause harm or encourage harmful actions, or spread and promote hatred is therefore guilty of hate speech. When looking at this section if it has already been established that the Islamic faith regards the LGBTQIA+ act as prohibited in the Quran then therefore this cannot be considered as hate speech as the Muslims are merely following the tenets of their religious practices. In this regard if Muslims are not allowed to express their views in writing and by speech this is viewed as limiting their right of religion and the Bill is therefore considered as infringing their fundamental right.

5.2 After careful consideration of section 4(1) of the Bill we see that the usage of the word 'Harm' is not only layered and patterned, but it is also amplified multiple times in the Bill. Any scholar of Constitutional law however, will be loath to confine the term 'harm' to a specific category The following forms of harm are considered; emotional harm, psychological harm, physical harm, social and economic harm.⁸

⁷ See the works of Professor Jonathan Klaaren: Jonathan Klaaren is a legal scholar specializing in human rights, constitutional law, and legal pluralism. He has written extensively on constitutional rights, including freedom of religion and belief. His work explores the complexities and challenges associated with protecting and balancing these rights within a diverse pluralist society. See also Shaheen Azmi; Lorne Foster; Lesley A. Jacobs *Balancing Competing Human Rights Claims in a Diverse Society* Irwin Law (Canada)

⁸ The Bill of Rights in the Constitution of South Africa recognizes and protects against various forms of harm and rights violations. While it does not explicitly list specific forms of harm, it guarantees a wide range of rights and protections to individuals. These rights can be seen as safeguards against different forms of harm. Some key rights in the Bill of Rights that address various types of harm include:

Viewing these terms we see that one can say that any action in general may constitute harm as the Bill does not provide a clear and crisp definition of the term. In the Islamic faith, emphasis is placed on the importance of compassion, respect, and avoiding harm to others. There is therefore a need for a more explicit and crisp definition of hate to understand and allow for the Muslim community to continue with their beliefs and reasoning. The interpretation and understanding of harm are generally guided by legal principles, case law, and context-specific considerations. The Constitution aims to provide broad protection to individuals against various forms of harm without rigidly defining each specific instance. In legal contexts, the definition of "harm" frequently takes into account the term's common and natural meaning as well as its function within the particular rule or right under consideration. In order to clarify their concept of harm, courts and legal experts may also turn to comparative law, legal principles, and international human rights standards.

5.3 before a law is promulgated or Bill is passed there needs to be mutual understanding amongst all communities and people of the republic of South Africa., It is our submission that the wording and the word harm is misplaced and is unconstitutional as it does not underline a specific way in which the conduct of

Equality (Section 9): This section prohibits unfair discrimination based on various grounds such as race, gender, religion, or social origin. It aims to prevent harm caused by discrimination and promote equal treatment and opportunities. Human dignity (Section 10): This section protects the inherent dignity of every person and guards against degrading treatment or punishment. It aims to prevent harm to a person's dignity, identity, and self-worth. Life (Section 11): This section protects the right to life, safeguarding individuals from harm to their physical well-being and protecting them from arbitrary deprivation of life. Freedom and security of the person (Section 12): This section safeguards against various forms of harm, including torture, cruel, inhuman, or degrading treatment or punishment. It also protects against arbitrary arrest or detention. Privacy (Section 14): This section safeguards individuals' right to privacy and protects against unauthorized intrusion into their personal lives, homes, and correspondence. It helps prevent harm caused by unwarranted invasions of privacy. Freedom of religion, belief, and opinion (Section 15): This section protects individuals' rights to practice their religion, hold their own beliefs, and express their opinions freely. It guards against harm caused by restrictions on these freedoms. Freedom of expression (Section 16): This section protects the right to freedom of expression, including freedom of the press and other media. It aims to prevent harm caused by censorship and restrictions on the dissemination of information and ideas.

hate speech can be regulated.⁹ In an important Constitutional Law case, *State President v Hugo*, the principle of the rule of law states that in order for a Bill to be regulated it must provide clear understanding and must provide for easy implementation. If Muslims would speak out on the LGBTQIA+ community, he should not be found guilty of the offence of hate speech¹⁰.

