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Date: 22 May 2023

Hon. S Shaikh, MP
Chairperson: Select Committee on Security and Justice
By email: HateCrimesBill9B-2018@parliament.gov.za

**RE: SUBMISSION ON PREVENTION AND COMBATING OF HATE CRIMES AND HATE
SPEECH BILL (B9B-2018)**

This is a response to the Select Committee on Security and Justice invitation for the submission of written comments on the **Prevention and Combating of Hate Crimes and Hate Speech Bill (B9B-2018)**.

Background

1. The Centre for Social Justice (CSJ) and Law Trust Chair in Social Justice at Stellenbosch University is grateful for the opportunity to submit comments in response to the call for comments on the Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018. The comments have been enriched immensely and are submitted with the input of stakeholders who attended our roundtable held on 26 April 2023, including the contribution of the Commission for Gender Equality (CGE).
2. The research, innovation, teaching and stakeholder engagement efforts of CSJ at Stellenbosch University is to contribute to ending poverty and equalising opportunities by 2030, in support of the National Development Plan (NDP), Agenda 2063 and the UN

Sustainable Development Goals (SDGs). In having committed ourselves at the Inaugural International Social Justice Summit and Conference that was convened from 29-31 August 2019, to join hands in advancing the constitutional promise, human rights and Sustainable Development Goals in a manner that redressed imbalances of the past, while ending poverty and ensuring no one is left behind with regard to full participation in all aspects of the economy and social life, we seek accelerated change, focusing on

- Policy and law reform through data analytics to ensure inclusive and transformative social impact;
- Mobilizing society towards social accountability and social cohesion;
- Cultivating leadership at all levels of society and contributing to a capable state; and
- Resource mobilization from society and international collaborators to fund accelerated social change.¹

Introduction

You have heard the English aphorism that says, “sticks and stones can break my bones, but words will never hurt me”. But is this true? Is it only physical attacks that can harm us?

One of the legends from eSwatini, pointed to the gravity they attach to insults. The legend summarized the narrative of Swati warriors following an ancient battle with the Zulus.² They said, Zulus hit us hard, but we excelled in insulting them. Many egregious Swati insults cannot be repeated in public without leaving people traumatised for days and the utterer to wash their mouth with some disinfectant.

What can be deduced is that Swatis knew millennia ago, what neuroscientists discovered only in the last century, that words hurt and harm as much as physical harm. In that regard, Dr. Andrew Newberg, a neuroscientist at Thomas Jefferson University, and Mark Robert Waldman, a communications expert state, “a single word has the power to influence the expression of genes that regulate physical and emotional stress.”³ We now know that sometimes the trauma caused by words can be more severe and enduring than physical harm and often underpins stubborn mental health challenges.

The architects of the Prevention and Combating of Hate Crimes and Hate Speech Bill (hereafter referred to as the Hate Crimes Bill) have answered this question in the negative. They believe that both words and physical attacks can harm people and have come up with a draft law seeking to prohibit harmful words and other actions that are driven by the hate of those harmed based on their identity. They are not the first to do so. When we drafted the

¹ Resolution adopted by the Inaugural International Social Justice Conference (2019) Hazendal Wine Estate.

² The context of this assertion is in reference to Professor Thuli Mandonsele’s contribution at the Hate Speech Round Table on the Prevention and Combating of Hate Speech and Hate Crimes Bill on 26 April 2023.

³ Busine Relationship Management Institute, The Neuroscience Behind Our Words, <https://brm.institute/neuroscience-behind-words/>. Accessed 18 May 2023.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, we operated from the same paradigm hence the provisions of section 10, which state that:

“no person may publish, propagate, advocate or communicate words that are based on prohibited grounds, against any other person, where the words could “reasonably be construed to demonstrate a clear intention (a) to be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred.”

It is our considered view that the architects of section 16 of our constitution had the same understanding. In Rwanda and Germany, we have learnt that words can dehumanise others to the point of inciting or enabling others to harm the dehumanised group without shame or sanction. The result was a genocide and holocaust, respectively. In her book, *Apartheid, Britain’s Bastard Child*, psychologist Helene Opperman Lewis gives us into the psychology of harm. One of her quotes is one from Professor David Livingstone Smith, which says:

“When we dehumanise others we banish them from the ‘magic circle of moral consideration’. As consequence, inhibitions against harming them are thereby disabled and we feel free to dispose of them, to suit our purposes).”⁴

In the book, Opperman Lewis focuses on Afrikaner dehumanisation and humiliation by the British and cascading effect of such harm.

