SUBMISSIONS ON THE PREVENTION AND COMBATTING OF HATE CRIMES AND HATE SPEECH BILL [B9B – 2018]

FOR THE ATTENTION OF:

The Select Committee On Security and Justice –

HateCrimesBill9B-2018@parliament.gov.za

ON BEHALF OF:

CAMPAIGN FOR FREE EXPRESSION NPC

12 May 2023

INTRODUCTION

1 The Portfolio Committee on Justice and Correctional Services has re-published the Prevention and Combating of Hate Crimes and Hate Speech Bill for public comment ("**the Hate Crimes Bill**" or "**the Bill**").[1]

2 These are the written submissions of the Campaign for Free Expression NPC ("**CFE**"). CFE also indicates its interest in making an oral presentation and respectfully requests the opportunity to do so.

(i) Background on CFE

3 CFE is a registered Public Benefit Organisation, a non-profit body dedicated to defending and expanding the right to free expression for all in Southern Africa. It is independent and firmly non-partisan.

4 CFE's aims and activities include:

4.1 Monitoring the free flow of ideas and information and reporting on relevant events and developments;

4.2 Injecting an informed, principled, consistent, and fact-based freedom of expression position into the national discourse;

4.3 Encouraging awareness of and support for freedom of expression across all elements of society, in particular ensuring it is not just a concern for members of the media, but one for all citizens and members of civil society.

[1] [B9B – 2018]

4.4 Promoting transparency and access to information in all sectors of society.

4.5 Undertaking strategic litigation to promote and defend free expression.

4.6 Acting as a think-tank on policy, particularly around the complex issues arising from digital media, disinformation, and regulation.

5 CFE's Directors are Professor Tawana Kupe, Advocate Carol Steinberg SC, Dr Ismail Mahomed, Editor Adriaan Basson and Professor Anton Harber (Executive Director).

(ii) Summary of CFE's core submissions

6 These submissions do not comment on the entire Bill but principally deal with the particular provisions related to the criminalisation of hate speech as set out in clause 4 of the Bill. CFE wishes to make it clear at the outset that, like all right-thinking citizens, it abhors hate speech and discrimination based on immutable characteristics such as race, gender, religion, culture, sexual orientation, and so forth.

7 But, in our view, the answer to the societal scourge that is hate speech is not to criminalise such speech.

8 The apartheid regime was infamous for criminalising speech that it regarded as threatening. The laws had the opposite effect to what they intended. The publications of the banned liberation movements became a prized commodity. Many South Africans risked jail sentences to read them. CFE fears that the democratic government is making the same mistake. Instead of suppressing

hate speech, there is every chance that the Bill will merely force it underground and the very fact that it is criminalised will encourage its dissemination.

9 In addition, we are of the view that the criminal offences the Bill creates will inevitably restrict the right to freedom of expression and, in doing so, threaten the lifeblood of our democracy.

10 CFE's argument set out in these submissions is fivefold.

11 In the first place, CFE contends as its main submission that clause 4 should be deleted in its entirety.

11.1 The offences in clause 4 are not necessary in order to curb hate speech and there are less restrictive means of effectively dealing with hate speech that already exist in our law. These include civil hate speech under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act") as well as the criminal offences of, at least, incitement, *crimen injuria*, and assault.

11.2 As a matter of principle, only extreme forms of speech should be met with criminal sanction (those outlined in section 16(2) of the Constitution). As the law already stands, the offences that exist are already sufficient to target that extreme speech.. Criminalising hate speech beyond this would not be consistent with international law. There is no need for the crime the Bill would create. Yet, its introduction

has a significant drawback: it would pose a significant threat to freedom of expression, the lifeblood of our democracy.

12 In the second place, even assuming for the purpose of argument that CFE's primary submission were to be disregarded, then CFE points out that there are still other key flaws in the Bill which probably render it unconstitutional:

12.1 *First*, if criminal prohibitions of speech are to be used at all – the threshold for triggering the offence should mirror the higher thresholds set out in section 16(2) of the Constitution;

12.2 *Second*, the Bill imposes liability for hate speech without specifying explicitly that the requirement of "*could reasonably be construed to demonstrate a clear intention*" must be applied objectively (i.e. the offence in clause 4(1)(a) is impermissibly vague);

12.3 *Third*, the prosecutorial discretion set out in the Bill is insufficient to cure the constitutional defects; and

12.4 *Fourth,* the exceptions sculpted clause 4(2) do not explicitly offer protection to comedic expression including satire and parody.

13 Before turning to explain these points in further detail – we deal with the following topics:

13.1 We begin by outlining key features of the right to freedom of expression under section 16 of the Constitution;

13.2 Thereafter, we deal with four important constitutional principles relating to free speech which frame the discussion of the flaws in the Bill.

