Phone: 021 556 5502

Email: info@forsa.org.za
Website: www.forsa.org.za

P.O. Box 50110, West Beach
Cape Town 7441

To: Hon Ms Shaikh, MP
Chairperson
Parliamentary Select Committee on Security and Justice
For attention: **Mr Gurshwyn Dixon**
Committee secretary
[redacted] [redacted]

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

Date: 19 May 2023 (**Deadline for comment: Monday, 22 May 2023 at 13:00**)

CONTENTS:	**PAGE NUMBER:**

INTRODUCTION:

Dear Hon. Ms Shaikh, MP,

1. We refer to the invitation for written submissions by the Parliamentary Select Committee on Security and Justice (the "Committee"), on the *Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B–2018]* (the "Bill").

2. At the outset, we thank the Committee for extending the deadline for comments. We see this as a sign of the Committee's serious commitment to facilitate meaningful public participation. We are, however, concerned that there was **no physical address was given for submissions** to the Committee, thus effectively excluding every South African citizen who does not have the advantage of access to the internet.

3. While the Bill currently before the Committee is certainly an improvement on the initial version opened for comment by the Department of Justice and Constitutional Development ("the Department"), ***Freedom of Religion South Africa* ("*FOR SA*") remains concerned about**

certain aspects of the Bill, specifically the hate speech component which we believe to be unconstitutional for the reasons set out in this submission.

4. We would appreciate an opportunity to make verbal submissions to the Committee, if and when such opportunity presents itself. In this regard, we call on the Committee to ensure Parliament's constitutional obligation to facilitate meaning public consultation is fulfilled, and in this regard, specifically request the Committee to host public hearings.

5. Public hearings would be greatly beneficial – especially given the controversy and far-reaching implication of, and public interest in, the Bill – as it will enable stakeholders to address the Committee directly on their most pertinent concerns. At the same time, the Committee will have the benefit of asking stakeholders questions in turn. Ultimately, this will culminate in a much more thorough public participation process, as issues will be ventilated much more thoroughly. It will also emphasise the Committee's commitment to ensuring that the constitutional obligation to ensure meaningful public participation is facilitated, is discharged.

ABOUT *FOR SA* AND ITS INTEREST IN THE BILL:

6. *Freedom of Religion SA NPC* (2014/099286/08) ("*FOR SA*") is a legal advocacy organisation mandated to protect and promote the right to religious freedom and related rights of all South Africans, regardless of their specific religious or ideological beliefs. *FOR SA* is, therefore, neutral and non-partisan in terms of any interpretation of doctrine, faith or belief to the extent that it complies with the rule of law.

7. *FOR SA* currently has an endorsement base of religious leaders representing millions of people in South Africa. Its constituency spans across various denominations, churches and faith groups. (For example, in the Lockdown matter, *FOR SA* mandated by religious leaders and organisations representing between 11 million and 18.5 million people (including 10 million people from the African Indigenous and Spirituality Churches) from a cross-spectrum of churches, denominations and faith groups, to engage with Government and make submissions on their behalf.)

8. *FOR SA* has also appeared in various court cases that may have an (adverse) impact on religious freedom and related rights, either as an *amicus curiae* or as a principal party.

9. *FOR SA*'s interest in the Bill is limited only to the **hate speech component**, as we believe it could have a bearing on the **right to freedom of conscience, religion, thought, belief and**

opinion[1] ("religious freedom") and related rights, specifically: the **right to freedom of (religious) expression**.[2]

10. As an organisation, *FOR SA* believes that every human being has intrinsic dignity and worth (value). We need to recognise and respect the inherent dignity of all people. No person should suffer violence or hatred because of their race, nationality, sex, religion or any other immutable characteristic or trait.

11. *FOR SA* further esteems and affirms the constitutional promise that "*South Africa belongs to all who live in it, united in our diversity*".[3]

12. As such, we commend the Committee for what we believe to be a *bona fide* effort to prevent and combat hate crimes and hate speech and to create an environment where South Africans can peacefully and respectfully co-exist despite our differences.

13. We are concerned, however, that the Bill, particularly the "hate speech" component is unconstitutional (for the reasons set out below). The Bill's current definition of "hate speech" is so broad and/or vague and/or ambiguous that it will violate other constitutional rights, including particularly freedom of expression and religious freedom– which may, inadvertently, undermine the very democratic values of the *Constitution* that also celebrate the diversity of South Africa's people.

EXECUTIVE SUMMARY OF SUBMISSIONS:

14. As an organisation working to protect and promote religious freedom in South Africa, *FOR SA* is concerned that the hate speech component in the Bill, which aims to criminalise expressions that the Bill sees as "hate speech", is:

14.1. **Unnecessary**, as existing laws already effectively prohibit hate speech:

A) Criminal law:

i. The common law crime of *crimen iniuria* which has been successfully used to convict racist speech – e.g. **Penny Sparrow** and **Vicky Momberg**;[4]

[1] Section 15 of the Constitution of the Republic of South Africa, 1996 ("the *Constitution*").
[2] Section 16 of the *Constitution*.
[3] Preamble to the *Constitution*.
[4] **Penny Sparrow** and **Vicky Momberg** were both found guilty of *crimen iniuria* for making racists statements. In the case of Sparrow, she was fined R5 000 and sentenced to two years' imprisonment, suspended for five years. In addition, she was found to have committed "hate speech" under *PEPUDA* and ordered to pay R150 000,00 in compensation to the Oliver and Adelaide Tambo Trust. In the case of Momberg, she was sentenced to three years' imprisonment, of which one year was suspended.

ii. The *Riotous Assemblies Act, 1956*[5] which criminalises **inciting** people to commit an offence; and

iii. The *Intimidation Act, 1982*[6] which criminalises **intimidating** the public, through fear, to do or not do something.

B) Civil law:

i. The *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000*[7] ("*PEPUDA*") - e.g. **Qwelane** (sexual orientation), **Velaphi Khumalo** (race), **Masuku** (antisemitism).

14.2. **Overbroad**, going further than the definition of hate speech in the *Constitution*[8] as well as the definition of (civil) hate speech in *PEPUDA*[9] as confirmed by the Constitutional Court in the *Qwelane v South African Human Rights Commission and Another*[10] ("*Qwelane*") judgment.[11]

14.3. **Unclear, vague and ambiguous** in that the various elements in the Bill's definition of the proposed crime of hate speech are either undefined, such as the quintessential element of *hate*,[12] or vague and/or ambiguous in their definition, such as *social cohesion*[13].

[5] Section 18(2) of the *Riotous Assemblies Act*:
"*(2) Any person who-*
(a) conspires with any other person to aid or procure the commission of or to commit; or
(b) incites, instigates, commands, or procures any other person to commit,
any offence, whether at common law or against a statute or 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."
[6] Section 1A - *Intimidation Act*:
"*(1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-*
incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,
shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."
[7] Section 10 of *PEPUDA,* as per the Constitutional Court judgment in *Qwelane*:
"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.
(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."
[8] Section 16(2)(c) of the *Constitution*.
[9] Section 10 of *PEPUDA*.
[10] 2021 (6) SA 579 (CC).
[11] The implications of this judgment are discussed from paragraph 48 onwards in this submission.
[12] Clause 1 of the Bill fails to define *hate* which is the *core* element of the proposed crime of hate speech.
[13] Clause 1 of the Bill includes *social detriment* as a form of *harm*, one of the elements of the proposed crime of hate speech. It defines this form of harm as undermining South Africa's *social cohesion.*

14.4. Contrary to the **rule of the law**, which is a founding value[14] of the Republic, in that:

14.4.1. By failing to define the element of *hate* in the proposed crime of *hate* speech, Parliament abdicates its legislative responsibility to the courts and is thereby acting irrationally[15] in the exercise of its legislative powers; and

14.4.2. This unclear, overbroad, vague definition of hate speech results in an unclear criminal law that members of the public will not be able to know[16] beforehand that they are breaking.

14.5. **Unconstitutional**, because it:

14.5.1. **Contravenes section 36** of the *Constitution* by unreasonably and unjustifiably limiting various constitutional rights, specifically freedom of (religious) expression, due to:

14.5.1.1. Being unnecessary; and

14.5.1.2. Being overbroad and/or vague and/or ambiguous.

14.5.2. **Contravenes the rule of law**, one of the values that must be upheld and promoted when interpreting the Bill of Rights[17] which affirms the democratic values of dignity, equality and freedom.[18]

14.6. Falls foul of South Africa's **international law obligations and commitments** to:

14.6.1. uphold freedom of expression and freedom of religion including, as an integral component of that right, **the right to manifest freely and without fear or hindrance, one's religious convictions and beliefs in public through observance and practice**;[19]

[14] Section 1(c) of the *Constitution* states that South Africa is one, sovereign, democratic state founded on the value of the supremacy of the Constitution and the rule of law.
[15] *Pharmaceutical Manufacturers Association of SA, In re: Ex parte Application of President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.
See also: *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at paras 19 and 24.
[16] *See, for example, Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 69 and *Abahlali BaseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 123.
[17] Section 39(1)(a) of the *Constitution.*
[18] Section 7(1) of the *Constitution*.
[19] Including, but not limited to, *the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights*, the *African Charter on Human and People's Rights*, *the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, and *the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* held in Durban.

14.6.2. impose criminal sanctions for hate speech only as a last resort measure in strictly justifiable circumstances; and

14.6.3. incorporate the requirements of the six-part United Nations' ("UN") Rabat Plan of Action threshold test (which is used to determine culpability for criminal hate speech); and

14.7. Could have a **major chilling effect** on *inter alia* the following constitutional rights which are fundamental to the well-being and vibrancy of the pluralistic, democratic society envisaged by our *Constitution*:

14.7.1. freedom of expression (section 16 of the *Constitution*); and

14.7.2. religious freedom (section 15 of the *Constitution*).

15. Should the current hate speech provisions in the Bill be allowed to remain "as is", it is highly likely that the Bill will be the subject of a constitutional challenge.

16. We recommend that the presumably unintended, but nonetheless unconstitutional, consequences of the definition of hate speech in its current form, be avoided or eliminated by:

16.1. **Omitting the hate speech provisions** (clause 4) from the Bill altogether; and

16.2. Alternatively, in the event that the hate speech provisions remain in the Bill, remedying the constitutional defects in the definition by:

16.2.1. **Defining harm** as *"gross psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group caused by the expression".* This will **remove problematic types of harm - subjective** (emotional detriment) and **novel and ambiguous** (social detriment) – and insert the degree of harm (gross) that should be appropriately required for a speech crime that can result in a long jail sentence;

16.2.2. **Defining hatred** as *"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"[20] in-line with the *Qwelane* judgment;

16.2.3. **Defining to promote or propagate hatred** as "*the expression, when objectively assessed, actively supports, instigates, exhorts, stirs up or calls for hatred on a listed ground. Advocacy of hatred bears the same meaning*."

16.2.4. **Defining the grounds for hate speech** as *"(a) race, (b) ethnicity, (c) gender, (d) religion, or (e) sexual orientation."*

16.2.5. **Dealing with the Bill's current expanded grounds** by including a clause criminalising ***incitement of imminent violence***:[21] *"Any person who intentionally, publicly publishes, propagates or advocates anything or communicates to one or more persons in a manner that incites imminent violence against any person and/or group of people, will be guilty of an offence*."