5.4 Upon closer observation of section 4 of the Bill, Sections 4(2)(a) and 4(2)(d) of the Bill, it is obvious that these sections lack clarity, leaving room for confusion as a result of the multiplicity of interpretations that this provision is capable of.¹¹ Of particular interest is section 4(2) (d), which directly relates to and impact upon the Muslim community. It provides an understanding that when Muslims want to express a religious opinion on issues pertaining to the LGBTQIA+ community they should do so without prejudice and without the threat of being accused of hate speech. According to this section, the provisions outlined in subsection 4(1) do not apply when certain actions or conduct are carried out in good faith as part of sincere engagement in the legitimate interpretation, promotion, and propagation of religious tenets, beliefs, teachings, doctrines, or writings. However, it is crucial to note that such interpretations and promotions must be bona fide and not endorse or incite hatred that leads to harm, based on the grounds specified in subsection 4(1)(a).

5.5 The Islamic faith and its beliefs are entrenched in the Muslim mind since a tender age to ensure they are able to express and manifest their beliefs without the threat of

⁹ ME Marais, JL Pretorius “The Constitutionality of the Prohibition of Hate Speech in terms of Section 10(1) of the Equality Act: A Reply to Botha and Govindjee” *Potchefstroom Electronic Law Journal* (22) 19 2019.

¹⁰ *State president v Hugo* 1997 Recognising that injustices of the past have led to inequalities and that these inequalities cannot be addressed by treating all persons equally at all times,⁹ the constitution has provided for a substantive rather than a formal approach to equality

¹¹ See Tameshnie Deane “The Constitutional Court’s approach to equality” taken from <https://journals.co.za/doi/pdf/10.10520/EJC27401> Accessed on 23 May 2023

being accused of hate speech. In the Quran homosexuality is expressly prohibited and Muslims are admonished not to partake in any such activity.

5.6 From the point of view of the above deliberation it will not be possible for any Muslim adherent to convey any disagreement towards the LGBTQIA+ community. However, we believe this may be done in a respectful manner and if the Muslim community wishes to express their religious beliefs and moral convictions, this should be allowed as they are using their right to freedom of religion.

6. Section 4(2) breakdown

6.1 In terms of section 4(2) the Bill set out that subsection 4(2) the offence of hate speech does not apply if it is done in good faith.

6.2 Certain sections of the Bill that lack clarity and are ambiguous include sections 4(2)(a) and 4(2)(d). We focus on the latter section, which pertains to Muslims. This section states that the provisions mentioned in subsection 4(2) do not apply to any actions or conduct carried out in good faith during the sincere interpretation, promotion, or endorsement of religious principles, beliefs, teachings, doctrines, or writings. However, this exception does not cover the advocacy of hatred that incites harm, based on the grounds specified in subsection 4(1)(a).

6.3 In essence, this section implies that individuals who intentionally publish, propagate, or advocate ideas, or communicate in a manner that demonstrates a clear intention to harm or incite harm, or promote hatred based on the specified grounds, will not be charged with hate speech if their actions are done in good faith while engaging in the sincere interpretation, promotion, or endorsement of religious principles, beliefs, teachings, doctrines, or writings. It is important to note that this exception does not encompass the advocacy of

hatred that incites harm, based on the grounds mentioned in subsection (1)(a). If a Muslim that follows the Islamic faith believes that by expressing their views to other Muslim's helps to understand and endorse religious teachings, therefore it should be considered as good faith and following the right to practice one's religion.

6.4 Both section 1 and section 4 lack clarity in defining specific types of conduct that would be considered as "good faith." Since this statute pertains to criminal law, it is crucial to have precise and well-defined crisp concepts within the law. Citizens need to know in advance what actions could potentially be deemed criminal. The uncertainty surrounding the definition of "good faith" (Bona Fide) conduct will lead to self-censorship among Muslims and others. Moreover, individuals who express their rights under section 15(1) (freedom of religion) and section 16 (freedom of expression) may face public condemnation and legal consequences due to the ambiguity in the law.