13.3 Next, we examine the forms of speech that are not protected expression under section 16(1) of the Constitution.

13.4 Thereafter, we show that the definition of hate speech in the Bill goes beyond the speech that is not protected under section 16(1) of the Constitution. It follows that the Bill is required to satisfy the limitations clause in section 36 of the Constitution.

13.5 We then turn to the reasons that CFE submits that the Bill, in its present form, fails to satisfy the limitations clause.

THE RIGHT TO FREEDOM OF EXPRESSION

14 Section 16 of the Constitution of South Africa, 1996 provides:

> "(1) Everyone has the right to freedom of expression which includes-
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> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information and ideas;
>
> (c) freedom of artistic creativity;
>
> (d) academic freedom and freedom of scientific research.
>
> (2) The right in subsection (1) does not extend to -
>
> (a) propaganda for war;
>
> (b) incitement of imminent violence;
>
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

15 The significance of freedom of expression to an open and democratic society

has been emphasised by our highest courts on numerous occasions.[2] It is accepted as a right that "*lies at the heart of democracy*"[3] and an "*indispensable element of a democratic society*"[4] due to its importance in the development of society.

16 The Constitutional Court has also emphasised that these freedoms have amplified importance because we have "recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments".[5] Langa DCJ, as he then was, referred to these restrictions as "a denial of democracy itself" and noted that those restrictions would be "incompatible with South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours".[6]

17 There is a wealth of jurisprudence on the importance of freedom of expression, not only as a self-standing right but also as a right, which supports the right to freedom of conscience, religion, thought, belief and opinion.[7]

18 The Constitutional Court has also acknowledged that these rights "implicitly

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[2] See, for example, *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7 ("*South African National Defence Union* "); *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) ("*Laugh It Off*") at para 7; *NM v Smith* 2007 (5) SA 250 (CC) at para 145 ("*NM v Smith*"); *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 22.

[3] *South African National Defence Union* at para 7.

[4] *NM v Smith* at para 145.

[5] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) ("*Islamic Unity Convention*") at para 25.

[6] Ibid at para 25 (footnote omitted).

[7] Section 15(1) of the Constitution provides: "*Everyone has the right to freedom of conscience, religion, thought, belief and opinion*".

recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions… even where those views are controversial"[8] (emphasis added).

19 At the outset we also emphasise further important constitutional principles relating to freedom of speech.

IMPORTANT CONSTITUTIONAL PRINCIPLES RELATING TO FREE SPEECH

(i) Limitations on the right to freedom of expression must be interpreted narrowly

20 In order to withstand constitutional scrutiny – any statute that limits constitutionally-protected expression must be interpreted as narrowly as possible.[9]

(ii) Freedom of expression cannot be limited on a speculative basis

21 The Courts will not allow freedom of expression to be restricted on a speculative basis or on the basis of conjecture.[10]

(iii) Freedom of speech includes the freedom to engage in offensive speech

22 Legitimate speech that is protected under the Constitution includes robust

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[8] *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (3) SA 617 (CC).

[9] *Laugh It Off* at para 59.

[10] *S v Mamabolo* 2001 (3) SA 409 (CC) at para 45; *Laugh It Off* at para 59.

political speech,[11] legitimate criticism,[12] and public debate which does not amount to hate speech.[13] In other words, speech that is thought-provoking and can stimulate meaningful debate is protected.

23 But our Constitution goes much further than this. The only speech that is not protected by section 16(1) is the speech described in section 16(2). The Constitution protects speech that is not necessarily valuable and meritorious. It even protects speech that might be offensive, as long as it does not seek to incite imminent violence or advocate hatred.

24 In this regard we emphasise the importance of the European Court of Human Rights' decision in ***Handyside v The United Kingdom***.[14] The Court set out one of the most critical principles of freedom of speech: freedom of expression extends not only to information or ideas that are favourably received or regarded as inoffensive, "*but also to those that offend, shock or disturb*."

25 This proposition was endorsed by the Constitutional Court in ***Islamic Unity Convention***[15] and again in July this year in the leading case on hate speech, ***Qwelane***.[16] It has also been accepted by the Broadcasting Complaints

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[11] *Chairperson, National Council Of Provinces v Malema and Another* 2016 (5) SA 335 (SCA) at para 22. In that case, Malema had criticised the government and its ruling party for the conduct of the police in Marikana.

[12] *Laugh it Off* at para 86 where the Constitutional Court stated that "*there is a legitimate place for criticism of a particular trade mark*".

[13] *The Citizen 1978 (Pty) Ltd and Others v Mcbride (Johnstone And Others, Amici Curiae)* 2011 (4) SA 191 (CC) at para 100.

[14] (1974) 1 EHRR 737 at 754.

[15] *Islamic Unity Convention* at paras 26 and 27.

[16] *Qwelane v South African Human Rights Commission* [2021] ZACC 22 (31 July 2021) at paras 74 and 79.