16.2.6. **Defining hate speech**[22] to expressly **exclude private communications** as follows: "*Any person who intentionally, <u>publicly</u> publishes, propagates or advocates anything or communicates to one or more persons in a manner — (i)<u>to incite harm</u>; **and** (ii)promote or propagate hatred, based on one or more of the grounds is guilty of the offence of hate speech."*

16.2.7. **Clarifying and strengthening the religious exemption clause** (clause 4(2)(d)), to ensure adequate protection of the constitutional right to religious freedom, including religious expression, of <u>all people</u> – not only ministers of religion. In this regard, we propose the following amendment:[23]

"(d) <u>expression</u> of any religious conviction, tenet, belief, teaching, doctrine or writings, <u>by a religious organisation or an individual, in public or in private; or</u>

…

that does not <u>actively stir up enmity, ill-will, detestation, malevolence and vilification against members of an identifiable group</u>, that constitutes incitement to cause <u>gross psychological and physical detriment that objectively and severely</u>

[20] The definition proposed is an amalgamation of what came out of the three (3) Canadian cases the Constitutional Court endorsed in *Qwelane* (see footnote 100 in the Qwelane judgment).
[21] I.e. as opposed to locating these additional grounds under the s16(2)(c) with its limited grounds, locating it under s16(2)(b) of the *Constitution* which has no limitation on grounds.
[22] Clause 4(1)(a) of the Bill.
[23] Changes to existing text are <u>underlined</u>.

undermines the human dignity of the targeted group, based on race, ethnicity, gender, religion or sexual orientation."

16.2.8. Expressly providing **protection for the right and freedom to receive or impart information or ideas** (section 16(1)(b) of the *Constitution*),[24] by inserting after clause 4(2)(d), a new clause 4(2)(e):

"(e) exchange of information or ideas;

…

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."

151.2.9 By inserting the following sub-clause as clause 6(3)(b) to include and require the consideration of the six-part **UN Rabat Plan of Action** threshold test in determining sentencing: *"6(3)(b) The following factors need to be considered when determining sentencing –*

(i) The context prevalent at the time the within which the expression was made and the likelihood it would have incited harm against the target group in that context.

(ii) The speaker's standing in the context of the audience to whom the speech was directed.

(iii) The degree to which the expression was provocative and direct.

(iv) The expression's reach: the size of its audience, whether the audience had the means to act on the incitement, whether the statement (or work) was circulated in a restricted environment, or widely accessible to the general public."

16.2.9. Removing clause 10(2)(b) from the Bill so that no regulations may ever be **deemed** to be approved by Parliament.

[24] Since the Bill proposes imposing criminal sanctions for hate speech and not merely civil sanctions, like *PEPUDA* does.

16.2.10. Amending the Preamble of the Bill to include specific reference to:

- Sections 15 (**freedom of conscience, religion, thought, belief and opinion**) and 31 (**rights of cultural, religious and linguistic communities**) of the *Constitution*; and
- All international instruments (and not only some) pertaining to **South Africa's binding international law obligations** to uphold 1) freedom of expression and 2) freedom of religion while 3) prohibiting hate speech, as well as the **UN Rabat Plan of Action**.

THE BILL's STATED OBJECTIVES:

17. The Bill's stated objectives include giving "*effect to the Republic's obligations in terms of the Constitution and international human rights instruments*,"[25] including "*regarding prejudice and intolerance in terms of international law*".[26]

18. The Preamble makes clear which particular international legal instruments are contemplated by the Bill, namely:

18.1. The Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban ("*Durban Declaration*"); and

18.2. The International Convention on the Elimination of All Forms of Racial Discrimination ("*ICERD*"), to which South Africa is a signatory.

19. While both instruments undoubtedly are pertinent to the issue, it is important to understand that both are concerned with – and confined to – issues of discrimination and intolerance based on "*race, colour, descent, or national or ethnic origin*",[27] and do not extend beyond this limited list to all the "characteristics" and/or "grounds" mentioned in clauses 1, 3(1) and 4(1)(a) of the Bill.

20. Furthermore, as set out in the *International Legal Framework* component of this submission (below from paragraph 22 onwards), these are **not** the only international human rights instruments pertaining to hate speech and expression, and that South Africa has an obligation to fulfil and which should have been considered in the Bill.

[25] Preamble of the Bill.
[26] Clause 6(5) of the Memorandum on the Objects of the Bill.
[27] Article 5 of *ICERD*.

THE LEGAL FRAMEWORK:

21. Our main concerns relating to the **hate speech provisions (clause 4)** in the Bill, are as follows:

21.1. It is **unnecessary**, as existing laws already effectively prohibits hate speech:

A) Criminal law:

i. The common law crime of *crimen iniuria* which has been successfully used to convict racist speech – e.g. **Penny Sparrow** and **Vicky Momberg**;[28]

ii. The *Riotous Assemblies Act, 1956*[29] which criminalises **inciting** people to commit an offence; and

iii. The *Intimidation Act, 1982*[30] which criminalises **intimidating** the public, through fear, to do or not do something.

B) Civil law:

i. *PEPUDA*[31] - e.g. **Qwelane** (sexual orientation), **Velaphi Khumalo** (race), **Masuku** (antisemitism).

21.2. The proposed definition and scope of hate speech is:

21.2.1. **Overbroad**, going further than the definition of hate speech in the *Constitution* as well as the definition of (civil) hate speech in *PEPUDA* as confirmed by the Constitutional Court in the *Qwelane* judgment;

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[28] **Penny Sparrow** and **Vicky Momberg** were both found guilty of *crimen iniuria* for making racists statements. In the case of Sparrow, she was fined R5 000 and sentenced to two years' imprisonment, suspended for five years. In addition, she was found to have committed "hate speech" under *PEPUDA* and ordered to pay R150 000,00 in compensation to the Oliver and Adelaide Tambo Trust. In the case of Momberg, she was sentenced to three years' imprisonment, of which one year was suspended.

[29] Section 18(2) of the *Riotous Assemblies Act*:

"*(2) Any person who-*

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or 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."

[30] Section 1A - *Intimidation Act*:

"*(1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-*

incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."

[31] Section 10 of *PEPUDA,* as per the Constitutional Court judgment in *Qwelane*:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

21.2.2. **Unclear, vague and ambiguous** in that the various elements in the Bill's definition of the proposed crime of hate speech are either undefined, such as the quintessential element of *hate*,[32] or vague and/or ambiguous in their definition, such as *social cohesion*;[33]

21.2.3. Contrary to the **rule of the law**, which is a founding value[34] of the Republic, in that:

21.2.3.1. By failing to define the element of *hate* in the proposed crime of *hate* speech, Parliament abdicates its legislative responsibility to the courts and is thereby acting irrationally [35] in the exercise of its legislative powers; and

21.2.3.2. This unclear, overbroad, vague definition of hate speech results in an unclear criminal law that members of the public will not be able to know[36] beforehand that they are breaking.

21.3. The proposed definition and scope of hate speech is **unconstitutional**, because it:

21.3.1. **Contravenes section 36** of the *Constitution* by unreasonably and unjustifiably limiting various constitutional rights, specifically freedom of (religious) expression, due to:

21.3.1.1. Being unnecessary; and

21.3.1.2. Being overbroad and/or vague and/or ambiguous.

21.3.2. **Contravenes the rule of law**, one of the values that must be upheld and promoted when interpreting the Bill of Rights[37] which affirms the democratic values of dignity, equality and freedom.[38]

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[32] Clause 1 of the Bill fails to define *hate* which is the *core* element of the proposed crime of hate speech.
[33] Clause 1 of the Bill includes *social detriment* as a form of *harm*, one of the elements of the proposed crime of hate speech. It defines this form of harm as undermining South Africa's *social cohesion.*
[34] Section 1(c) of the *Constitution* states that South Africa is one, sovereign, democratic state founded on the value of the supremacy of the Constitution and the rule of law.
[35] *Pharmaceutical Manufacturers Association of SA, In re: Ex parte Application of President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.
See also: *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at paras 19 and 24.
[36] *See, for example, Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para. 108; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 69 and *Abahlali BaseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 123.
[37] Section 39(1)(a) of the *Constitution.*
[38] Section 7(1) of the *Constitution*.

21.4. The criminalisation of hate speech could **severely limit (and violate) other fundamental rights** in the Bill of Rights. Specifically, the criminalisation of hate speech could have a **major chilling effect** on:

21.4.1. freedom of expression (section 16 of the *Constitution*); and
21.4.2. religious freedom (section 15 of the *Constitution*).

21.5. The criminalisation of hate speech, as proposed by the Bill, also likely **falls foul of South Africa's international law obligations** in respect not only of protecting freedom of expression and freedom of religion, but even of addressing hate speech itself.

A: INTERNATIONAL LEGAL FRAMEWORK:

International Law:

22. In terms of section 39(1)(b) of the *Constitution*, a court "*must consider international law*" when interpreting the Bill of Rights.

23. In addition, section 233 of the *Constitution* requires that every court, when interpreting any legislation, "***must prefer***" any reasonable interpretation that is consistent with international law.

24. For this reason, it is prudent for the Committee to heed and give effect to South Africa's international human rights law obligations when drafting legislation that directly affects fundamental rights, including the right to religious freedom and the right to freedom of expression.

25. In addition to *ICERD* and the *Durban Declaration* (both cited in the Bill's Preamble), the following international instruments are also relevant and applicable:

25.1. Universal Declaration of Human Rights ("*UDHR*"):[39]

Article	**Right / Duty**
Article 18	*Religious Freedom:* states that everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
Article 19	*Freedom of Expression:* states that everyone has the right to freedom of opinion and expression; freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

[39] Although not ratified by South Africa, it can be argued that the *UDHR* is binding on the Republic as customary international law, because it is the foundation of international human rights law.

25.2. International Covenant on Civil and Political Rights ("ICCPR"):[40]

Article	**Right / Duty**
Article 18	*Religious Freedom:* Everyone has the right to freedom of thought, conscience and religion; and that this includes the freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. The freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
Article 19	*Freedom of Expression:* Everyone has the right to hold opinions without interference and the right to freedom of expression; and that the right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. The right to freedom of expression carries with it special duties and responsibilities, and may be subject to restrictions necessary but only as are provided by law and are necessary for 1) respect of the rights or reputations of others, and 2) for the protection of national security, public order, public health or morals.
Article 20	Akin to section 16(2) of the *Constitution* – prohibits 1) propaganda for war, and 2) the **advocacy** of ***national, racial or religious*** **hatred** that constitutes incitement to ***discrimination, hostility or violence***.

25.3. The African Charter on Human and People's Rights (Banjul Charter):[41]

Article	**Right / Duty**
Article 8	*Religious Freedom:* Guarantees **freedom of conscience, the profession and the free practise of religion**. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.
Article 9	*Freedom of Expression:* Every individual has the right not only to receive information, but also to express and disseminate his opinions within the law.
Article 17(3)	*Duty of the State to Promote Morals and Traditional Values:* The State has the duty to promote and protect morals and **traditional** values recognised by the community.
Article 28	*Duty to Individual to Respect Fellow People:* states that every individual has the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.

25.4. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief:[42]

In its opening, the Declaration states that religion or belief is one of the fundamental elements in a person's conception of life, and that freedom of religion or belief should be fully respected and guaranteed.