It is such banishing of people from the circle of moral consideration that made the horrendous forced exodus of Africans from farms in this country resulting in loss of lives, social fabric and livelihoods 110 years ago under the Group Areas Act (no. 41 of 1950). This atrocity of unimaginable magnitude, which is eloquently documented in Sol Plaatje’s Lamentation titled *Native Life in South Africa*, written a year later, following a country wide evidence gathering process. It is the same banishment from the golden circle of moral consideration that inspired and enabled forced removals under the Group Areas Act of 1950 and the atrocities that flowed from such⁵.

The challenge we face in our analysis of the bill, with a view to making a submission as invited by government, is how far is enough and how far is too far, taking into account the interconnectedness and indivisibility of rights as pointed out in the Vienna Declaration on Human rights and some of our constitutional cases? The rights that immediately come into mind, regarding hate crimes that involve speech, include freedom of expression and religious freedoms.

The Draft Bill

The draft bill states its objectives as being:

To give effect to the Republic’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related

⁴ HL Opperman Lewis *Apartheid, Britain’s Bastard Child* (2018) Piquet Publishers.

⁵ S Plaatje *Native Life In South Africa* (1916).

intolerance, in accordance with international law obligations; to provide for the offence of hate crime and the offence of hate speech and the prosecution of persons who commit those offences; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech; to provide for the reporting on the implementation, application and administration of this Act; to effect consequential amendments to certain Acts of Parliament; and to provide for matters connected therewith.

It further outlaws hate speech and other hate crimes and provide for accountability measures in the event of a breach. Key provisions include:

- 1) **A preamble**, which locates the bill in the constitutional preamble and sections 7, 9, 10 and 16 of the Constitution, international human rights obligations and the prohibition of hate speech in the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act). Regarding international obligations, the bill specifically mentions that the International Convention on the Elimination of All Forms of Racial Discrimination enjoins state parties to enact laws that enact hate crimes.
- 2) **Clause 1: Definitions**, where the only substantive definitions are “intersex”, meaning a congenital sexual differentiation which is atypical, to whatever degree and “victim” means a person, including a juristic person, or group of persons, against whom an offence referred to in section 3 or 4 has been committed.
- 3) Harm: The definition accorded to “harm” are not specific enough to speak to the issues that ought to be addressed when considering the crimes of hate speech and hate crimes. There is need for a comprehensive elaboration on the definition that brings out the issues that ought to be curbed. Specific mention of the character of the crime of hate ensures the recognition of all potential victims.
- 4) **Clause 2: Objects**, which are to:
 - a) give effect to the Republic’s obligations regarding prejudice and intolerance as contemplated in international instruments;
 - (b) provide for the prosecution of persons who commit offences referred to in this Act and provide for appropriate sentences;
 - (c) provide for the prevention of hate crimes and hate speech;
 - (d) provide for effective enforcement measures;
 - (e) provide for the co-ordinated implementation, application and administration of this Act;
 - (f) combat the commission of hate crimes and hate speech in a co-ordinated manner; and
 - (g) gather and record data on hate crimes and hate speech. Should be to enable the gathering of ...)
- 5) **Clause 3: Offence of Hate Crimes** prohibits recognised offences whose commission is motivated by identity based prejudice or intolerance because of the victim’s association or support for a group of persons identified by 16 alphabetically ordered grounds, being: a) age; b) albinism; (c) birth; (d) colour; (e) culture; (f) disability; (g) ethnic or social origin; (h) gender or gender identity; (i) HIV status; (j) language; (k)

nationality, migrant or refugee status; (l) occupation or trade; (m) political affiliation or conviction; (n) race; (o) religion; (p) sex, which includes intersex; or (q) sexual orientation.

Worth noting is that clause 3 of the bill seems to proffer an exhaustive list and does not cover analogous grounds.

A concern raised in one of the submissions are the risks posed by only defining intersexed.

Also worth noting is the rise of private prosecutions, which in this case could include a major corporation targeting a person, given that juristic persons are regarded as persons.