Commission of South Africa[17] and courts in various other jurisdictions have expressed similar views, such as the Supreme Court of Sri Lanka[18] and the Supreme Court of India.[19]

26 It follows from the above authority that whether expression causes offence, shocks or even disturbs people is, with respect, legally irrelevant. That speech is still protected by the Constitution. Parliament would therefore have to justify any legislation that seeks to curb speech that may be offensive, but does not seek to incite imminent violence or advocate hatred.

HATE SPEECH UNDER THE CONSTITUTION

27 Section 16(1) of the Constitution provides that everyone has the right to freedom of expression. Section 16(2) of the Constitution, however, provides that the right to freedom of expression does not extend to:

> "(a) propaganda for war;
>
> (b) incitement of imminent violence; or
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> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." (Emphasis added.)

28 Thus, under the Constitution, for expression to amount to hate speech it must satisfy three requirements.

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[17] See, for example, *SABC v Blem and Others* [2012] JOL 28941 at para 7 where Dr Venter held: "*One of the demands of living in a democratic society is that one should be tolerant of material that offends, shocks, or disturbs*".

[18] *Lerins Peiris v Neil Rupasinghe, Member of Parliament and Others* [1999] LKSC 27.

[19] *S. Rangarajan etc. v. P. Jagjivan Ram* 1989 (2) SCR 204 at 224.

28.1 First, the expression must advocate hatred.[20]

28.2 Second, the "*advocacy of hatred*" must be based on one of four listed grounds:

28.2.1 Race;

28.2.2 Ethnicity;

28.2.3 Gender; or

28.2.4 Religion.

28.3 Moreover, the advocacy of hatred cannot "*simply advocate hatred of a specific person*" but must instead advocate hatred based on "*group characteristics*".[21]

28.4 Third, the expression must also amount to "*incitement to cause harm*". That is, the expression must "*instigate or actively persuade others to cause harm*".[22]

29 It follows that where legislation prohibits expression that is not "hate speech" within the meaning of section 16(2) of the Constitution, it will only be constitutionally permissible if it satisfies the provisions of the limitations clause under section 36 of the Constitution.

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[20] In the matter of *R v Keegstra* [1990] 3 SCR 697 at 777, the Canadian Supreme Court explained that the term hatred "*connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation*". In *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) the Human Rights Commission found that "calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly indicates otherwise."

[21] Milo D, Penfold G and Stein, A, 'Freedom of Expression' in Woolman S, Roux T and Bishop M (eds), *Constitutional Law of South Africa* (2008) at 42–80 to 42–81.

[22] Ibid at 42–80.

The definition of hate speech under the Bill is broader than the Constitution

30 The definition of hate speech under the Bill is broader than the exclusion under section 16(2) of the Constitution in at least four key respects.

30.1 First the grounds have been extended. The grounds under the Bill extend to race, gender, religion, or ethnicity (the four constitutional grounds). But also to:

> Albinism, ethnic of social origin, gender, HIV or AIDS status, nationality, migrant or refugee status or asylum seekers, race, religion, sex, sexual orientation, gender identity or expression or sex characteristics, or skin colour,

30.2 Second, the term “harm” has been given a wide definition to include not only physical harm but also emotional, psychological, social or economic "detriment".

30.3 Third, in clause 4(1)(b) the Bill creates an entirely new offence for distributing an electronic communication of known hate speech (for instance, sharing a viral video depicting hate speech) and/or for displaying or making hate speech material available.

31 Since the Bill targets expression that goes beyond the expression that does not enjoy constitutional protection, it must satisfy the limitations clause under section 36 of the Constitution.

CLAUSE 4 OF THE BILL FAILS THE LIMITATIONS ANALYSIS

32 Section 36 of the Constitution sets out the circumstances under which rights in the Bill of Rights may be limited. It provides:

> "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—
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> (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."

33 Notwithstanding the laudable intentions of the Bill, the CFE is of the view that the manner in which the provisions have been drafted fails to meet the requirements of section 36 and is therefore likely to fall foul of the Constitution.

34 We point out that, since the Bill seeks to target categories of speech that are protected by section 16(1) of the Constitution, the government bears the onus of proving that the limitations are justifiable under section 36 of the Constitution.[23] In our view, the government would not be able to discharge its onus because it fails to strike an appropriate balance between the purpose it seeks to achieve (preventing hate speech) and the right that is being limited (freedom of expression). Put simply, our law "*does not permit a sledgehammer to be used to crack a nut,*"[24] which, in our view, is what the Bill does.

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[23] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC) at para 31; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at paras 33-7; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) at para 20.

[24] *S v Manamela and Another* 2000 (3) SA 1 (CC) at para 34.