Article	**Right / Duty**
Article 1	*Religious Freedom:* states that everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice. Freedom to manifest one's religion or belief may be subject only to such limitations as are necessary to protect public

[40] Ratified by South Africa on 10 December 1998.
[41] Ratified by South Africa on 9 June 1996.
[42] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 40, where the Constitutional Court considers the Declaration and seems to indicate it considers it binding on South Africa.

	safety, order, health or morals or the fundamental rights and freedoms of others.
Article 6	Further elaborates on some of the contents of the right to religious freedom, saying it includes the freedom to *inter alia*: - Write, issue and disseminate relevant publications in these areas; - Teach a religion or belief in places suitable for these purposes; and - Establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.
Article 2	*Discrimination on the Basis of Religion or Belief:* states that no one shall be subject to discrimination by any state, institution, group of persons, or person on the grounds of religion or belief. The expression "*intolerance and discrimination based on religion or belief*" is defined as any distinction, exclusion, restriction or preference based on religion or belief which has as its purpose, or as its effect, the nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis ("belief discrimination").
Article 4	Places a duty on the state to take effective measures to prevent and eliminate belief discrimination in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. This includes the duty to make all efforts to enact, or rescind, legislation to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief.

26. We will now consider the two international human rights instruments referred to in the Preamble of the Bill, which are the international law obligations upon which the Bill is (supposedly) based:

26.1. International Convention on the Elimination of All Forms of Racial Discrimination ("*ICERD*"):[43]

Article	**Right / Duty**
Article 4	Places a duty on states to condemn all propaganda and all organisations based on ideas or theories of racial superiority (or colour or ethnic origin), or which attempt to justify or promote racial hatred and discrimination in any form. States must not permit public authorities or institutions to promote or incite racial discrimination, and are required to declare as an offence punishable by law: - All dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, - 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); and - Participation in organisations or activities which promote and incite racial discrimination.
Article 5	**Importantly**, States are required to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of *inter alia* the right to freedom of thought, conscience and religion and the right to freedom of opinion and expression.

26.2. Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban ("*Durban Declaration*"):

26.2.1. Recognises that religion, spirituality and belief play a central role in the lives of millions of women and men, and in the way they live and treat other persons. Religion, spirituality and belief may and can contribute to the promotion of the

[43] Ratified by South Africa on 10 December 1998.

inherent dignity and worth of the human person and to the eradication of racism, racial discrimination, xenophobia and related intolerance.[44]

26.2.2. Urges states to recognise the particularly severe problems of religious prejudice and intolerance that many people of African descent experience, and to implement policies and measures that are designed to prevent and eliminate all such belief discrimination.[45]

26.2.3. Urges states to guarantee the rights of persons belonging to national or ethnic, religious and linguistic minorities, individually or in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language, in private and in public, freely and without interference, and to participate effectively in the cultural, social, economic and political life of the country in which they live, in order to protect them from any form of racism, racial discrimination, xenophobia and related intolerance that they are or may be subjected to.[46]

26.2.4. Calls upon states to promote and protect the exercise of the rights set out in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (discussed in paragraph 25.4 above).[47]

26.2.5. Voices concern about the use of new information technologies, such as the internet, for purposes contrary to respect for human values, equality, non-discrimination, respect for others and tolerance, including to propagate racism, racial hatred, xenophobia, racial discrimination and related intolerance, and recognises the need to promote the use of this technology to contribute to the fight against racism, racial discrimination, xenophobia and related intolerance.[48]

International law conclusion:

27. The emphasis on protecting the fundamental rights to religious freedom and freedom of expression can clearly be seen in the above international human rights instruments. **Explicit protection of the fundamental right to religious freedom is the norm and includes** – as an

[44] Para 8 on page 14 of the *Durban Declaration*.zx
[45] Para 14 on page 51 of the *Durban Declaration*.
[46] Para 47 on page 62 of the *Durban Declaration*.
[47] Para 79 on page 75 of the *Durban Declaration*.
[48] Paras 91 and 92 on page 35 of the *Durban Declaration*.

integral component of that right – **the right to manifest freely and without fear or hindrance, one's religious convictions and beliefs in public through observance and practice**.

28. From the above examination of international law, it is clear that the right to freedom of expression in international law contains two parts:

I. States have an obligation to protect the right to freedom of expression (and the right to freedom of religion); and
II. States have to prohibit (though not necessarily criminalise) hate speech.[49]

29. Importantly, even though *ICERD* (discussed in paragraph 26.1 above), requires States to declare the dissemination of ideas based on racial superiority or hatred, an offence punishable by law, this does not necessarily require the offence to be a **criminal offence**. This is because **hate speech can be addressed (or punished) effectively through civil remedies as well.**

30. Indeed, one could argue quite persuasively, that both the law already effectively fulfils the obligation to address and punish hate speech in both the **Criminal Law** and the **Civil Law**:

30.1. Criminal law:

30.1.1. The common law crime of *crimen iniuria* which has been successfully used to convict racist speech – e.g. **Penny Sparrow** and **Vicky Momberg**;[50]

30.1.2. The *Riotous Assemblies Act, 1956*[51] which criminalises **inciting** people to commit an offence; and

30.1.3. The *Intimidation Act, 1982*[52] which criminalises **intimidating** the public, through fear, to do or not do something.

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[49] *Qwelane* at para 88. See footnote 1.

[50] **Penny Sparrow** and **Vicky Momberg** were both found guilty of *crimen iniuria* for making racists statements. In the case of Sparrow, she was fined R5 000 and sentenced to two years' imprisonment, suspended for five years. In addition, she was found to have committed "hate speech" under *PEPUDA* and ordered to pay R150 000,00 in compensation to the Oliver and Adelaide Tambo Trust. In the case of Momberg, she was sentenced to three years' imprisonment, of which one year was suspended.

[51] Section 18(2) of the *Riotous Assemblies Act*:
"*(2) Any person who-*
(a) conspires with any other person to aid or procure the commission of or to commit; or
(b) incites, instigates, commands, or procures any other person to commit,
any offence, whether at common law or against a statute or 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."

[52] Section 1A - *Intimidation Act*:
"*(1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-*
incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,
shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."

30.2. Civil law:

30.2.1. *PEPUDA*[53] - e.g. **Qwelane** (sexual orientation), **Velaphi Khumalo** (race), **Masuku** (antisemitism).

31. Furthermore, these two international instruments (*ICERD* and the *Durban Declaration*) both also explicitly recognise the importance of the right to religious freedom and States' duty to protect it.

32. When it comes to concerns about the use of technology for purposes of, for e.g., spreading racial hatred, it is recognised that these technologies can equally assist with the promotion of tolerance and respect for human dignity, and the principles of equality and non-discrimination. The objective, therefore, of the two international instruments the Bill itself is based on and refers to and relies upon, is **more speech** – not less speech.

33. It is quite obvious that both *ICERD* and the *Durban Declaration* concern **discrimination based on race, colour and ethnicity *only***. This means the Bill goes much wider than the Republic's obligations under these instruments – not only because it extends the grounds for hate speech from race to a variety of other grounds, but also because it effectively adopts the idea that "less speech is better". Ironically, this is contrary to what is espoused in the very instruments the Bill relies upon. Yet, the Bill goes even further still and criminalises speech, while simultaneously ignoring the Republic's other international law obligations under other equally important and relevant international instruments, to protect fundamental rights such as religious freedom and freedom of expression.

UN Rabat Plan of Action:

34. The UN Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that constitutes Incitement to Discrimination, Hostility or Violence. ("Rabat Plan of Action"), brings together the conclusions and recommendations from several expert workshops. These workshops were convened by the Office of the UN High Commissioner for Human Rights ("OHCHR") and the Rabat Plan of Action was adopted at a meeting of experts in 2012.[54]

[53] Section 10 of *PEPUDA,* as per the Constitutional Court judgment in *Qwelane*:
"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.
(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."
[54] OHCHR and Freedom of Expression vs Incitement to Hatred: the Rabat Plan of Action.

35. The Rabat Plan of Action recommends setting a **high threshold for defining restrictions on freedom of expression**, incitement to hatred, and for the application of article 20 of the *ICCPR* (which is similar to s 16(2)(c) – the hater speech provision – of the *Constitution*).

36. The Rabat Plan of Action states 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*."[55]

37. The **UN Strategy and Plan of Action on Hate Speech** affirms that one of its key guiding principles is that the "***UN supports more speech, not less****, as the key means to address hate speech*".[56]

Six-part Rabat threshold test:

38. The Rabat Plan of Action highlights that article 20 of the ***ICCPR*** **requires a high threshold for restricting freedom of expression**, precisely because the limitation of freedom of expression must remain an exception, and specifically warns against the "*abuse of vague domestic legislation*".[57]

39. This useful OHCHR One-pager on "Incitement to Hatred", outlines the six-part Rabat threshold test for restricting freedom of expression. It suggests that ***each*** **of the following** ***six*** **parts** of the threshold test ***must*** **be fulfilled** ***before*** a statement amounts to a criminal offence:

    (1) **Context**: "*Context is of great importance when assessing whether particular statements are likely to incite discrimination, hostility or violence against the target group, and it may have a direct bearing on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.*" (Own emphasis.)

    (2) **Speaker**: "*The speaker's position or status in the society should be considered, specifically the individual's or organization's standing in the context of the audience to whom the speech is directed.*" (Own emphasis.)

[55] Rabat Plan of Action at para 34. (Own emphasis.)
[56] Principle 1 on page 3 of the UN Strategy and Plan of Action on Hate Speech. (Own emphasis.)
[57] Rabat Plan of Action at para 8.

(3) **Intent**: "*Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.*" (Own emphasis.)

(4) **Content and form**: "*The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as the form, style, nature of arguments deployed in the speech or the balance struck between arguments deployed.*" (Own emphasis.)

(5) **Extent of the speech act**: "*Extent includes such elements as the reach of the speech act, its public nature, its magnitude and size of its audience. Other elements to consider include whether the speech is public, what means of dissemination are used, for example by a single leaflet or broadcast in the mainstream media or via the Internet, the frequency, the quantity and the extent of the communications, whether the audience had the means to act on the incitement, whether the statement (or work) is circulated in a restricted environment or widely accessible to the general public.*" (Own emphasis.)

(6) **Likelihood, including imminence:** "*Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for said speech to amount to a crime. Nevertheless, some degree of risk of harm must be identified. It means that the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognizing that such causation should be rather direct*." (Own emphasis.)

40. Furthermore, as clearly stipulated in the UN Rabat Plan of Action, **criminalisation of speech** must be a **last resort measure** – the UN prefers an approach of more speech as a means to counter hate speech, rather than restricting speech.

41. Should Parliament fail to ensure that the Bill meets the six-part Rabat threshold test – and that this test's criteria are expressly set out in the Bill - this will lead to a violation of the Republic's obligations under the *ICCPR*.

B: SOUTH AFRICAN LEGAL FRAMEWORK:

Constitutional Provisions:

42. Duties of the state:

42.1. In terms of section 8(1) of the *Constitution*, the **Bill of Rights applies to *all* law**, and binds the state, including Parliament.

42.2. Section 7(2) of the *Constitution* requires the state to **respect, protect, promote and fulfil *all* the rights** in the Bill of Rights.

