



ADF INTERNATIONAL

To: Hon Ms Shaikh, MP, Chairperson
Parliamentary Select Committee on Security & Justice

For attention: Mr Gurshwyn Dixon, Committee secretary

Date: 19 May 2023

Re: **ADF International submission – Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B – 2018]**

From: ADF International – Dr. Georgia du Plessis
& Dr. Adina Portaru

1 Introduction

1. ADF International is a faith-based legal advocacy organization that protects fundamental freedoms and promotes the inherent dignity of all people. We act before national and international institutions and have ECOSOC consultative status with the United Nations (registered name 'Alliance Defending Freedom'), accreditation with the Organization of American States, and are registered with the EU Transparency Register. ADF International is also a participant in the FRA Fundamental Rights Platform.
2. ADF International submits that the South African *Prevention on Combating of Hate Crimes and Hate Speech Bill* (B9B – 2018) (hereinafter the 'Bill') violates the international right to freedom of expression (Article 19 of the International Covenant on Civil and Political Rights ('ICCPR')). For the reasons described below, it is respectfully submitted that the South African government should abandon the said Bill.

2 Freedom of expression and freedom of speech

3. Freedom of expression is undoubtedly one of the most fundamental freedoms in the constitutional structure of any democracy, underpinning, *inter alia*, the vital ability of citizens to speak out without fear of repercussion. This is even more relevant considering the historical and political context of South Africa, where the right to freedom of expression was severely stifled during Apartheid.
4. The right to speak freely features prominently in all international human rights treaties and section 16 of the South African Constitution. To bolster this right, section 39(1) of the Constitution of the Republic of South Africa, 1996 (hereinafter the 'South African Constitution') clearly states that international law *must* be considered, and regional law *may* be considered when interpreting whether (potential) legislation is in line with the Constitution. It is therefore fundamentally important for the South African government to assess whether the said Bill is in line with international human rights standards.
5. Consequently, Article 19 of the Universal Declaration of Human Rights (UDHR) is unambiguous in its far-reaching recognition of freedom of expression:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

6. The wording was followed closely in the drafting of Article 19 of the ICCPR, Article 10 of the European Convention on Human Rights, and Article 11 of the Charter of Fundamental Rights of the European Union (EU Charter).

7. General Comment 34 by the UN Human Rights Committee states:

Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.¹

8. The same General Comment states that Article 19(2) of the ICCPR also protects *deeply offensive* speech.²

9. In keeping with other international human rights bodies, the European Court of Human Rights (ECtHR) has had a longstanding tradition of giving robust protection to freedom of expression.

10. The ECtHR has stated on numerous occasions that freedom of expression has a 'special importance' under the European Convention on Human Rights (ECHR)³ and that States are under a positive obligation to create a favourable environment for citizens to participate in public debate, enabling them to express their opinions and ideas without fear.⁴

11. According to the ECtHR, Article 10 not only protects the substance of the ideas and information expressed but also their form. In the seminal case of *Handyside v the United Kingdom*, the ECtHR explained the importance of freedom of speech to democracy itself:

Freedom of expression constitutes one of the essential foundations of a [democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.⁵

¹ Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, para 2.

² Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, para 11.

³ See *Ezelin v. France*, App no. 11800/85, para 51.

⁴ *Dink v. Turkey*, App nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, para 137.

⁵ *Handyside v. the United Kingdom*, App no 5493/72, para 49.

12. Therefore, it is not just inoffensive speech that is protected in international and European law, but also speech which disturbs, shocks, provokes, hurts, and displeases.
13. Nonetheless, freedom of expression is not absolute: it can be legitimately limited in specific situations. For an interference with freedom of expression to be justified, it must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. The ECtHR has stated that any exceptions to the right to freedom of expression must be construed strictly and the need for any restrictions must be established convincingly,⁶ and only 'convincing and compelling reasons' can justify a restriction on freedom of expression.⁷ Additionally, the United Nations General Comment 34 similarly states that limitations to the right to freedom of expression are to be strictly interpreted and not overbroad.⁸ The Rabat Threshold test⁹ prefers a *direct causal link* between the speech and harm suffered before any limitation to freedom of expression can be made.
14. Therefore, limits on speech should remain an exception which is narrowly construed, well-defined, proportionate, legitimate, pursuing a clear aim, and must ensure that less restrictive means do not exist.

3 The South African Bill is not in line with international human rights standards

3.1 'Hate speech' is not strictly defined and lacks objectively determinable criteria

15. There 'is no universally accepted definition of the expression hate speech'¹⁰ - largely because of underlying philosophical, historical, and constitutional differences between global states in relation to freedom of expression.¹¹ Hate speech is an elusive umbrella term usually referring to speech considered hateful by a group of persons. Similarly, hate speech laws intend to criminalise speech and expression based on subjective criteria such as 'insult' and 'offence'.
16. In 2015 UNESCO published a manual addressing online hate speech: its authors admitted that 'the possibility of reaching a universally shared definition seems unlikely.'¹² Likewise, the United Nations Strategy and Plan of Action on Hate Speech clearly stated that 'there is no international legal definition of hate speech, and the characterization of what is "hateful" is controversial and disputed.'¹³

⁶ *Şener v. Turkey*, App no. 26680/95, para 39. See also *Thoma v. Luxembourg*, App no. 38432/97, paras 43, 48, *The Observer and The Guardian v. the United Kingdom*, App no. 13585/88, para 59.

⁷ *Delfi As v. Estonia* [GC], App no. 645669/09, 16 June 2015, para 131.