(i) The criminalisation of hate speech is not necessary – adequate legal mechanisms already exist

35 As world-renowned free speech expert Dr Agnès Callamard comments that any criminal restrictions on expression in a democratic society must only be used where truly necessary:

> "The word 'necessary' means that there must be a 'pressing social need' for the limitation. The reasons given by the State to justify the limitation must be 'relevant and sufficient'; the State should use the least restrictive means available and the limitation must be proportionate to the aim pursued. The European Court of Human Rights has warned that one of the implications of this is that States should not use the criminal law to restrict freedom of expression unless this is truly necessary."[25] (Emphasis added, footnotes omitted.)

36 The offences created in clause 4 of the Bill are not necessary to address the purposes of the Bill. Hate speech is already dealt with comprehensively, by means of civil law, under the Equality Act and criminally in the form of *crimen injuria*, incitement and assault. These are therefore less restrictive means than the new criminal offences to achieve the purposes of the Bill.

37 In ***Qwelane v South African Human Rights Commission and Another***,[26] the Constitutional Court recently noted that South Africa regulates hate speech through civil remedies., which accords the United Nations Rabat Plan

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[25] Agnès Callamard "Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence" UN HCHR available at: http://menschenrechte.org/wp-content/uploads/2013/05/Freedom-of-expression-and-advocacy-of-religious-hatred-that-constitutes-incitement-to-discrimination-hostility-or-violence.pdf (Accessed 20 January 2017). Dr Callamard is presently the Secretary General of Amnesty International and was a former Special Rapporteur for the United Nations. She also until recently headed up Columbia University's Global Freedom of Expression and Freedom of Information project.

[26] (CCT 13/20) [2021] ZACC 22 (31 July 2021) at para 90

of Action.[27]

38 Importantly, the Constitutional Court has stated that: “If society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values.”[28]

39 Thus, far from achieving laudable intentions of the Bill, criminalisation may actually result in the opposite: it may encourage proponents of hatred to be more circumspect in the manner in which they conduct themselves, and drive the extremists underground rather than attempting to alter their position.

40 This is precisely what happened when the apartheid state criminalised, for example, the publications of the banned liberation movements. Their literature was merely forced underground and became more valuable and sought after because it was illegal. It would be sad and ironic if the democratic government were to repeat these mistakes.

41 To take one example of how criminalisation may become an own goal, in 1989, David Irving made two speeches in Austria, one in Vienna and the other in Leoben denying the Holocaust. The speeches included a call for an end to the "*gas chambers fairy tale*" and claimed that Nazi leader Adolf Hitler had

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[27] The Rabat Plan of Action (The Rabat Plan of Action considers the distinction between freedom of expression and incitement to hatred) recommends that: “Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply.” (Emphasis added) [Annual Report of the United Nations High Commissioner for Human Rights, 11 January 2013 A/HRC/22/17/Add 4 at para 34].

[28] *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para 122

helped Europe's Jews and that the Holocaust was a "*myth*". Irving was sentenced to three years' imprisonment in accordance with the Austrian Federal Law on the prohibition of National Socialist activities. Irving's trial attracted massive publicity, made him famous and a hero of the right-wing. It has also been argued that by imprisoning Irving, the Austrian Courts made a martyr out of Irving and did more damage than good.[29]

42 Hate speech is already regulated by civil law under the Equality Act and criminally in the form of *crimen injuria*, incitement and assault.

Existing civil law mechanism: hate speech under the Equality Act

43 The Equality Act already regulates hate speech using civil remedies. This means that the Bill is not necessary in order to address hate speech.

44 We note that, in various cases,[30] the Equality Courts have dealt with matters which would now be criminalised by the Bill.

45 In ***Qwelane***,[31] the Constitutional Court recently considered the constitutionality of hate speech under the Equality Act. The Constitutional Court retained most of the definition of hate speech and found that it was not unconstitutional.

46 Importantly, however, it does not follow that the thresholds used in clause 4 of

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[29] http://news.bbc.co.uk/2/hi/uk_news/4578534.stm

[30] *Strydom v v Nederduitse Geregformeerde Gemeente Moreleta Park* 2009 (4) SA 510, *Zonke Gender Justice Network v Malema* Case Number 2/2008 and *N G Kempton v André van Deventer* Case Number 9/2013.

[31] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 (31 July 2021)

the Bill would pass constitutional muster. The Constitutional Court upheld the formulation of the thresholds in the Equality Act in the context of a civil remedy for hate speech, not a criminal sanction.

47 The imposition of a criminal penalty significantly magnifies the extent of the limitation of freedom of expression. When a court is examining a criminal sanction, which carries a potential sanction of eightyears in prison – the clear question is whether there is a less restrictive means of addressing the harm that the state seeks to curb. The civil remedy is the clear less-restrictive choice.

Existing criminal law mechanism: *Crimen injuria*

48 Another effective means of addressing hate speech that already exists in South African law is the crime of *crimen injuria*.

49 *Crimen injuria* consists of unlawfully and intentionally impairing the dignity or privacy of another person.[32]

50 The approach adopted by the court in ***ANC v Sparrow***[33] is instructive, where the Court found the defendant liable for civil damages.