43. **Limitation of rights:** Section 7(3), read with section 36, of the *Constitution* states that a right contained in the Bill of Rights can only be limited by section 36, or "*elsewhere in the Bill*" – i.e. by an internal limitation clause as is the case in section 16(2).

44. **Interpreting a law:** Importantly, in the current situation of drafting a proposed law, section 39(2) of the *Constitution* requires that any law must be interpreted in a way that promotes *"the spirit, purport and objects of the Bill of Rights*". This includes, therefore, interpreting the law to see if it meets the requirements of **the rule of law**,[58] which is one of the Republic's founding values[59] that must be upheld and promoted when interpreting the Bill of Rights.[60]

45. **Hierarchy of rights:** The *Constitution* also knows no hierarchy of rights[61] – rights should also not be construed absolutely or individualistically in ways which deny that all individuals are members of a community.[62] Again, the *Constitution* requires[63] the State to protect and promote all the rights in the Bill of Rights, without preferring one over another.

[58] *See, for example, Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 69 and *Abahlali BaseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 123.
[59] Section 1(c) of the *Constitution*.
[60] Section 39(1)(a) of the *Constitution.*
[61] See, for example, *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services: In Re Masetlha v President of the Republic of South Africa and Another* 2008 (5) SA 31 (CC) at para 84; *The Citizen 1978 (Pty) Ltd and Others v Mcbride (Johnstone and Others, Amici Curiae)* 2011 (4) SA 191 (CC) at para 148; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 CC at para 3.
[62] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC) at para 31, citing *Bernstein v Bester* 1996 (2) SA 751 (CC) at para 67.
[63] Section 7(2) of the *Constitution*.

Religious Freedom and Related Rights:

46. Religious freedom:

46.1. The applicable constitutional provisions:

46.1.1. *Constitution* expressly protects the right to freedom of conscience, religion, thought, belief and opinion[64] (commonly referred to as "religious freedom") in section 15 of the *Constitution* – without any internal limitation.

46.1.2. The right to religious freedom applies to both individuals and juristic persons[65] such as for example, religious institutions and organisations.

46.1.3. This right can only be limited in accordance with section 36 of the *Constitution*. Therefore, to the extent that the Bill will potentially limit the right to religious freedom guaranteed in section 15 of the *Constitution*, it must pass the section 36 limitations test.

46.2. Examining the content of the right to religious freedom: the Constitutional Court[66] has said that the "*essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*"[67] and that it "*implies an absence of coercion or constraint and … may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs*". [68]

46.3. In considering the scope of this right, the Constitutional Court has said that it even extends to beliefs that are "*bizarre, illogical or irrational to others, or are incapable of scientific proof*.[69]

46.4. Furthermore, the right to religious freedom is irrevocably intertwined with other rights, including but not limited to, the right to:

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[64] Own emphasis.
[65] See section 8(4) of the *Constitution*.
[66] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) para 92.
[67] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 18 citing *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 92. (Own emphasis.)
[68] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 92.
[69] *Prince v President, Cape Law Society, and Others* 2002 (2) SA 794 (CC); 2002 (3) BCLR 231 (CC) (hereafter referred to as "*Prince 2*") at para 42.

46.4.1. **Dignity**, as explained by the Constitutional Court: "*[t]he right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity"*[70] and *"[r]eligious and cultural practices are protected because they are central to human identity and hence to human dignity which is in turn central to equality."*[71] This means that the "*State should, wherever reasonably possible, seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law".*[72]

46.4.2. **Equality**, as illustrated by section 9 of the *Constitution*, which enshrines the right to equality, expressly entrenches *religion, conscience* and *belief* as grounds on the basis of which neither the State nor any other person may unfairly discriminate against a natural or juristic person.[73] Indeed, *PEPUDA*, the subsidiary legislation giving effect to section 9 of the *Constitution*, presumes discrimination on the grounds of religion, conscience or belief[74] to be automatically unfair (i.e. unlawful discrimination) unless proven otherwise.[75] This is so, irrespective of whether such discrimination is committed by the state or any other person,[76] or was direct or indirect[77] in nature.

46.4.3. **Freedom of Expression**, [78] as apparent from the fact that the right to religious freedom extends to *thought and opinion*,[79] and our Constitutional Court has said it includes the "*right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*".[80] The right to freedom of religion also includes the right to verbalise beliefs which some may find offensive – for e.g. "*those persons who for reasons of religious belief disagree with or condemn homosexual conduct, are free to hold and articulate such beliefs*".[81]

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[70] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 36.
[71] *MEC for Education, KwaZulu-Natal & others v N Pillay & Others* 2008 (1) SA 474 (CC) at para 62.
[72] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 35.
[73] Section 9(3) and (4) of the *Constitution*.
[74] Section 1 of *PEPUDA*.
[75] Section 13(2) of *PEPUDA*.
[76] Section 6 of *PEPUDA*.
[77] Section 1 of *PEPUDA*.
[78] See for example *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) in para 27 where the Court said the rights to freedom of expression, privacy, dignity and religious freedom were all part of a "*web of mutually supporting rights*".
[79] Section 15(1) of the *Constitution*.
[80] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 18 citing *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 92. (Own emphasis.)
[81] *National Coalition for Gay and Lesbian Equality And Another v Minister Of Justice and Others* 1999 (1) SA 6 (CC) at para 137.

46.5. Due to religious freedom and related rights being irrevocably intertwined with the above rights, eroding the right to religious freedom's protection erodes the protection of these related rights too.

46.6. On just how closely connected the right to freedom of religion is with the **institution of democracy and with a free society**, the Court has said that "*[t]he constitutional right to practise one's religion … is of fundamental importance in an open and democratic society. It is one of the hallmarks of a free society"*.[82]

46.7. In light of the above, it is emphasised that, in South Africa, religious freedom is understood as freedom *of* religion, and not freedom *from* religion, whether in private or in public, and with the State being required to treat all belief systems (religions, conscience and beliefs) equally.

47. Freedom of expression:

47.1. The applicable constitutional provisions:

47.1.1. Section 16(1) of the *Constitution* expressly protects the right to freedom of expression, explicitly stating that this right includes the right to freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research.[83]

47.1.2. Section 16(2) of the *Constitution* also clearly states what the right to freedom of expression does not extend to, namely:

a) propaganda for war;
b) incitement of imminent violence; and
c) **advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm** (commonly referred to as "*hate speech*").

47.1.3. The aforementioned three (3) grounds are **unprotected expressions** – and the State is allowed to regulate such "unprotected speech" as it sees fit.

[82] *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC) (hereafter referred to as "*Prince 1*") at para 25.
[83] Own emphasis.

47.1.4. As soon as the State wishes to regulate any speech falling outside of section 16(2)'s three (3) narrow grounds ("unprotected expression"), it is limiting **expression** protected by section 16(1) ("protected expression") and needs to show that the limitation passes the **section 36 test**.

47.2. Examining the importance of the right to freedom of expression we see that:

47.2.1. It is one of the most important rights in a democracy,[84] because it is the right (vehicle) by which all other rights are defended and affirmed. In ***Mandela v Felati,***[85] the Court explained it thus: "*In a free society all freedoms are important, but they are not equally important. Political philosophers are agreed about the primacy of freedom of speech. It is the freedom upon which all the other freedoms depend; it is the freedom without which the others would not long endure*."

47.2.2. It is **indispensable to a democracy**, especially South Africa's democracy with **our history**. As the Constitutional Court has said freedom of expression:

47.2.2.1. "*lies at the heart of a democracy*";[86]

47.2.2.2. Plays an "*instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally*";[87] and

47.2.2.3. "*is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having 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… Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed*.[88]

[84] *S v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* 2001 (3) SA 409 (CC) at para 33; *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 at para 24; and *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC) at para 7.
[85] *Mandela v Felati* 1995 (1) SA 251 (W) at 259.
[86] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 7.
[87] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 7.
[88] *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37. (Own emphasis.)

47.3. Examining the scope of freedom of expression, we see that like freedom of religion,[89] it specifically includes the right to say things which are **offensive and even hurtful**:

47.3.1. In the matter of *Masuku and COSATU v SAHRC obo SAJBD*,[90] the Supreme Court of Appeal ("SCA") emphasised that "***a hostile statement is not necessarily hateful in the sense envisaged under s 16(2)(c)***"[91] and again that "***[t]he fact that particular expression may be hurtful of people's feelings, or wounding, distasteful, politically inflammatory or downright offensive, does not exclude it from protection …***"[92]

47.4. Similarly, in the case of *Moyo v Minister of Justice and Constitutional Development and Others*,[93] the SCA likewise held that: "*[U**]nless hate speech, incitement of imminent violence or propaganda for war as proscribed in s 16(2) of the Constitution are involved, no one is entitled to be insulated from opinions and ideas that they do not like, even if those ideas are expressed in ways that place them in fear.** Indeed, in present day South Africa many will be afraid of the political and social possibilities that are advocated for daily in high stakes debates that characterise a transforming society with a violent, racist past. Obviously this may place many South Africans in a condition of subjective or 'reasonable' fear. **But that does not entitle them to expect the State to lock up those whose chosen forms of expression placed them in a subjective state of fear or might reasonably (but not in fact) have placed them in fear**.*"[94]

47.5. This approach was settled by the Constitutional Court in its *Qwelane* judgment (discussed below in paragraphs 48 to 57), where the Court expressly said that: "*[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech... offensive speech is protected by freedom of expression*."[95]

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[89] See paragraph 46 above.
[90] *Masuku and COSATU v SAHRC obo SAJBD* (1062/2017) [2018] ZASCA 180; 2019 (2) SA 194 (SCA); [2019] 1 All SA 608 (SCA) (4 December 2018). *("Masuku").*
[91] *Masuku* at para 19.
[92] *Masuku* at para 32.
[93] *Moyo v Minister of Justice and Constitutional Development and Others* 2018 (2) SACR 313 (SCA) ("*Moyo*").
[94] *Moyo* at para 31. (Own emphasis).
[95] *Qwelane* at para 103. (Own emphasis.)

47.6. The Court has also held that we are obliged to **delineate the bounds of the constitutional guarantee of free expression *generously*** and that unless an expressive act is excluded by section 16(2), it is protected expression.[96]

47.7. Examining how the right to freedom of expression relates to other rights and requires tolerance:

47.7.1. The Court has held freedom of expression to be a "*web of mutually supporting rights*",[97] because it is closely related to other constitutional rights such as freedom of religion, dignity, freedom of association, the right to vote and to stand for public office (section 19 of the *Constitution*) and the right to assembly (section 17 of the *Constitution*).[98]

47.7.2. The Constitutional Court has said that *"[t]hese rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions. The rights implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions, whether individually or collectively,* ***even where those views are controversial****. The corollary of the freedom of expression and its related rights is* ***tolerance by society of different views****. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the* ***public airing of disagreements and the refusal to silence unpopular views***."[99]

Implications of *Qwelane* judgment on Hate Speech in the CIVIL LAW:

48. In *Qwelane v South African Human Rights Commission and Another*[100] ("*Qwelane*") the Constitutional Court specifically traversed under which circumstances freedom of expression can be limited.

[96] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC) para 47.
[97] *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) at para 27.
[98] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 8.
[99] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 8. (Own emphasis.)
[100] 2021 (6) SA 579 (CC).

