



SC Justice and Security Committee Presentation

September 2023

Prevention & Combating of Hate Crimes & Hate Speech Bill

[B9B – 2018]

WHAT IS RELIGIOUS FREEDOM?

■ AMBIT OF SECTION 15 RIGHT

- Bill of Rights protects *everyone's* right to freedom of:
 - Thought
 - Belief
 - Opinion
 - Conscience
 - Religion
- Includes the freedom to:
 - Believe & tell others about it
 - Publicly live out that belief by words and actions.
 - Not forced to act against belief
 - Without fear of punishment



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Synopsis of Concerns

PUBLIC REMAINS AGAINST BILL

- NUMBER OF SUBMISSIONS MADE TO NCOP INDICATE PROBLEMS NOT RECTIFIED
 - Vague / undefined / overbroad elements & definitions of proposed crime
 - Sanctions: 8 years' imprisonment
 - **Circular exemption clauses**
- **FOR SA FACILITATED PUBLIC AWARENESS CAMPAIGN**
 - NOT SUBMISSIONS BY MEMBERS
- PUBLIC SUBMISSION REQUIRE DUE CONSIDERATION FOR MEANINGFUL PUBLIC ENGAGEMENT



Effect of Bill – Criminal v Civil

- **BROADENING OF CIVIL PROHIBITION, THEN CRIMINALISING IT**
 - Bill takes the civil law prohibition against hate speech, broadens it and then criminalises it:
 - Constitutional Court's definition of harm in *Qwelane*, a civil matter under a civil law (the Equality Act) is *narrower* than the Bill's definition of harm.
 - Constitutional Court found the Equality Act's expansion of grounds from the Constitution's s 16(2)(c) to pass the section 36 test. However, this is a civil law that imposes civil sanctions (e.g. apology / fine). It is not automatic that the expansion of grounds in a criminal law will pass section 36 justification test.

Synopsis of Concerns – 6 Problems

Problem 1	Unnecessary
Problem 2	Overbroad definitions / elements – Harm, hate, grounds, victim, self-defeating exemption clauses, criminalisation of distribution, lack of parliamentary oversight
Problem 3	Result: vague, unclear, ambiguous
Problem 4	Result: contravenes Rule of Law
Problem 5	Fails s36 Justification Analysis
Problem 6	Fails to meet international law obligations

Problem 2 – Overbroad

- DEFINITION OF “HATE SPEECH” & ITS ELEMENTS

- Bill defines **hate speech** as an expression that consists of the following elements:

- 1) Element 1 - harmful or incites *harm*, and
- 2) Element 2 - promotes or propagates *hatred*;
- 3) Element 3 - against a group of people specifically *listed* in the Bill.

- DEFINITION OF “VICTIM”

- DEFINITIONS NULLIFY EXEMPTION CLAUSES

- DISTRIBUTION

Problem 2 - Overbroad

- **DEFINITION OF ELEMENT 2 – “HATE”**
 - Bill fails to define most essential element of crime.
 - **Result** = people will not know if they are committing the crime of hate speech. (Rule of Law)
 - **Result** = Magistrate’s Courts (Regional Courts) and High Courts have to define this element.
 - **Result** = Parliament neglects duty. (Rule of Law)
 - **Result** = crime is overbroad.

Problem 2 - Overbroad

- **DEFINITION OF ELEMENT 1 – “HARM”**
 - Bill’s current **definition of harm** (is contrary to the ***Qwelane*** judgment) in a substantial way.

Bill’s Definition of “harm” - Clause 1

“ ‘harm’ means **substantial** emotional, psychological, **physical, social or economic detriment** that **objectively** and severely undermines the human dignity of the targeted **individual** or groups;”

Constitutional Court’s definition of “harmful”

“ ‘harmful’ can be understood as **deep** emotional and psychological harm that **severely undermines** the dignity of the targeted group.”

Problem 2 - Overbroad

- **DEFINITION OF ELEMENT 3 – “GROUNDS”**
 - Bill proposes wide range of grounds (**18 grounds**) compared with section 16(2)(c) of Constitution (**4 grounds**).
 - Grounds are **undefined** - problematic for new grounds with novel, socially fluid, controversial or contested meanings.
 - Effect: Bill catches expressions in its “**hate speech net**” beyond the expression envisaged in section 16(2)(c) of the Constitution, requiring a **section 36 justification** analysis to determine if the limitation is reasonable and justifiable.

Problem 2 - Overbroad

■ DEFINITION OF “VICTIM”

- Bill proposes “*juristic persons*” can be victims of hate speech
- **Result:** Call for boycott (economic harm) of Woolworths (juristic person, i.e. victim) during June (LGBT grounds) will likely be **hate speech**.
- “*Victim*” also includes a “*family member or associate*”: undefined, and capable of multiple interpretations, leaving Bill wide open to abuse.
- **Result:** actual victim not necessarily required before a person can be charged with and found guilty of hate speech.