51 The approach followed by the Equality Court in ***Sparrow*** demonstrates that the expression that the Bill seeks to target in clause 4 of the Bill is already criminalised in the form of the crime of *crimen injuria*.

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[32] J Burchell 'Principles of Criminal Law' 5 ed (2016), Juta and Company (Pty) Ltd at p 648

[33] (01/16) [2016] ZAEQC 1 (10 June 2016)

52 There have been many successful prosecutions where racists have been held to be criminally liable under the common law.[34]

53 There is no authority in which a conviction for *crimen injuria* has warranted a prison sentence of six months or more.[35]

54 Therefore, the Bill seeks to radically change the common law. Clause 6(3) of the Bill provides that:

> "(3) Any person who is convicted of an offence referred to in section 4 is liable to a fine or to imprisonment for a period not exceeding eight years, or to both a fine and such imprisonment,

55 The criminal penalty is significant. At the very least, in order to pass constitutional muster, the offence for a first-time conviction should be specified as only a criminal fine (at worst, a suspended sentence of imprisonment). This again makes clear that the existing criminal measures for dealing with the speech targeted by the Bill is a less restrictive means of limiting free speech.

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[34] In *State v Pistorius* [2014] ZASCA 47; 2014 (2) SACR 314 (SCA) – where the Supreme Court of Appeal upheld the conviction for *crimen injuria* of a farmer for saying of a security guard "die k***** praat kak", at para 37, the Supreme Court of Appeal held: "It is a well-known fact that these words formed part of the apartheid-era lexicon. They were used during the apartheid years as derogatory terms to insult, denigrate and degrade the African people of this country. Similarly words like 'boer', 'coolie' and 'bantu', the word is both offensive and demeaning. Its use during apartheid times brought untold pain and suffering to the majority of the people of this country. Suffice to say that post-1994, we, as a nation, wounded and scarred by apartheid, embarked on an ambitious project to heal the wounds of the past and create an egalitarian society where all, irrespective of race, colour, sex or creed would have their rights to equality and dignity protected and promoted. Our Constitution demands this. Undoubtedly, utterances like these will have the effect of re-opening old wounds and fanning racial tension and hostility.". See also earlier decided cases such as *S v Meiring* 2011 JDR 1544 (FB) at paras 23, 25, 27 and 39; *Mostert v S* [2006] 4 All SA 83 (N) at pages 93 to 95; *S v Bugwandeen* 1987 (1) SA 787 (N) at 794E-796G.

[35] *Coetzee v National Commissioner of Police and Others* 2011 (2) SA 227 (GNP) at para 27. For instance, in *S v B* 1980 (3) SA 846 (A), the court combined the appellant's four convictions of crimen injuria to one. Even where there were four convictions the court imposed a suspended prison sentence of 12 months' imprisonment suspended for five years as well as some further conditions.

Existing criminal law mechanism: incitement

56 Section 18(2)(b) of the Riotous Assemblies Act provides:

> "(2) Any person who—
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> …
>
> (b) incites, instigates, commands or procures any other person to commit,
>
> any offence whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable".

57 The offence of incitement was recently dealt with by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*.[36] The Constitutional Court declared the Riotous Assemblies Act inconsistent with section 16(1) of the Constitution to the extent that it criminalised the incitement of another person to commit "any offence".

58 The Constitutional Court suspended the declaration of invalidity for a period of 24 months to permit Parliament to rectify the constitutional defect. The Court held that it was too invasive of freedom of expression that incitement applied to any offence. The Court made an interim order limiting the application of the offence only to "serious offences".

59 The manner in which the Constitutional Court dealt with the crime of incitement is instructive for Parliament when considering how best to amend the present Bill.

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[36] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC)

59.1 *First*, the Court acknowledged the "chilling consequences" that accompany a criminal sanction.

59.2 *Second*, it makes clear that offences limiting free speech should be as narrowly tailored as possible.

60 The core point is this: the Constitutional Court has held that only extreme forms of speech should be met with criminal sanction (those outlined in section 16(2) of the Constitution). There are already sufficient laws to target that speech.

Existing criminal law mechanism: Assault

61 The common law crime of assault is also of assistance in targeting the kind of speech dealt with in section 16(2) of the Constitution.

62 Assault under the South African common law can be committed in two ways: either by actually applying force to a person or by acting in such a way as to make that other person believe that such force was to be immediately applied to her. In short, the crime of assault is committed by any act, gesture or words that makes a person fear that she is about to suffer an attack on her person.[37]

63 This means that the ordinary crime of common assault is able to encapsulate the kinds of speech referred to in section 16(2) of the Constitution. This means that where a person makes threats of violence based on the grounds set out in clause 4 of the Bill, she falls foul of the existing law of assault.