49. Importantly, *Qwelane* was decided in terms of ***PEPUDA*** - a civil law. This is the legal context of the Constitutional Court's judgment and all the Court's remarks (e.g., relating to the need for a *causal link* and *analogous grounds* etc.) need to be understood in light of the fact that we are dealing with the civil law branch of the legal system, and not the criminal. In *Qwelane* the most the Constitutional Court could have ordered was e.g., the payment of damages and/or an unconditional apology. In terms of the Bill, a Court will be deciding whether or not to send someone to jail for up to eight (8) years.

50. Hence, it is important to immediately differentiate between *PEPUDA*, which is the context of the *Qwelane* judgment, and the Bill:

50.1. *PEPUDA* is a civil law in terms of which an Equality Court can order[101] e.g.: the payment of *damages*; the implementation of *special measures* to address hate speech; that an *unconditional apology* be made. Thus, one does not end up with a criminal record and one cannot be sent to jail.

50.2. The Bill, on the contrary, is proposing **criminalising expressions** it deems to be "hate speech" with a criminal penalty of a criminal record, a maximum of eight (8) years' imprisonment and/or a fine.

51. The context is thus vastly different between *PEPUDA* (in terms of which *Qwelane* was decided and the Bill. Parliament should therefore be wary of simply "copy-pasting" from the civil law context into the criminal law context, because it should be more difficult to be convicted of a crime and sent to jail than to be found to have contravened a civil law and ordered to apologise.

52. Importantly, in *Qwelane*, the Court clarified the **meaning of hate speech, harm(ful) and hatred** – all three key terms used in the Bill – for the purposes of *PEPUDA*.

53. Albeit decided under *PEPUDA*, the *Qwelane* judgment is rightly regarded as the *locus classicus* case on hate speech. As such, its guidance concerning the meaning of hate speech, hatred and harm, must be heeded, while at the same time remaining aware of the differences in context (i.e., between *PEPUDA*, a civil law, and the Bill, a criminal law).

[101] Section 21 of *PEPUDA*.

54. **Key definitions**:

54.1. Hate speech:

54.1.1. "*[H]ate speech travels **beyond mere offensive expression** and can be understood as "**extreme detestation and vilification which risks provoking discriminatory activities against that group**". Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity."*[102]

Importantly,

54.1.2. "*Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, **disturbing or even shocking views are tolerated** as long as they do not infringe on the rights of persons or groups of persons. As was recently noted, "**[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced**"."*[103]

54.1.3. "***Expressions that are merely hurtful**, especially when understood in everyday parlance, are **insufficient to constitute hate speech**. It is well established that the **prohibition of hate speech is not aimed at merely offensive speech**, but that **offensive speech is protected by freedom of expression**. …[M]erely offensive or hurtful expression should be excluded from the ambit of a hate speech prohibition and respect should be given to the Legislature's choice of a provision predicated on hatred.*"[104]

54.2. Harm(ful): "*[H]armful can be understood as **deep emotional and psychological harm that severely undermines the dignity of the targeted group***"[105] as well as physical harm.[106]

54.3. Hatred:

54.3.1. "*[I]n the context of hate speech, the legislative term "hatred" [is persuasively defined] as — "being **restricted to** manifestations of emotion described by the*

[102] *Qwelane* at para 81. (Own emphasis.)
[103] *Qwelane* at para 81. (Own emphasis.)
[104] *Qwelane* at para 103. (Own emphasis.)
[105] *Qwelane* at para 154. (Own emphasis.)
[106] *Qwelane* at para 155. (Own emphasis.)

*words '**detestation**' and '**vilification**'. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects.*"[107]

54.3.2. "*[S]trong and deep-felt emotions of **detestation, calumny and vilification***".[108]

54.3.3. "*[T]he most severe and deeply felt form of **opprobrium***".[109]

55. *PEPUDA's* hate speech prohibition declared unconstitutional:[110]

55.1. Importantly, the Constitutional Court specifically confirmed that:[111]

55.1.1. Merely "*hurtful*" speech does not qualify as hate speech.

55.1.2. The provisions of section 10(1) of *PEPUDA* (i.e. the subsections "*harmful or to incite harm*" and "*promote or propagate hatred*") must be read conjunctively.

55.2. The Constitutional Court declared section 10 of *PEPUDA* unconstitutional and gave Parliament 24 months to amend its provisions relating to hate speech,[112] accordingly. Meanwhile, section 10 of *PEPUDA* reads as follows: "…*no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred*". (Own emphasis.)

56. Private communications:

56.1. The Court also confirmed that hate speech does not extend to private communications: "***Hate speech prohibitions, even those that attach civil liability, should not extend to private communications,*** *because that would be incongruent with the very purpose of regulating hate speech – that public hateful expression undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination and violence. Furthermore, the purpose of hate speech prohibitions is "to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader*

[107] *Qwelane* at para 103. (Own emphasis.)
[108] *Qwelane* at para 81, footnote 100. (Own emphasis.)
[109] *Qwelane* at para 81, footnote 100. (Own emphasis.)
[110] After being in operation for over 20 years.
[111] The B-version of the Bill reflects the correct constitutional position (the original version included "hurtful" and its hate speech provisions read disjunctively).
[112] **I.e. until 30 July 2023.**

societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. It is improbable that most private conversations will have this effect."[113]

57. Criminal versus civil hate speech:

57.1. It is important to note that unlike the Bill – which proposes the criminalisation of speech – *Qwelane* deals with *PEPUDA*, which is a civil statute (not a criminal statute). Criminalising speech is accompanied by the threat of imprisonment and a criminal record.

57.2. Before anyone is convicted of the crime of hate speech (and receiving a criminal record and possible prison sentence), we must **ensure that the threshold for criminal hate speech is *higher* – *not* identical or lower – than the threshold for (mere) civil law hate speech**.

57.3. Practically, this means looking at the threshold for the civil hate speech offence (in *PEPUDA*), comparing it with the threshold in the Bill, and ensuring that the threshold for the criminal hate speech offence (in the Bill) is higher than that of *PEPUDA*. This is crucially important, as the Bill currently proposes imprisonment of up to eight years if found guilty of hate speech (whereas a person only incurs civil liability for the same or similar offence under *PEPUDA*).

57.4. A simple way to achieve this is by *inter alia*:

57.4.1. Including the six-part Rabat Plan threshold test criteria in the Bill;
57.4.2. Requiring a direct causal link between the expression and the harm;
57.4.3. Explicitly excluding private communications from the ambit of criminal hate speech;
57.4.4. Tightening the definition of criminal hate speech (to clearly distinguish it from civil hate speech); and
57.4.5. Strengthening the religious exemption clause.

58. In conclusion:

58.1. What is clear from the above, is that freedom of expression is a non-negotiable and crucial constitutional right for our democracy and that unless expression falls within the ambit of section 16(2) of the *Constitution* (read with the Constitutional Court's definition of hate

[113] *Qwelane* at para 118. (Own emphasis.)

speech in *Qwelane*), it is and should be **speech protected by the State** – even if it is hurtful, unpopular or offensive.

58.2. Should a law curtail the right to freedom of expression (including religious expression) outside of these bounds, it must pass section 36, otherwise, it will be unconstitutional and an indefensible limitation of these fundamental rights.

SUBSTANTIVE SUBMISSIONS ON THE BILL:

59. Section 16(1) of the *Constitution* guarantees **freedom *of* expression** (**not freedom *from* expression** – or offence) as a fundamental human right.

60. Importantly, section 16(1)(b) expressly protects the "*freedom to receive or impart information or ideas*". Thus, any law limiting expressions should be carefully considered to ensure it does not limit this freedom.

61. In terms of section 16(2), the only expressions that are not protected by this constitutional guarantee, are:
    a) Propaganda for war;
    b) Incitement of imminent violence; and
    c) Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm ("hate speech").[114]

62. As soon as the State wishes to regulate any speech falling outside of the aforementioned three (3) narrow forms of *unprotected expression*, it is limiting ***protected expression***[115] and needs to show that the limitation passes the **section 36 test**.

A: PROBLEM 1 – THE BILL IS UNNECESSARY:

63. It is noteworthy that the Bill itself acknowledges that hate speech is already prohibited in South African law, through:

    63.1. The **internal limitation in section 16 of the *Constitution***,[116] which explicitly excludes the following types of speech from the constitutional guarantee to free speech:

        a) "Propaganda for war;

[114] It is this last aspect, relating to the advocacy of hatred and commonly known as hate speech, that the Constitutional Court thoroughly traversed the requirements for in its *Qwelane* judgment (see paragraphs 48 through 57 above).
[115] Protected in terms of section 16(1) of the *Constitution*.
[116] The Preamble of the Bill.

b) Incitement of imminent violence; or

c) ***Advocacy of hatred*** *that is based on race, ethnicity, gender or religion, and* ***that constitutes incitement to cause harm***." (Own emphasis.)

63.2. **Section 10** of ***PEPUDA*** prohibition of hate speech:[117]

"*(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred*.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21 (2) (n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation." (Own emphasis.)

63.3. The common law crime of ***crimen iniuria*** (i.e., the wilful injury to someone's dignity).[118]

64. It is *FOR SA*'s strong view that the Bill is unnecessary, because hate speech is already prohibited in existing South African law:

64.1. Criminal law:

64.1.1. The common law crime of *crimen iniuria* which has been successfully used to convict racist speech – e.g. **Penny Sparrow** and **Vicky Momberg**;[119]

64.1.2. The *Riotous Assemblies Act, 1956*[120] which criminalises **inciting** people to commit an offence; and

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[117] The Preamble of the Bill.

[118] Clause 3(1)(a) of the Bill.

[119] **Penny Sparrow** and **Vicky Momberg** were both found guilty of *crimen iniuria* for making racists statements. In the case of Sparrow, she was fined R5 000 and sentenced to two years' imprisonment, suspended for five years. In addition, she was found to have committed "hate speech" under *PEPUDA* and ordered to pay R150 000,00 in compensation to the Oliver and Adelaide Tambo Trust. In the case of Momberg, she was sentenced to three years' imprisonment, of which one year was suspended.

[120] Section 18(2) of the *Riotous Assemblies Act*:

"*(2) Any person who-*

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or 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."

64.1.3. The *Intimidation Act, 1982*[121]*which* criminalises **intimidating** the public, through fear, to do or not do something.

64.2. Civil law:

64.2.1. *PEPUDA*[122] - e.g. **Qwelane** (sexual orientation), **Velaphi Khumalo** (race), **Masuku** (antisemitism).

65. These existing laws, specifically, the common law crime of *crimen iniuria* (i.e. the wilful injury of someone's dignity) and the civil sanctions for hate speech under *PEPUDA*, are already being effectively used to address and punish real instances of hate speech as seen by their effective enforced in the following cases:[123]

65.1. ***Qwelane v SAHRC***:[124] The Constitutional Court found the late Jon Qwelane guilty of hate speech in terms of ***PEPUDA*** (i.e. civil hate speech) for offensive statements made towards the LGBT community.

65.2. ***ANC v Penny Sparrow***: In terms of ***PEPUDA***, the Equality Court ordered Sparrow to pay a fine of R150,000 to the Oliver and Adelaide Tambo Trust, for calling black people "monkeys" on social media.