Problem 2 - Overbroad

■ DEFINITIONS NULLIFY EXEMPTION CLAUSE:

The provisions of subsection (1) do not apply in respect of anything done as contemplated in subsection (1) if it is done in good faith in the course of engagement in any bona fide— (a) artistic creativity, performance or expression; (b) academic or scientific inquiry; (c) fair and accurate reporting in the public interest or the publication of any information, commentary, advertisement or notice; or (d) interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings, that does not advocate hatred [**Element 2** of the crime and undefined in the Bill] that constitutes incitement to cause harm [**Element 1** of the crime and defined as substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups], based on one or more of the grounds [**Element 3** of the crime and defined as (a) Albinism; (b) ethnic or social origin; (c) gender; (d) HIV or AIDS status; (e) nationality, migrant or refugee status or asylum seekers; (f) race; (g) religion; (h) sex; (i) sexual orientation, gender identity or expression or sex characteristics; or (j) skin colour].

Synopsis of Concerns – Exemption

- The clause, specifically the religious exemption clause, has also been open to multiple interpretations by the Department and/or Parliament:
 - Deputy Minister indicated at Parliamentary briefing on [30 May 2018](#) that this exemption would only apply to statements that are part of a sermon, but not when someone was expressing their own view.
 - This is opposite to what he advised the same Committee about the same clause on [21 September 2022](#).
- **Result:** clause must be clarified and strengthened in order to provide proper protection of religious freedom in the public realm, and “*not stifle ideology, belief or views*”.

Synopsis of Concerns – Sentence

- **THE BILL PROPOSED MAXIMUM 8 YEARS' JAIL SENTENCE:**
 - **Originally** Bill proposed three (3) years' imprisonment for a first offence and a five (5) years for a second or subsequent offence of hate speech.
 - **Now** Bill proposes eight (8) years for first (and all subsequent) offences of hate speech.
 - This increase happened **in complete opposition** to the tens of thousands of submissions made to the NA that asked for a lesser sentence (or no jail sentence at all).

Synopsis of Concerns

- **BILL'S PROPOSED CRIMINALISATION OF DISTRIBUTION:**
 - Not only original author guilty of, and punished for, hate speech, but anyone who distributes the hate speech in such a way that it is accessible to the public or the “victim”.
 - **Result:** 1) employer
2) private WhatsApp group
- **BILL FAILS TO PROVIDE FOR PARLIAMENTARY OVERSIGHT**

Synopsis of Concerns – Criminalisation

- **THE BILL CRIMINALISES SPEECH, DESPITE:**
 - UN supporting more speech, not less, as the key means to address hate speech.
 - SA is obliged to protect the rights to freedom of religion and expression in the public realm.
 - International law does not require SA to criminalise hate speech.
 - Bill fails to pass the six-part Rabat threshold test contrary to the UN Rabat Plan of Action – requires high threshold test for restricting freedom of expression to ensure article 20 of the ICCPR is not violated.

Synopsis of Concerns – General

- **THE BILL CRIMINALISES SPEECH, DESPITE:**
 - The Bill goes much wider than South Africa's obligations under these instruments, because it:
 1. extends the prohibited grounds from race to a variety of others, and
 2. adopts the idea of “less speech is better”,
 3. criminalises speech,
 4. ignores SA's other obligations under other international instruments to protect religious freedom and freedom of expression.

Recommendations

- **SPLIT “HATE SPEECH” & “HATE CRIMES”**

ALTERNATIVELY:

- Revise definitions – **HATE, HARM, HATE SPEECH, VICTIM**
- Strengthen the **RELIGIOUS EXEMPTION** clause
- Ensure that Bill meets **RABAT THRESHOLD TEST** – and that this test’s criteria is expressly set out. Failing to do so, will lead to a violation of the ICCPR.
- Removing **clause 10(2)(b)** from the Bill so that no regulations may ever be deemed to be approved by Parliament.
- **Preamble** of Bill should include specific reference to sections 15 and 31 of the Constitution.

Recommendations

- **DEFINE “HATE”:**

“strong and deeply-felt emotions of enmity, ill-will, detestation, malevolence and vilification against members of an identifiable group, that implies that members of that group are to be despised, scorned, denied respect and subjected to ill-treatment based on their group affiliation”.

- **DEFINE “HARM”:**

“gross psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group caused by the expression”.

- **DEFINE “HATE SPEECH”:**

“Any person who intentionally, publicly publishes, propagates or advocates anything or communicates to one or more persons in a manner —(i)to incite harm; and (ii) promote or propagate hatred, based on one or more of the grounds is guilty of the offence of hate speech.”

Recommendations

- **CLARIFY & STRENGTHEN RELIGIOUS EXEMPTION CLAUSE IN 4(2)(d):**

“(d) expression of any religious conviction, tenet, belief, teaching, doctrine or writings, by a religious organisation or an individual, in public or in private; or ... that does not actively stir up enmity, ill-will, detestation, malevolence and vilification against members of an identifiable group, that constitutes incitement to cause gross psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group, based on race, ethnicity, gender, religion or sexual orientation.”

Recommendations

- **INCLUDE RABAT THRESHOLD TEST (for criminal hate speech offences):**
 1. Content
 2. Speaker
 3. Intent
 4. Content and form
 5. Extent of the speech act
 6. Likelihood, including imminence

*“**Criminal sanctions** related to unlawful forms of expression should be seen as **last resort measures** to be applied only in **strictly justifiable situations.**”* (Rabat Plan of Action)

QUESTIONS & ANSWERS



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