[37] Burchell (supra) at p 597

(ii) If used at all (which CFE does not consider to be justifiable) – criminalisation for hate speech should only be permitted on the higher thresholds of harm outlined in s16(2) of the Constitution

64 CFE submits that, if Parliament is set on criminalising some forms of expression, it should criminalise expression that is not protected by the section 16(1) of the Constitution, that is, expression that either incites imminent violence or advocates hatred as well as constituting incitement to cause harm.

65 This approach is in line with findings of the Constitutional Court in the ***Islamic Unity*** and ***Qwelane*** case. It is also supported by foreign law. We set out some examples of foreign cases and instruments which demonstrate how far more extreme, abhorrent and disgusting speech is still protected in open and democratic societies in Annex **A**.

66 Thus clause 4 should only apply to the speech not protected by the Constitution, that is, the speech section 16(2) excludes from constitutional protection. We believe, however, that clause 4 is entitled to include speech beyond the prohibited grounds, like homophobic speech, for example.

<u>The international instruments referred to in the Bill, if at all, only suggest criminal sanction for the most extreme forms of speech</u>

67 The proposition that clause 4 should apply only to speech that section 16(1) of the Constitution does not protect is supported by the very international instruments the Bill seeks effect.

68 The stated purposes of the Bill, in the preamble, explains that the offences in

the Bill are linked to South Africa's international obligations and undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination and the Durban Declaration.[38]

69 The current wording of the Bill criminalises conduct far beyond what is suggested in these international documents. Accordingly, there is no rational relationship between the stated purpose of limiting freedom of speech (to comply with South Africa's obligations and undertakings) and the means used to achieve that purpose.

70 It is, accordingly, important to understand what those instruments prohibit and the bases upon which they do so.

71 The Durban Declaration urges states to take a number of steps against racism and xenophobia. It urges states to adopt measures to one, combat racial profiling in the prosecution of crimes and two, consider crimes motivated by race as aggravating circumstances for the purposes of sentencing.

72 But nowhere – in any of its 62 pages – or 219 paragraphs – does it call upon states to *criminalise* expression in the manner set out in clause 4 of the Bill. There is accordingly no rational connection between the stated purpose and the mechanisms under clause 4.

73 The same is so in relation to the International Convention. The preamble to the Bill states:

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[38] That is, the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001.

> "AND SINCE the International Convention on the Elimination of All Forms of Racial Discrimination, to which the Republic is a signatory, requires States Parties to declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin"

74 Article 2(d) of the International Convention provides that "Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization".

75 Articles 4 (a) and (b) of the International Convention provide:

> "(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 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".

76 Accordingly, the only conduct that the International Convention calls on member states to criminally sanction is:

76.1 The dissemination of ideas based on racial superiority or hatred;

76.2 Incitement to racial discrimination;

76.3 Acts of violence or incitement to acts of violence against persons of another race or ethnic group.

77 The forms of speech targeted by the International Convention are substantially similar to (i) the thresholds set out in section 16(2) of the Constitution; as well as (ii) the forms of speech that are already prohibited by the common law crimes of *crimen injuria*, incitement and assault – read with clause 3 of the Bill.

78 Since mechanisms already exists which give effect to the principles of the international conventions referred to in the Bill, then there is no rational reason to repeat those offences in clause 4.

79 Another purported catalyst for the hate speech provisions under clause 4 of the Bill is section 9(3) of the Constitution which prevents unfair discrimination on any of the listed grounds, which include:

> "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

80 Section 9(4) goes on to state that national legislation must be enacted to prevent or prohibit unfair discrimination. That legislation is the Equality Act. Nonetheless, those constitutional provisions do not state or suggest anywhere that the bases for the crime of hate speech on the basis of the listed grounds under the Constitution.

Summation

81 In our view, clause 4 of the Bill as it stands would fail the limitations analysis because there are less restrictive means of achieving the stated purposes. These include the civil law penalties for hate speech and the existing criminal

offences detailed above. Clause 4 of the Bill (if it is to be retained at all) should only criminalise the forms of extreme speech that are specified under section 16(2) of the Constitution and do not enjoy constitutional protection.

(iii) The Bill imposes criminal liability for hate speech without explicitly requiring objectivity

82 Clause 4(1)(a) imposes criminal liability where the content which is intentionally disseminated through one of the listed forms of conduct *could reasonably be construed* as demonstrating a clear intention to be harmful or incite harm, and to promote or propagate hatred, on the basis of race, religion, or various other prohibited grounds.