65.3. ***State v Penny Sparrow***: Sparrow was thereafter charged with ***crimen iniuria*** (i.e. a criminal offence) and having pleaded guilty, was given the choice between 12 months in prison or an R5,000 fine. She was additionally sentenced to two years' imprisonment, wholly suspended for five (5) years, during which time she must not be convicted again of *crimen iniuria*.

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[121] Section 1A - *Intimidation Act*:
"*(1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-*
incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,
shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."

[122] Section 10 of *PEPUDA,* as per the Constitutional Court judgment in *Qwelane*, prohibits hate speech:
"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.
(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

[123] This is not intended to be an exhaustive list of all hate speech cases in South Africa, but an illustrative list showing that existing laws are not only working but doing so effectively.

[124] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 ("*Qwelane*").

65.4. ***SAHRC v Khumalo***:[125] Velaphi Khumalo was found guilty of hate speech in terms of ***PEPUDA*** for statements he made on the internet concerning white people. The Court interdicted Khumalo from repeating such statements and ordered him to apologise to all South Africans. In addition, the matter was referred to the National Prosecuting Authority ("NPA").

65.5. ***SAHRC v Vicki Momberg***: Momberg was found guilty on four counts of ***crimen iniuria*** in connection with racist statements and was sentenced to three (3) years' imprisonment, suspended by one year.

65.6. ***SAHRC obo SAJBD v Masuku & COSATU***:[126] Bongani Masuku was found guilty of hate speech in terms of ***PEPUDA*** antisemitic statements. The Court ordered Masuku to give an unconditional apology to the Jewish community, which apology must also be published.

66. As can be seen from the above, these hate speech laws are already effectively being enforced in South Africa by:

66.1. The South African Human Rights Commission ("SAHRC"), can investigate a hate speech incident of their own accord or following a complaint laid with the Commission. Cases considered by the SAHRC may result in further court action, should the Commission decide that this is warranted;

66.2. The Commission for Gender Equality ("CGE"), which has similar powers to the SAHRC in relation specifically to gender-related matters;

66.3. The Equality Courts (created in terms of *PEPUDA*) enforce the prohibitions against unfair discrimination and hate speech in terms of *PEPUDA*, and can apply a considerable range of sanctions,[127] including corrective community service and fines; and

66.4. The divisions of the High Court of South Africa.

[125] *South African Human Rights Commission v Khumalo* (EQ6-2016; EQ1-2018) [2018] ZAGPJHC 528; 2019 (1) SA 289 (GJ); [2019] 1 All SA 254 (GJ) (5 October 2018).
[126] *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku and Another* CCT14/19.
[127] Which not only punishes hate speech effectively but is also much more conducive to rehabilitation and reconciliation.

67. It is hard to conceive how the provisions in the Bill could have assisted the above entities in any way with the enforcement, the prosecution, judgment and ultimate punishment in any of the above matters.

68. For this reason, it is unnecessary to create an additional hate speech law that will only place further strain (human, financial and other resources) on the already overburdened law enforcement and criminal justice system. Existing laws already serve to fulfil the purported purpose of the Bill without its likely detrimental consequences: unconstitutionally infringing on freedom of expression and freedom of religion, and the threat of imprisonment or a criminal record.

69. Hence, *FOR SA* submits that the Bill will **not pass** constitutional muster under **section 36** of the *Constitution* for its limitation of a right so foundational to our democracy as freedom of expression (or intrinsic to human dignity, as religious freedom), because there are **less restrictive means available** to achieve the Bill's purpose[128] – and these means are already being effectively used.

70. As set out in paragraphs 25 through 30 above, there is no international law obligation on South Africa to criminalise hate speech. With the existing laws any obligation to declare hate speech an offence, has already been fulfilled.

71. The question arises: if, by the Bill's own admission, hate speech is already prohibited in South African law, and these laws are proving effective in dealing with real incidents of hate speech, why the need for an additional law on hate speech – and even more so, one that threatens to unlawfully limit constitutionally protected speech?

72. It is no secret that the South African Police Service (which, in terms of the Bill, would be the body responsible for collecting data on these new offences, in addition to enforcing the law) is understaffed and under-resourced, and hardly coping with their current investigation load.

73. The same can be said of the criminal courts, which are already strained under the flood of criminal cases coming before them on a daily basis (and have massive backlogs). The Bill will place an additional burden on the criminal courts, which will be tasked with the interpretation and application of legislation that effectively (unnecessarily) duplicates laws that are already in place.

[128] The Preamble of the Bill states the Bill's purpose is 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 intolerance, in accordance with international law obligations".*

74. Finally, this Bill calls for a "**criminal justice-centric response**" to what is, essentially, a **socio-cultural issue**. Criminalising "offensive" behaviour will not in itself bring change. What is required, is a multi-sectoral approach, including specifically raising public awareness and providing education on these sensitive issues.

75. It has been said that the South African public's overwhelming repudiation of recent regrettable incidences of real hate speech, particularly on social media, is indicative of the growing maturity of the South African democracy in general, and specifically, in exercising the right to freedom of expression. The best remedy for hate speech may well not be criminalisation, but more rigorous protection and promotion of the right to free speech, including the right (and duty) to reprimand offenders and facilitate societal penalties.

76. In line with this approach, the **African Commission on Human and Peoples' Rights** ("ACHPR") adopted a resolution on repealing criminal defamation laws in Africa. It provides as follows: "*Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners [from] practising their profession without fear and in good faith.*" This is particularly so when less restrictive remedies are available in the form of civil defamation, and the right of reply.[129]

77. *PEPUDA* likewise addresses hate speech and unfair discrimination through corrective measures ultimately aimed at transformation, rather than criminalising persons who have committed hate speech.

78. It is submitted that this approach is preferable to a criminal justice-centric approach, which involves the arrest and (often, costly, time-consuming and arbitrary) prosecution of an individual who may not even be found guilty of hate speech at the end of the day.

79. Experience in the United Kingdom has shown that there are numerous street preachers who have been arrested and prosecuted for alleged hate speech, only to be acquitted later on.[130] This illustrates that prosecuting authorities often misapply the law, and that we should therefore be slow to criminalise speech which ultimately may turn out to be legal, and to make criminals out of innocent people too quickly.

[129] ACHPR/Res.169 (XLVIII) 10: Resolution on Repealing Criminal Defamation Laws in Africa. (Own emphasis.)
[130] For the sake of prolixity *FOR SA* has not included proof of the abuse of hate speech laws overseas. Such proof can be given to the Committee upon request. See, however, this article as one such example.

80. In conclusion, it is submitted that adequate laws against hate speech are already in place, and that an additional law is thus **unnecessary and will only serve to confuse what is a working system and/or process**. If there is a genuine need for additional measures to deal with "hate speech", it can be achieved by amending *PEPUDA* and/or training and empowering the bodies or forums responsible for enforcing the hate speech laws already in place.

B: PROBLEM 2 – THE BILL IS OVERBROAD:

81. The Bill criminalises[131] hate speech as follows:

> "*Any person who intentionally publishes, propagates, advocates, makes available or communicates anything 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; and (ii) promote or propagate hatred, based on one or more of the grounds, is guilty of the offence of hate speech*."

82. We see from the above, that the 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.

83. Problems with the Bill's definition of Element 1 – *Harm*:

83.1. The Bill's current definition of harm[132] is contrary to the Constitutional Court's definition of *harmful* (in *Qwelane*) in a substantive way:

Bill's Definition of "harm" - Clause 1	Constitutional Court's definition of "harmful"[133]
" 'harm" means substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups;	"*'harmful' can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group*."

83.2. The Bill **substantially extends the types of harm** included compared to *Qwelane.* It also lowers the **degree** of harm required, from "*deep"* to "*substantial*", which common parlance would imply a lower standard. Finally, it also expands the ambit of those **affected** from "*group*" to "*individual*".

[131] In Clause 4(1)(a) of the Bill.
[132] Clause 1 of the Bill.
[133] See *Qwelane* at para 154 and 155.

83.3. This is despite both *Qwelane's* narrow types of harm and a higher degree of harm, being held to be what is constitutional for purposes of a civil lawsuit bought under *PEPUDA*.

83.4. As stated in paragraph 57 above, there is a marked difference between civil law and criminal law. If the Constitutional Court held that the element of *harm* was to be understood narrowly for purposes of deciding whether or not to order someone to e.g. apologise and pay damages, extending that element to include many more things in its ambit for purposes of criminalising a person and sending them to jail leads to serious concerns of unconstitutionality.

83.5. By broadening the definition of the element of harm, the Bill also broadens the definition of hate speech. I.e. the result is that the Bill will catch more expressions "in its net" that will be deemed to be hate speech than what *PEPUDA* will (with its narrower definition of harm).

83.6. This means the Bill – a criminal law – sets a **lower bar** for harm for the purposes of criminal hate speech than *PEPUDA* sets for civil hate speech: the Bill only requires substantial (and not deep) harm. Also, since the Bill has a **wider definition** of harm than *PEPUDA*, it creates more categories of harm for criminal hate speech than *PEPUDA* has for civil hate speech – which is unconstitutional.

83.7. The ultimate result is that it will be easier for an expression to be *harmful or incite harm* (i.e. to meet element 1 of hate speech) under the Bill than under *PEPUDA*.

83.8. Whether or not the Bill should even include both types of harm ("*emotional and psychological*") found to be constitutional for *PEPUDA* is also a consideration. Do we want ***emotional*** harm", which essentially is hurt feelings and highly subjective, to be a valid form of harm for purposes of the prosed *crime* of hate speech in South Africa? Surely **civil law**, with its award of **damages**, is the correct vehicle for such forms of harm suffered? The same holds true for ***economic*** harm. It is hard to see how sending the offender to prison is going to make good the monetary loss suffered.

83.9. The Bill's definition of *harm* also fails to meet the Rabat threshold test, which *inter alia* prefers a **direct causal link** between the speech and the harm suffered. (See paragraph 39 above.)

83.10. The result is that the State does not need to prove an expression caused any actual harm suffered. All that is required is that a reasonable person who is aware of the context of the facts and circumstances surrounding the expression and who sees (or reads or hears) the expression understands it as being potentially harmful or inciting harm.

83.11. Now, it is true that the Constitutional Court in *Qwelane* held that for purposes of *PEPUDA* (a civil remedy) it is unnecessary to prove a causal link between the statement and the actual harm, or incitement of harm. However, this does not extend to the Bill, which is a proposed criminal law. In the creation of a crime, the threshold that should be met needs to be higher than for a civil offence. (I.e. it should be more difficult to send someone to jail than to order them to apologise.)

83.12. In order to not unlawfully infringe on either protected expression[134] or on South Africa's various international law obligations, including but not limited to, article 20 of the *ICCPR*, the Bill will need to require a direct causal link between the expression and actual harm suffered.

84. Problems with the Bill's definition of Element 2 – *Hate*:

84.1. The Bill fails to define hate.

84.2. To reiterate - it that wishes to criminalise "*hate speech*"[135] fails to define what "*hate*" is.

84.3. The result is that the courts, specifically the Magistrate's Courts (Regional Courts) and High Courts charged with hearing these cases,[136] will have to define this element.

84.4. The problems of Parliament leaving the most essential element of a statutory crime undefined are discussed below, in paragraphs 104 and 105, relating to the rule of law. Suffice it to say here that by failing to define the quintessential element of a crime, the result is that the crime is overbroad due to the possibility of unknown expressions being caught in that element's, and therefore the Bill's definition of hate speech, reach.