6.5 Regarding the term "bona fide," which is the Latin equivalent of "good faith," it remains unclear whether its usage in section 4(2)(d) only applies as a qualification for the word "interpretation" or, due to the conjunction "and," also encompasses "proselytising" and "espousing."

8.1 We believe that there is an increasing sensitivity within our society, particularly within the LGBTQIA+ community, towards the opinions of their critics. This heightened sensitivity has the potential to develop into an unjustifiable intolerance. Additionally, we argue that the state, and to some extent the courts, instead of creating legislation that upholds the rights of all individuals in our

republic, are inadvertently enabling the dominance of one group over another. Specifically, the dominance of secularism over religion.

8.2 It is our submission that practicing Muslims should have the freedom to openly express their faith without fear and any obstacles, even if it may involve matters concerning the LGBTQIA+ community. If the Muslim community expresses concerns that the LGBTQIA+ community cannot fully understand or accept their religious practices, it is important to recognize that these views are based on religious teachings and not specifically targeted at the LGBTQIA+ community. Consequently, any discussions of hate speech or hate crime should take this context into account.

9. General commentary

9.1 The Bill represents a significant threat and infringement of the fundamental right of freedom of expression, not just for individuals and politicians, but also for journalists, artists, academics, and religious practitioners. Despite the limited exemptions granted to these groups under the provisions of the bill, their freedom of expression remains at risk. Religious practitioners will then be confined to the practice of their religion without being able to proselytise and therefore undue limitations are placed on their right to freedom of religion.

9.2 Should the proposed Bill be accepted, it will limit the right to freedom of expression that is carefully defined and protected in terms of Section 16 of the Constitution.

9.3

9.4 We are concerned that the Bill would criminalise constitutionally protected speech and therefore limit the right to freedom of expression.

9.5 As extensively discussed in this paper, the Bill surpasses the freedom provided and the evident intention of section 16 by expanding the number of protected characteristics from four to fifteen. Moreover, it introduces a new definition of harm that broadens its scope, resulting in a lack of clarity and understanding. Consequently, this subjective interpretation renders the Bill seemingly devoid of meaning.

9.6 The Bill, through its extensive inclusion of a wide range of characteristics beyond those outlined in the section 9 Equality provision of the Constitution, expands the scope for potential harm. This broad net creates an environment where liability may be determined based on subjective considerations rather than objective facts.

9.7 If found guilty the seriousness is one that is out of place. The risk to freedom of expression is further amplified by the potential consequence of a three-year prison sentence for a first offense of hate speech.

9.8 The mere existence of such an excessively harsh sentence would create an atmosphere where individuals, media outlets, and online platforms feel compelled to engage in self-censorship, refraining from expressing any views that could potentially offend individuals belonging to the 15 protected categories. Consequently, this would significantly impede free and open discussions on a wide range of topics.

9.9 Furthermore, the bill's broadening of the definition of "victim" to include not just individuals but also "juristic persons" poses a significant obstacle to civil society's ability to hold institutions and organizations accountable. Fearing the possibility of being accused of hate speech, individuals may hesitate to criticize or challenge the actions and behaviours of such entities. This extension of liability hampers the important role civil society plays in promoting transparency and accountability.

9.10 Authentic and vigorous debates on current issues are essential prerequisites for healthy democratic governance, ensuring accountability, responsiveness, and transparency. Therefore, it is imperative to unwaveringly defend the constitutional right to freedom of expression. The existing legislation provides adequate remedies and sanctions for hate speech, rendering the inclusion of a hate speech clause in the bill unnecessary and easily removable. Hence, it is recommended to completely eliminate the hate speech clause from the bill, as it can be readily severed from the rest of the legislation.