Hate crimes: Considering that over the past years xenophobic violence has erupted in South African communities, it should be explicitly listed as an offence under hate crimes. The argument for the non-specific mention on the list could be that it is captured under “ethnic and social origin”. Due to its recurring nature and the prejudices within communities it warrants its explicit inclusion as characteristic of hate crimes. Its specific inclusion as characteristic to the crime of hate augments the constitutional values that all are equal and entitled to the enjoyment and protection of the rights enshrined and promoted in its laws. It further substantiates the notion that the state regards xenophobia as a hate crime that is serious to warrant its non-commission within the Republic.

- 6) **Clause 4:** Hate speech prohibits intentional publication, propagation or advocacy of anything or communicating “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, based on one or more of the 16 grounds in clause 3.
- 7) Hate speech: on the list of grounds that are considered as hate speech, there ought to be inclusion of gender in its broad interpretation in order to capture potential victims and grounds that are harmful within the context of gender equality and gender justice . Further to that, as reiterated under the offence of hate crimes, xenophobia should be included as a potential ground of hate speech.
- 8) Traditional concerns regarding hate speech include religion and freedom of speech.
- 9) **Clause 5:** Victim Impact Statement makes space for sourcing and assessing impact on victims. Community grassroots organisation and other potential organisations that work in communities on issues related to violence and its prevention should be recognised as having the ability to assist victims in preparation of statements on crimes of hate including hate speech. Due to the legalistic nature of such statements it is unrealistic to have an expectation that victims will always be in a position to draft such statements on their own. A failure to recognise this gap, has the potential of victims slipping in the cracks of non-redress for offences committed against them.
- 10) **Clause 6:** Penalties or orders makes provision for penalties and victim compensation but it appears that the compensation is limited to physical and economic loss and does not seem to deal with emotional harm that cannot be quantified in loss productive ways or medical costs, which leaves the victims with the burden of parallel or additional civil proceedings.
- 11) **Penalties and Orders:** The concern in this section relates to the absence of the recognition of African traditional conflict resolution methods in resolving hate crime and hate speech. There is great emphasis placed on adversarial justice without due

regard to non-adversarial processes promoted in African law under Ubuntu.⁶ Retributive justice and restorative justice through integration within the justice system could provide plausible avenues of redressing hate crimes and hate speech. Restorative justice is a concept found in African law which has greater potential to deal with the prejudices that often perpetuate crimes of hate than incarceration.⁷ An option for the adoption of African restorative legal practices should be accommodated in this Bill. This has the potential to offer a holistic approach in addressing hate crimes within the Republic.

- 12) Based on the above observation, a restorative justice approach can be inferred from existing legislation amongst others, section 297 of the Criminal Procedure Act, 1977, which enjoins presiding officers to impose creative sentences which keep convicted persons out of prison, for instance sentences and the postponement of sentences, with appropriate conditions.
- 13) **Clause 7:** Prosecutorial Directives are provided for as a possibility by the National Director of Public Prosecutions regarding approaches to prosecuting hate crimes and speech. Special education similar to Equality Court prescriptions is not included.
- 14) **Clause 8:** Reporting on the Implementation of the Hate Crimes Act, is mandatory for the designated Minister, which will give an indication of the extent to which the problem is declining or escalating.
- 15) **Clause 9:** Education on Hate Crimes is mandated as a measure aimed at prevention and appropriate handling of such matters by responsible prosecutorial and other officials, but it is not made mandatory that only appropriately trained officers and officials should handle such matters.

The Social Context on Hate Speech and Other Crimes

South African law and social architecture has been a bedrock of legalised hate speech and other hate crimes primarily on the ground of race and its intersection with other grounds such as gender, nationality and class.

Because of the egregious nature of racist hate crimes, equally egregious forms of hate crimes, including hate speech have pretty much flown under the radar. This has been the case with hate crimes based on sexual orientation, HIV status, age and other identity markers that confront hitherto invisible minority groups. Gender unrelated to race, has also not been given adequate attention. It has only been when hate crimes on these other grounds have been so heinous as the case of Gugu Dlamini killed for disclosing her HIV status and a Mozambican national killed in what has since been characterized as Xenophobic violence.