83 In ***Qwelane,*** the Constitutional Court characterised the phrase "that could reasonably be construed to demonstrate a clear intention", used in relation to hate speech under the Equality Act, as follows:

> "[I]t is plainly an objective standard that requires a reasonable person test. This is based on the gloss "reasonably be construed" and "to demonstrate a clear intention", implying that an objective test that considers that facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group."[39]

84 There is no basis upon which to insulate the Constitutional Court's interpretation above from application to clause 4(1)(a) of Bill. It follows that the standard in the Bill must be an objective one. The offence thus requires a test which contemplates how the impugned statements would be understood by a

[39] *Qwelane* at para 96.

reasonable person in context. As stated in ***Qwelane***, an objective test "gives better effect to the spirit, purport and objects of the Bill of Rights".[40]

85 In view of the clarity of the Constitutional Court's views in ***Qwelane***, CFE submits that the language of the Bill should make it clear that the test required by Clause 4(1)(a) is objective in nature. The danger perceived in ***Qwelane,*** namely that a subjective approach would "unduly encroach on freedom of expression" and would render the standard for civil liability "considerably higher than usual"[41], is even more glaring in the context of criminal liability. This danger warrants a cautious injection of unambiguity such that the responsibility of avoiding a subjective, incorrect approach is not left on the shoulders of the interpreter.

86 If Parliament is intent on criminalising hate speech, then, at the very least, objectivity must expressly be referred to in the Bill in relation to the elements set out in clause 4(1)(a)(i) and (ii). This can be achieved by simply altering the language of the provision such that it reads "could objectively and reasonably be construed".

87 In addition, CFE submits that the language of the Bill should make it clear that only intention in the form of *dolus directus* (direct intention) rather than *dolus indirectus* or *dolus eventualis* will suffice. This is in keeping with South African[42] and international[43] jurisprudence. CFE does not, however, want to

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[40] *Qwelane* at para 99

[41] *Qwelane* at para 99.

[42] The Appellate Division interpreted the Internal Security Act 74 of 1982 as requiring dolus directus rather than regarding dolus eventualis as sufficient for liability in relation to offences

be seen to be suggesting that, should section 4 be amended to include the element of direct intention, it would render the section constitutional. This form fo fault is necessary. But it is not sufficient. Requiring direct criminal intent on the part of the accused is not sufficient to save the constitutional defects in the Bill.

88 In ***Economic Freedom Fighters***, the Constitutional Court made this plain:

> "[A]lmost all crimes have intention, as opposed to negligence, as one of the elements. That this is also a requirement for establishing guilt in respect of incitement to commit 'any offence' cannot help save this overly intrusive legislative provision."[44]

89 People engaging in legitimate expression, without direct criminal intention, may ultimately found to be innocent. But this does not eradicate the harms of criminalising the speech.

90 This is well illustrated by the Zimbabwean Constitutional Court in ***Madanhire***, where that Court struck down criminal defamation as unconstitutional.[45] It found, unanimously, that the crime failed the proportionality test in constitutional law.

91 One of the critical bases in the court's reasoning was the harsh consequences that flow from a charge (let alone a lengthy prosecution before an ultimate acquittal) of criminal defamation.

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for subversion, sabotage and, by inference, terrorism as well. On this score, see *S v Nel* 1989 (4) SA 845 (A) and *Minister of Law and Order v Pavlicevic* 1989 (3) SA 679 (A).

[43] For example, in the international sphere, the intent required for commission of the crime of genocide under art 6 of the Statute of the International Criminal Court (and incitement to commit genocide) requires *dolus directus*.

[44] *Economic Freedom Fighters* at para 53

[45] *Madanhire v Attorney-General* 2014 JDR 1967 (ZiCC)

92 According to the Court it was the very existence of the crime that created a stifling or chilling effect on freedom of expression:

> "The overhanging effect of the offence is to stifle and silence the free flow of information in the public domain. This in turn may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices".

93 The very same factors obtain in the context of the speech criminalised by the Bill. Citizens must not be faced with the choice of having their fundamental right to free expression unnecessarily and severely limited or being exposed to the risk of arrest or even prosecution.[46]

(iv) The prosecutorial discretion in the Bill is insufficient to cure the constitutional defects

94 Clause 4(3) of the Bill provides:

> "(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her."

95 It might be suggested that, even if there are constitutional limitations or defects, this provision for prosecutorial discretion – regarding whether to prosecute a particular person in each case – helps to cure or curb them. Because (so the argument goes) on a case-by-case basis the Director of Public Prosecutions would only prosecute individuals where the facts cried out for it, and the offence would not be used.

96 Our courts have made clear that this argument is untenable.

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[46] *Economic Freedom Fighters* at para 56

97 In ***Teddy Bear Clinic***[47] the Constitutional Court made clear that the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. The Court emphasised that the "*mere existence of a prosecutorial discretion creates the spectre of prosecution*" which undermines the particular rights at play (in that case, children's rights).

98 The Court emphasised, moreover, that the discretion is only exercised at a later stage in the criminal justice process:

> "[T]he discretion cited by the respondents only occurs at the stage of deciding whether to prosecute, by which time the adolescent involved may already have been investigated, arrested and questioned by the police".[48]

99 Accordingly, the fact that a person might not actually be prosecuted does not remove all of the harms occasioned by the overbroad criminalisation of constitutionally protected – even if offensive or abhorrent – speech.