[134] In terms of section 16(1) of the *Constitution*.
[135] Clause 4(1)(a) of the Bill.
[136] Clause 1 of the Bill defines "*court*" as "*a Division of the High Court or a magistrate's court for any regional division established in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944)*".

85. **Problems with the Bill's definition of Element 3 – *Listed grounds:***

Bill's listed grounds - Clause 1	*Constitution's* listed grounds in s16(2)(c):
"grounds" means any of the following grounds: *(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;*	*"grounds" means any of the following grounds:* *(a) race,* *(b) ethnicity,* *(c) gender,* *(d) religion.*

85.1. The Bill proposes a very wide range of grounds when compared with section 16(2)(c) of the *Constitution*. No definitions are provided for the grounds listed in the Bill. While not problematic in respect of some of the grounds, the meaning of other grounds – those with novel, socially fluid, controversial or contested meanings – require clarification. For e.g., the concept of "*gender*" and "*gender identity*" does not mean what it meant ten years ago and many South African may not be familiar (or in agreement) with more recent interpretations.

85.2. By broadening the listed grounds, the Bill will catch expressions in its "hate speech net" *beyond* the expression envisaged in section 16(2)(c) of the *Constitution* will be criminalised, resulting in criminalisation of expressions protected by section 16(1), requiring a section 36 justification analysis to determine if the limitation is reasonable and justifiable.

85.3. The Constitutional Court held that *PEPUDA's* inclusion of "*sexual orientation*" as a prohibited ground[137] limited protected expression,[138] but found it survived a section 36 justification analysis, because it would not be possible to protect the rights of the LGBT+

[137] Section 1 of *PEPUDA* defines "*prohibited grounds"* as "*(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or (b) any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)*".
[138] *Qwelane* at para 136.

community <u>without</u> prohibiting hate speech based on sexual orientation, thus *PEPUDA's* inclusion of "*sexual orientation*" was proportional to its purpose and was a justifiable limitation of section 16(1).[139]

85.4. Now, it is true that the Court in *Qwelane* also found that *PEPDUA's* inclusion of analogous grounds survives a section 36 analysis and does not unjustifiably limit the right to freedom of expression.[140]

85.5. However, again it has to be borne in mind that this finding was made with regards to, and for the purposes of, *PEPUDA* a ***civil law***. This does not mean that the Bill's extension of the grounds:

85.5.1. Do not need to be subjected to a section 36 analysis, because the Constitutional Court held that *PEPUDA's* extended grounds survive a section 36 analysis; and

85.5.2. Will survive a section 36 analysis for the purposes of ***criminal law***. This is particularly so, because one needs to be certain of when one is committing a crime.

86. Problems with the Bill's definition of "*victim*":

86.1. Furthermore, "*victim*" is defined as meaning "*a person, including a juristic person, or group of persons, against whom an offence referred to in section 3 or 4 has been committed*".[141]

86.2. "*Harm*" is also defined elsewhere as including "*physical, psychological, social, economic or any other consequences of the offence for the victim and his or her family member or associate*".[142] This makes the definition of harm even wider, and most certainly much broader than the Constitutional Court's definition of harm(ful) in the *Qwelane*. This broad notion of "harm" in the Bill is sufficient to turn almost any expression into a crime simply on the basis of it being offensive, and make almost any person and/or organisation able to claim that they are a "victim" of "hate speech".

86.3. In light of the wide definition of "*harm*", it appears that "***victim***" also specifically includes a "*family member or associate*", which again is undefined, and capable of **multiple interpretations**. It also has the potential to cause deep division within families and thus

[139] *Qwelane* at paras 139 and 145.
[140] *Qwelane* at paras 129 to 134.
[141] Clause 1 of the Bill.
[142] Clause 5(1) of the Bill.

undermine a core element of societal cohesion in South Africa. This stretches the definition of "*victim*" far too wide, again making the Bill wide open to abuse.

86.4. As a result of the overbroad definitions in the Bill, an **actual victim is not necessarily required** before a person can be charged with and found guilty of hate speech. This is in stark contrast with traditional defamation or slander cases, where a real person has to be slandered or defamed, and leaves the Bill wide open to abuse.

87. Problems with Self-Defeating Exemption Clauses:

87.1. Section 16(1) of the *Constitution* specifically states the right to freedom of expression includes:

a. freedom of the press and other media;

b. freedom to receive or impart information or ideas;

c. freedom of artistic creativity; and

d. academic freedom and freedom of scientific research.

87.2. In addition, as set out above in paragraph 46, section 15 of the *Constitution* entrenches the right to religious freedom, which right includes the "*right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*".[143] The right to freedom of religion also includes the right to verbalise beliefs which some may find offensive – for e.g. "*those persons who for reasons of religious belief disagree with or condemn homosexual conduct, are free to hold and articulate such beliefs*".[144]

87.3. The Bill[145] attempts to provide some protection for *some* of the freedoms expressly mentioned in section 16(1) (notably, the Bill fails to provide protection for the freedom to receive or impart information or ideas) and for section 15.

87.4. However, as shown below with the insertion of the Bill's definitions in yellow, problematic drafting makes the clauses confusing and self-defeating:

> 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,

[143] *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC) at para 18 citing *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC); 1997 (10) BCLR 1348 (CC) at para 92. (Own emphasis.)
[144] *National Coalition for Gay and Lesbian Equality And Another v Minister Of Justice and Others 1999 (1) SA 6 (CC)* at para 137.
[145] Clause 4(2) of the Bill.

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].

87.5. Essentially the exemption clause reads that if a journalist, academic, artist or religious person does anything as contemplated in the section criminalising hate speech – (e.g.) a journalist who reports something in a way that reasonable Joe Public, who is aware of the context surrounding the report, understands as *potentially* inciting (e.g.) *substantial social* harm – they are not guilty of the crime of hate speech as long as it was done in good faith. This is, of course, unless what they say advocates *hatred* (which according to our Constitutional Court means the same as promoting or propagating hatred, but with the Bill failing to define *hate*) that constitutes incitement to cause *harm* (which the Bill defines problematically) against a *group of people specifically listed* in the Bill.

87.6. As can be seen, only harmful speech is excluded. However, since the Bill's definition of *harm* is vague and overbroad, *hatred* is undefined, and the extended list of persons is wider than the grounds listed in the *Constitution* and *PEPUDA*, **the exemption clause offers very little (if any) practical protection**.

87.7. The clause, specifically the religious exemption clause, has also been open to **multiple interpretations** by the Department and/or Parliament:

87.7.1. Hon. Deputy Minister, Mr John Jeffery, advised the Justice and Correctional Services Portfolio Committee on 30 May 2018, that the Department's view was that the religious exemption clause contained in clause 4(2)(d) of the Bill, would only apply to sermons and not to statements made by individuals.

87.7.2. This is opposite to what he advised the same Committee about the same clause on 21 September 2022.

87.8. Thus, Bill's current (religious) exemption clause is not strong enough as it does not serve to protect religious freedom in the public realm, and "*not stifle ideology, belief or views*" (as per the Constitutional Court's *Qwelane* judgment).

87.9. Given that the religious exemption clause is self-defeating and its meaning ostensibly ambiguous, it 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*".[146]

88. Problems with Harsh Sentences:

88.1. The original version of the Bill proposed three (3) years' imprisonment for a first offence of hate speech, and a five (5) year jail sentence for a second or subsequent offence of hate speech.

88.2. The current version of the Bill proposes a maximum jail sentence of eight (8) years (and/or a limitless fine) for a first (and all subsequent) offences of hate speech. This increase the term of imprisonment happened in complete opposition to the tens of thousands of submissions made to the National Assembly's Portfolio Committee on Justice and Correctional Services' deliberation on the Bill, that asked for a lesser sentence (or no jail sentence at all).

88.3. This is a very harsh sentence for a first offence of hate speech – especially given that the definition of hate speech is vague and overbroad. The maximum sentence for hate speech (at least a first offence) should be dramatically reduced and brought in line with sentences already handed out under the common law crime of *crimen iniuria*.

89. Problems with the Bill criminalising distribution:

89.1. In terms of the Bill, it is not only the original author or communicator who could be found guilty of, and punished for, the crime of hate speech, but anyone who distributes the hate speech in such a way that it is accessible to the public or the "*victim*".[147] Notionally, therefore:

89.1.1. An employee who, in the course and scope of his/her duties as such, is asked to publish or share a piece written by someone else, on the internet or on social media, could potentially be charged with "hate speech" and if found guilty, suffer the same punishment; and

[146] *Qwelane* at para 81.
[147] Clause 4(1)(b) to (c) of the Bill.

89.1.2. A person who, on a private WhatsApp group (e.g. family group), shares a picture that could potentially be seen as emotionally, psychologically, physically, socially or economically harmful[148] towards another person (for e.g. a picture that makes fun of Afrikaans people, or Americans), could potentially be found guilty of "hate speech". (Even if it is someone outside the group were to somehow see the picture and think it is offensive or could be offensive.)

90. Problems with Failure to Provide for Parliamentary Oversight:

90.1. The current version of the Bill makes provisions for regulations (drafted by the Executive) to be deemed approved within 60 days after having been referred to Parliament. This means the Bill will not only limit speech protected under section 16(1) of the *Constitution* but grant the Executive the power to make regulations (i.e. rules) without Parliament (the citizens' elected representatives) having the opportunity to consider and approved these rules.

90.2. This oversight should be remedied to allow Parliament an adequate opportunity to provide the necessary oversight over regulations.

91. As per paragraphs 83 through 85 above, all three (3) of the Bill's proposed elements for the proposed crime of hate speech are defined *broader* than under the civil law. Should the Bill adopt a wider and more liberal definition or prohibition of hate speech that the Constitutional Court in its *Qwelane* judgment, *FOR SA* submits that alone will lead to the Bill being **overbroad and unconstitutional**.

92. As per paragraph 56 above, the Constitutional Court (for purposes of *PEPUA's* civil prohibition against hate speech) said that hate speech does not include private communications. The Bill, however, fails to exclude private communication from the ambit of its reach, and as a result, on this leg too, is wider than the Constitutional Court allows.

93. In light of the above recent jurisprudence, this Bill will likely be open to a constitutional challenge, as Parliament will find itself passing legislation which is in conflict with what the judiciary has already held, should the Bill maintain its current:

93.1. Definitions of *hate speech* and its respective elements (*harm, hatred* and *grounds*) and *victim*;

93.2. Reach to include private communications.

[148] Clause 4(1)(a) of the Bill read with the definition of harm contained in clause 1 of the Bill.

94. In view of the foregoing, it is clear that the definition and prohibition of hate speech in the Bill places much greater limitations on freedom of speech than either the *Constitution* itself (in section 16(2)(c)), or the Constitutional Court in *Qwelane*. As such, it is overbroad and for this reason, unconstitutional.

95. In this regard also, we mention that the *Qwelane* case successfully challenged the constitutionality of the hate speech section[149] of *PEPUDA*, precisely because of *PEPUDA* being broader and vaguer than the *Constitution*. The Bill is a criminal law and it is reasonable for a criminal law to set a higher / stricter threshold than a civil law.