⁶ *Dikoko v Mokhatla* 2006 6 SA 235 (CC); Ubuntu was clearly related to the concept of restorative justice. Malan (2014) De Jure 238. See also *S v Makwanyane* 1995 6 BCLR 665 (CC) para 68, 307, 224, 237.

⁷ J Ptacek, *Restorative Justice and Violence Against Women*. (2016) Oxford University Press. See also M Zernova *Restorative Justice Ideals and Realities* (2018) London Imprint Routledge.

A Aiyedun & A Ordor *Integrating the Traditional with the Contemporary Resolution in Africa. Law Democracy and Development* 20 (2016); I Roesttenburg-Morgan *The Proof is in the pudding: the value of Traditional Justice Mechanisms for Post Conflict Africa. Blog of the Montaigne Centre for Rule of Law and Administration of Justice.* <http://blog.montaignecentre.com/index.php/818/the-proof-is-in-the-pudding-the-value-of-traditional-justice-mechanisms-for-post-conflict-africa/>

The devaluing of life through hate speech does not only translate to hate crimes. It also influences judicial thought as seen in rape cases and murder sentences, key among the murder cases being a case where a farmer got away with murder when a court believed his version that he thought the victim he killed was a monkey.

The emergence of the internet and social media, which includes anonymity opportunities and globalised communication, have further contributed to fertile ground for hate speech and hate fueled cybercrimes.

The Bill responds to some of these challenges, but questions arise regarding the proficiency and proportionality of the regulatory impact of the Act. The comments in this paper are primarily premised in the provisions of a supplementary Regulatory Impact Assessment Tool (RIAT) designed by the Centre for Social Justice (CSJ) at Stellenbosch University to help policy, legislation and programme designers to prospectively assess the social justice impact of their products before implementation.

The key idea behind SIAM is to leverage data analytics to prospectively predict how an intended law, policy or programme is likely to impact of diverse groups existing under differentiated contexts in society primarily with a view to assessing the likely unintended impact of exacerbating inequality and poverty thus deviation from constitutional fidelity regarding the social justice commitment and related equality duty. SIAM was successfully used to predict the likely adverse impact on equality and poverty of Covid-19 regulations from as early as April 2020, the outcome of which was a Statement and Policy Brief on this matter and contribution to an AMBIO article⁸.

The Constitutional and International Human Rights Guardrails

Article 4 of The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) enjoins state parties to criminalise harmful speech and hate inspired harm. It specifically states:

States Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention⁹, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another

⁸ L Chiwona-Karlton *et al* 'COVID-19: From health crises to food security anxiety and policy implications' (2021) *Ambio*, 50(4) 794–811. Available at: <https://doi.org/10.1007/s13280-020-01481-y>.

⁹UN (1965) *International Convention on the Elimination of All Forms of Racial Discrimination*. Available at: <https://legal.un.org/avl/ha/cerd/cerd.html> (Accessed: 12 May 2023).

colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination (ibid).

Prohibition of hate crimes is also a constitutional duty, considering that section 7 of the Constitution enjoins the state to advance all human rights including the rights to equality, which is internally defined as equal enjoyment of all rights and freedoms by all. It is worth noting that the constitutional value of equality in section 1 is framed as an aspirational value as noted in *Grootboom*¹⁰.

Section 10 entrenches and protects the right to human dignity. Of equal significance is the fact that in *Makwanyane*, the Constitutional Court declared the value of Ubuntu as part of South Africa's founding values, based on the postamble of the interim constitution¹¹. Subsequent constitutional court decisions have affirmed that ubuntu remains a value under the Constitution, which makes sense as in *Makwanyane*, Madala J said, social justice is a dimension of ubuntu¹².

From a constitutional fidelity perspective, the Bill ought to contribute meaningfully to everyday justice by complementing section 10 of the Equality Act in preventing hate crimes and providing responsive and proficient avenues for vindicating relevant rights whenever violated. In so doing the Act would be contributing to giving meaning to rights such as equality and human dignity as enshrined in the constitution, while ensuring that the country complies with its international human rights obligations under and beyond ICERD. The central question, accordingly, is whether the bill achieves proficiency and proportionality in solving the problem it seeks to solve, considering the diversity of those it seeks to protect and those that must comply.