(v) The exceptions in clause 4(2) do not make provision for satire and parody

100 Clause 4(2) of the Bill provides:

> (2) 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;

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[47] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) at para 76; see also *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) at para 23.

[48] *Teddy Bear Clinic* at para 76.

(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 no advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds.

101 The importance of satire and parody in a democratic society was aptly captured by Sachs J in ***Laugh it Off***:

> "A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in nonviolent forms. It promotes diversity. It enables a multitude of discontents to be expressed in myriad of spontaneous ways. It is an elixir of constitutional health."[49]

102 The use of satire and parody in political commentary is an essential medium through which South Africans are able to exercise their right to freedom of expression. CFE submits that the prevalence of this medium in the South African context, coupled with its importance to the health of our democracy, warrants it being given express recognition as an exception by the language in the Bill. While comedic expression could interpretively be included within the scope of "artistic expression", the uncertainty occasioned by the ambiguity in this regard creates a risk of the Bill having the unintended effect of stifling comedy

103 Accordingly, CFE submits that "comedic expression", alternatively "satire and

[49] *Laugh it Off* at para 110.

parody", ought to be included expressly in the language of clause 4(2) of the Bill. Such an inclusion would be consistent with clause 12A(a)(v) of the Copyright Amendment Bill[50], which insulates "parody, satire, caricature" and "cartoon", amongst other forms of expression, from attracting liability for copyright infringement.

CONCLUSION

104 Our Constitutional Court has made clear that our history “remind[s] us that ours is a ‘never again’ Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away.”[51] CFE respectfully submits that the government should never again resort to the heavy hand of criminal law to limit free speech.

105 While clause 3 of the Bill is a welcome development that should be celebrated, and while the aims of the Bill are laudable and hate speech is to be deplored, CFE submits that clause 4 should (in the first place) be excised from the Bill. Importantly, this will not have any negative consequences for the laudable purposes that the Bill seeks to achieve. The speech targeted under clause 4 of the Bill is already adequately dealt with under the civil prohibition of hate speech under the Equality Act as well as a series of existing crimes (incitement, crimen injuria and assault).

106 In the event that the lawmakers, on some or other basis, disagree with CFE’s submissions on this score, we have also set out a variety of other serious

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51 *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 63.

defects in the current form of clause 4 of the Bill.

107 For all of these reasons, we respectfully submit that the Bill in its present form is unconstitutional and fails to limit the right to freedom of expression in accordance with the limitations clause in section 36 of the Constitution.

Annexe A

International case law evidencing the negative impact of criminalising hate speech

In the ***Brandenburg*** case before the United States Supreme Court,[52] a leader of the Ku Klux Klan's Ohio sect held a rally in order to celebrate his racist ideology. He was captured on television stating, amongst other things: "*if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken*". His message also included racial slurs about black people and Jewish people.

Brandenburg was convicted of violating state law in Ohio which prohibited –

> "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" as well as "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The United States Supreme Court overturned Brandenburg's conviction holding:

> "Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

As the rally was not aimed at inciting specific acts of violence – and was unlikely to do so – the restrictions on Brandenburg's speech was unconstitutional.

At the centre of this decision is the notion – made famous by John Stuart Mill – that the law should protect freedom of expression unless and until individuals might be physically harmed.

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[52] *Brandenburg v Ohio* 395 U.S 444 (1969).

Similarly, in ***Virginia v Black***,[53] the United States Supreme Court three men were convicted in two separate cases of breaching a Virginia statute against cross burning. The Court distinguished between acts which could lawfully be outlawed: "*those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.*"[54] The Court held that it regarded intimidation as a type of real threat "*where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.*"[55] The Court found that the act of cross burning often involves intimidation and often creates fear in victims that they are a target of violence. Banning this kind of intimidation did not fall foul of the First Amendment. However, the Court ruled that the statute at hand went too far. Its provisions created the risk of suppressing the act of cross burning completely as its provisions stated that any cross burning amounted to prima facie evidence of intent to intimidate.[56]

Precedent from the United States Supreme Court has particular instructive value in the context of free speech under our law. In ***Mamabolo***, the Constitutional Court has emphasised that –

> "[H]aving regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way".[57]

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[53] 538 U.S. 343 (2003).

[54] *Virginia judgment* at p 359.

[55] *Virginia judgment* at p 360.

[56] *Virginia judgment* at p 348.

[57] S v Mamabolo (E TV Intervening) 2001 (3) SA 409 (CC) at para 37

Similarly, in ***Economic Freedom Fighters***, in the context of the criminal offence of incitement, the Constitutional Court held that:

> "[L]egislation that seeks to limit free speech must thus be demonstrably meant to curb incitement of offences that seriously threaten the public interest, national security, the dignity or physical integrity of individuals – our democratic values."[58]

[58] *Economic Freedom Fighters* at para 47