⁸ Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, paras 21 – 36.

⁹ The Rabat Plan of Action, https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf, accessed 16 May 2023.

¹⁰ 'Factsheet – Hate Speech', Council of Europe, November 2008, p.2.

¹¹ C. Harris, J. Rowbotham, K. Stevenson, 'Truth, law and hate in the virtual marketplace of ideas: perspectives on the regulation of Internet content' *Information and Communications Technology and Law*, 18, no. 2 (2009), paras. 155-184. This research suggests that hate speech laws in different countries are rooted in historical and philosophical and constitutional traditions in relation to freedom of expression.

¹² Iginio Gagliardone et al., 'Countering Online Hate Speech' (2015), 8.

¹³ United Nations Strategy and Plan of Action on Hate Speech, p2.

17. The South African Bill's definition of 'harm' (clause 1) as 'substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups' is evidence of this as it contains elements open to subjective assessments. 'Social detriment' (clause 1) means 'detriment that undermines the social cohesion amongst the people of South Africa'. The notion of 'social cohesion' is subject to the ideological and subjective interpretation dominant in the country at present.
18. Furthermore, clause 4(1) of the Bill defines the 'offence of hate speech' as any person who intentionally publishes, propagates, or advocates anything in a manner that could reasonably be construed to demonstrate an intention to be harmful, incite harm or promote hatred. This provides a circular (and essentially no) definition 'hate speech' boiling down to what the European Commission President Ursula von der Leyen stated – 'hate is hate'.¹⁴
19. On the contrary, criminal law is predicated upon an objective and evidence-based assessment of culpability and harm relating to offending behaviour. Criminal frameworks rely upon clear, unambiguous, and predictable statutory definitions - in the interests of citizens and law enforcers alike. Contrary to other criminal laws, hate speech laws rely heavily on subjective and unclear terms. This is evident from the Bill essentially lacking in a definition of 'hate speech' or 'harm'.
20. This is also contrary to the international law requirement that any limitation to the freedom of expression should be clearly prescribed by law as required by Article 19 of the ICCPR.¹⁵ This means that for a legal restriction to meet the requirement of 'prescribed by law' it must be drafted with sufficient precision to enable an individual to regulate his or her conduct accordingly and must be made accessible to the public. It must be clear what sorts of speech 'are properly restricted and what sorts are not'.¹⁶ Hate speech as defined in the Bill does not provide any clarity as to what type of speech is limited and what is acceptable. Citizens would not be certain whether certain forms of expressions are within the boundaries protected by law or if they subject themselves to prosecution.
21. Additionally, the Bill fails to meet the strict proportionality tests set forth in Article 19 of the ICCPR as it does not require the State to prove a causal link between the speech and any actual or incitement of harm. This is contrary to the Rabat Threshold Test.

3.2 Prosecutorial and practical problems

22. As a result of the definitional complexities relating to hate speech, law enforcement agencies will face difficulties in identifying whether there is sufficient evidence to prosecute. Hate speech which aggravates many base crimes such as assault and harassment is often verbally communicated, and therefore the evidence relies on the

¹⁴ Ursula von der Leyen, President of the European Commission, <https://twitter.com/vonderleyen/status/1306151504110387200?lang=en>, accessed 16 May 2023.

¹⁵ Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, paras 21 – 36.

¹⁶ Article 19: Freedoms of opinion and expression, CCPR/C/GC/34 12 September 2011, paras 25.

hearer or receiver being able to accurately recollect the event. The evidence base can therefore be very thin and anecdotal.

23. According to the former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye: 'the vagueness of hate speech and harassment policies has triggered complaints of inconsistent policy enforcement that penalizes minorities while reinforcing the status of dominant or powerful groups.'¹⁷
24. Furthermore, by leaving the most essential element of a statutory crime undefined, the South African Parliament is also leaving its legislative responsibility to the lower courts, where such cases are typically heard. This leaves lower courts to struggle to identify whether an offence has been committed or not, with higher courts overruling lower court judgments when judges have failed to consider all relevant elements.¹⁸

4 Conclusion

25. The above issues highlight that:

- The proposed South African Bill violates to the right to freedom of expression as contained within international human rights law. It is also an unjustifiable limitation of this right as it does not meet the grounds required for the proportional limitation of the right to freedom of expression.
- The absence of a firm definition of the crimes and the lack of traditional criminal elements (i.e., criminal intent, causation, harm, state of mind) result in the fact that the policing of hate speech and hate crimes will be a difficult and unjustifiable task for law enforcers.

26. The Bill will chill public and private debate amongst South African citizens from different philosophical, historical, and religious contexts stifling the right to freedom of expression.

27. We therefore respectfully ask for the reconsideration and eventual dismissal of the Bill.

With warm regards,

Dr. Georgia du Plessis
Legal Officer, ADF International
[REDACTED]

Dr. Adina Portaru
Senior Legal Counsel, Europe, ADF International
[REDACTED]

¹⁷ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/38/35, 6 April 2018.

¹⁸ As evidenced by higher courts often overturning lower courts' decisions on hate speech. See for example, cases of Åke Green in the Supreme Court of Sweden 29 November 2005 Case No. B 1050-05; In Croatia, Slavica Lukic in the County Court, 2 October 2014; In Demark, Lars Hedegaard, Danish Supreme Court 20 April 2012; and in France, the case of Christian Vanneste, Court de Cassation, Criminelle, Chambre Criminelle, 12 November 2008, 07-83.398.