Analysis of the Bill and Possible Challenges

The Bill displays great appreciation of the harm caused by hate speech and crimes to groups identified in terms of protected characteristics, while responding decisively to the country's international human rights obligations in terms of clause 3 of ICERD. However, consideration needs to be given to the following:

¹⁰ Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) para 1, 53B-C (“Grootboom”), per Yacoob; D Davis Democracy and Deliberation: Transformation and the South African Legal Order (1999) 44; Du Plessis (2000) 11 Stell LR 385 388; D Moseneke “The Fourth Bram Fischer Memorial Lecture: Transformative Adjudication” 2002 18 SAJHR 309 315.

¹¹ T Madonsela “Making social justice real: Reflections on constitutional fidelity regarding the social justice commitment and achievement of equality in the transformation of the judicial system” in ZT Boggenpoel (ed) *Law, justice and transformation* (2022) 161-191 167.

¹² *S v Makwanyane* 1995 (3) SA 391 (CC) para 237, 263 and 306–7, respectively.

- 1) A tone that transcends the centrality of racial discrimination given the fact that hate crimes and speech against persons and groups on the basis other protected characteristics today transcends race both in prevalence and odious nature of such violation.
- 2) Balance between free speech and hate speech prevention. *Qwelane v South African Human Rights Commission*¹³ and *Afriforum v Economic Freedom Fighters and Others*¹⁴ provide insightful guidance on the approach to be adopted in balancing hate speech and freedom of expression.
- 3) Balance between hate speech prevention: In the Canadian Supreme Court judgement, *R v Keegstra*¹⁵ to count as hate speech, the communication must advocate or encourage “hatred.” Accordingly, hatred in the *Keegstra* matter means “an emotion of an intense and extreme nature that is clearly associated with vilification and detestation.” In the expression of hate there must be intention or rather, it must be expressed intentionally, as it is impossible to express an emotion that is of an extreme and intense nature on a negligent, accidental or subconscious basis.
- 4) The Canadian jurisprudence in the case of *R v Oakes*¹⁶ laid down the test to be applied in balancing the rights in question.
- 5) Choice of measures for the vindication of rights by victims and related accountability prefer the adversarial criminal justice system, which makes little provision for restoring victims.
- 6) Who is a victim, given the fact that speech may impair the dignity or invite harm to 80% of the nation or a significant group as emerged in the *Nelson Mandela v Afriforum* case.
- 7) Is harm only physical or financial? What about emotional and psychological harm?
- 8) Specialised skills needed to identify hate crimes within prosecutors and police. Existing community grassroots groupings skills are needed to identify hate crimes.
- 9) No mention of growing hate speech on the internet, particularly social media and need to control hate speech and other crimes perpetuated as cybercrimes. Specifically, those that pertain to gender warrant explicit elaboration. Furthermore, how can international social media companies be held accountable for refusing to remove hate speech and symbols such as the old apartheid flag that have been ruled as hate speech¹⁷

Conclusion and Recommendations

The Bill needs to be commended for taking the hate crimes agenda forward following a long hiatus since the passing of the Equality Act 20 years ago. However, further refinements based on constitutional fidelity, the Bill could have more transformative potency on hate speech and crimes.

¹³ *Qwelane v South African Human Rights Commission* [2019] ZASCA 167; 2020 (2) SA 124 (SCA) (Supreme Court of Appeal judgment).

¹⁴ *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAGPJHC 599; 2022 (6) SA 357 (GJ) (25 August 2022)

¹⁵ *R v Keegstra* [1990] 3 SCR 697.

¹⁶ *R v Oakes* [1986] 1 SCR 103.

¹⁷ *Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others* (EQ02/2018) [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC) ; 2019 (6) SA 327 (GJ) (21 August 2019).

- 1) The Bill's objects, definitions and remedies need refinement to ensure more responsiveness to the challenges underpinning the need for the bill. Consider a requirement similar to Equality Courts.
- 2) Consider providing for diversion to Alternate Dispute Resolution (ADR) based restorative justice, particularly on hate speech related matters.
- 3) Consider adding a requirement of funds allocation for education on hate speech.
- 4) Provide for state paid psychological services.
- 5) Consider inclusion of cybercrime related hate speech and making it easier to report the crime wherever you are regardless of where committed.

Yours sincerely

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