96. Given the successful direct challenge to the constitutionality of the hate speech provisions in *PEPUDA* in the *Qwelane* case, *FOR SA* respectfully submits that, in order to avoid unnecessary expenditure of money, time and effort, it is prudent to ensure that the Bill's definitions (of hate speech, harm etc.) and prohibition of hate speech strictly accord with the Constitutional Court's decision in *Qwelane*. Again, to ensure compliance with international law obligations, *FOR SA* recommends that the Rabat Plan's threshold test be expressly included as having to be satisfied for the right to freedom of expression to be limited.

97. Should the Bill's current hate speech provisions be allowed to remain, it is very possible that the provisions of this Bill, likewise, could be challenged for being over-broad and for that reason, unconstitutional and invalid.

C: PROBLEM 3 – THE BILL IS UNCLEAR AND/OR VAGUE AND/OR AMBIGUOUS:

98. As per paragraph 83 the Bill's **types of *harm*** include concepts such as "*social detriment"* a nebulous concept and one novel to criminal law.

99. The Bill's definition of social harm, "*detriment that undermines the social cohesion amongst the people of South Africa*", does not provide much clarification. This is problematic because social harm is an element of a proposed criminal offence and people need to know when they are committing social harm.

100. As per paragraph 84 the Bill fails to define "*hate*" - the quintessential element of its proposed crime of *hate* speech.

101. As per paragraph 8686.3 the Bill's definition of a "*victim*" of hate speech is capable of **multiple interpretations.**

[149] Section 10 of *PEPUDA*.

102. The aforementioned leads to a definition of hate speech that is unclear and/or vague and/or ambiguous.

103. **The result is that people will not know whether their expression will be seen to be *harmful* or to incite *harm* and promote or propagate *hate.*** Such uncertainty with respect to criminal law will open that law up to a constitutional challenge.

D: PROBLEM 4 – THE BILL CONTRAVENES TO THE RULE OF LAW:

104. As per paragraph 84 the Bill fails to define "*hate*" - the quintessential element of its proposed crime of *hate* speech – choosing rather to leave the defining of this element up to the Magistrate's Courts (Regional Courts) and High Courts charged with hearing these cases.[150]

105. Leaving the most essential element of a statutory crime undefined is contrary to the **rule of the law**, which is a founding value[151] of the Republic, because:

105.1. By failing to define the element of *hate* in the proposed crime of *hate* speech, Parliament abdicates its legislative responsibility to the courts and is thereby acting irrationally [152] in the exercise of its legislative powers; and

105.2. This unclear, overbroad, vague definition of hate speech results in an unclear criminal law that members of the public will not be able to know[153] beforehand that they are breaking. It also leave it open to arbitrary and inconsistent interpretation by Magistrate's Courts (Regional Courts) and High Courts charged with hearing these cases

E: PROBLEM 5 – THE BILL FAILS SECTION 36 (THE JUSTIFICATION ANALYSIS):

106. The above shows that the Bill extends far outside the borders of unprotected expressions in terms of section 16(2)(c). The Bill thus criminalises expressions the *Constitution* sees as protected and which the State is obliged to protect. This triggers a section 36 analysis to determine whether the Bill's limitation of this right is reasonable and justifiable.

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[150] Clause 1 of the Bill defines "*court*" as "*a Division of the High Court or a magistrate's court for any regional division established in terms of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944)*".

[151] Section 1(c) of the *Constitution* states that South Africa is one, sovereign, democratic state founded on the value of the supremacy of the Constitution and the rule of law.

[152] *Pharmaceutical Manufacturers Association of SA, In re: Ex parte Application of President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85.
See also: *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at paras 19 and 24.

[153] *See, for example, Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 108; *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) at para 69 and *Abahlali BaseMjondolo Movement SA v Premier of the Province of KwaZulu-Natal* 2010 (2) BCLR 99 (CC) at para 123.

107. Section 36(2) of the *Constitution* provides that no law may limit any right entrenched in the Bill of Rights, except as provided in section 36(1), or in any other provision of the *Constitution*.

108. Section 36(1) states that 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 — (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.

109. For purposes of this submission, only a limited justification analysis will be undertaken to avoid prolixity.

110. (a) The nature of the right to freedom of expression:

110.1. As set out in paragraph 47 freedom of expression expressly includes the "*freedom to receive or impart information or ideas*",[154] includes the right to say things which are **offensive and even hurtful, and** is **indispensable to a democracy**, especially South Africa's democracy with **our history**.

110.2. It is a right that "*lies at the heart of a democracy*";[155] that performs "*instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally*";[156] and "*is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having 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… Therefore we should be particularly astute to outlaw any form of thought-control, however respectably dressed*.[157]

[154] Section 16(1)(b) of the *Constitution*.
[155] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 7.
[156] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 at para 7.
[157] *S v Mamabolo* 2001 (3) SA 409 (CC) at para 37. (Own emphasis.)

111. (e) Less restrictive means available:

111.1. The following existing criminal and civil laws already criminalise and prohibit hate speech:

111.2. Criminal law:

111.2.1. The common law crime of *crimen iniuria* which has been successfully used to convict racist speech;

111.2.2. The *Riotous Assemblies Act, 1956*[158] which criminalises **inciting** people to commit an offence; and

111.2.3. The *Intimidation Act, 1982*[159] that criminalises **intimidating** the public, through fear, to do or not do something.

111.3. Civil law:

111.3.1. *PEPUDA.*[160]

111.4. As fully set out in paragraphs **Error! Reference source not found.**63 to 68 these existing laws are also already effectively been implemented to address issues of hate speech.

112. Hence, *FOR SA* submits that the Bill will **not pass** constitutional muster under **section 36** of the *Constitution* for its limitation of a right in **nature** so foundational to our democracy as freedom of expression (or intrinsic to human dignity, as religious freedom), because there are **less**

[158] Section 18(2) of the *Riotous Assemblies Act*:
"(*2) Any person who-*
(a) conspires with any other person to aid or procure the commission of or to commit; or
(b) incites, instigates, commands, or procures any other person to commit,
any offence, whether at common law or against a statute or 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."
[159] Section 1A - *Intimidation Act*:
"(*1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-*
incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,
shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."
[160] Section 10 of *PEPUDA,* as per the Constitutional Court judgment in *Qwelane*, prohibits hate speech:
"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.
(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

restrictive means available to achieve the Bill's purpose[161] – and these means are already being effectively used.

F: THE BILL IS UNCONSTITUTIONAL:

113. It is important to understand that the Constitutional Court's definition of hate speech in *Qwelane* was decided under *PEPUDA* – a civil law. In contrast, the Bill is a criminal law. This means that the Bill's definition of hate speech cannot be the same or worse – wider – than the definition in *PEPUDA*. Since the Bill imposes criminal sanctions for hate speech, it must also meet the requirements of the Rabat threshold test.

114. As a result, as the Bill currently reads, **it will be easier to be convicted of criminal hate speech** (and be imprisoned for up to eight (8) years) **than civil hate speech** (and be ordered to pay a fine and/or apologise). This is not only irrational but constitutionally indefensible.

115. It is *FOR SA*'s submission that the Bill will fail to pass constitutional muster and is unconstitutional (i.e. illegal[162]) for the following reasons:

115.1. It fails to pass the section 36 justification analysis (as per paragraphs 106 through 112 above) and therefore its limitation on the right to freedom of expression is unconstitutional; and

115.2. It contravenes the rule of law as set out in paragraphs 104 and 105 above.

G: FAILURE TO MEET INTERNATIONAL LAW OBLIGATIONS:

116. It is not correct that South Africa needs the Bill to become law in order to meet our international obligations under international law (specifically article 4 of *ICERD* which was ratified by South Africa on 10 December 1998 – i.e. 25 years ago already).[163]

117. It is important to note that *ICERD* is concerned with racist speech. The existing law crime of *crimen iniuria* has already been used effectively used to criminally prosecute real incidents of hate speech (e.g., Penny Sparrow and Vicky Momberg).

[161] The Preamble of the Bill states the Bill's purpose is 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 intolerance, in accordance with international law obligations".*
[162] Section 2 of the *Constitution*.
[163] The Preamble of the Bill states that: "*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, PARLIAMENT of the Republic of South Africa therefore enacts*" the Bill.

118. Indeed, *ICERD* itself recognises and requires states to uphold the right to freedom of expression.

119. Finally, South Africa's obligations in terms of article 4 of *ICERD* are already covered by our existing law:

119.1. Criminal law:

119.1.1. The common law crime of *crimen iniuria* which has been successfully used to convict racist speech – e.g. **Penny Sparrow** and **Vicky Momberg**;[164]

119.1.2. The *Riotous Assemblies Act, 1956*[165] which criminalises **inciting** people to commit an offence; and

119.1.3. The *Intimidation Act, 1982*[166] criminalises **intimidating** the public, through fear, to do or not do something.

119.2. Civil law:

119.2.1. *PEPUDA*[167] - e.g. **Qwelane** (sexual orientation), **Velaphi Khumalo** (race), **Masuku** (antisemitism).

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[164] **Penny Sparrow** and **Vicky Momberg** were both found guilty of *crimen iniuria* for making racists statements. In the case of Sparrow, she was fined R5 000 and sentenced to two years' imprisonment, suspended for five years. In addition, she was found to have committed "hate speech" under *PEPUDA* and ordered to pay R150 000,00 in compensation to the Oliver and Adelaide Tambo Trust. In the case of Momberg, she was sentenced to three years' imprisonment, of which one year was suspended.

[165] Section 18(2) of the *Riotous Assemblies Act*:

"(*2) Any person who-*

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or 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."

[166] Section 1A - *Intimidation Act*:

"(*1) Any person who with intent to put in fear or to demoralize or to induce the general public, a particular section of the population or the inhabitants of a particular area in the Republic to do or to abstain from doing any act, in the Republic or elsewhere-*

incites, instigates, commands, aids, advises, encourages or procures any other person to commit, bring about or perform such act or threat,

shall be guilty of an offence and liable on conviction to a fine which the court may in its discretion deem fit or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment."

[167] Section 10 of *PEPUDA,* as per the Constitutional Court judgment in Qwelane, prohibits hate speech:

"(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation."

120. The Bill goes much wider than South Africa's international law obligations under various instruments, because it (1) extends the prohibited grounds from race to a variety of others, and (2) adopts this idea of "less speech is better", contrary to international law and the UN. The Bill chooses to criminalise speech, despite:

120.1. South Africa's international law obligations under **various instruments**,[168] (the Department appears to only have considered selected instruments) which instruments emphasise the protection of the fundamental rights to religious freedom and freedom of expression in the public realm;

120.2. The fact that the UN supports more speech, not less, as the key means to address hate speech; and

120.3. The Bill's failure to meet the threshold test laid out in the Rabat Plan of Action, and that must be fulfilled in order for a statement to qualify as criminal hate speech (causing South Africa to violate article 20 the *ICCPR*, which requires a high threshold for restricting freedom of expression).

121. Loosely worded laws are arbitrarily enforced – again, the UN Rabat Plan expressly warns against vague laws and the abuse of such laws. The parameters of hate speech should be clearly (and unambiguously) defined to effectively serve the aims of this Bill, while still allowing open discourse, exchange of ideas and information and protecting against (ideological) censorship. Thus, *FOR SA* submits that the Bill should expressly include the Rabat Plan threshold discussed above in paragraphs 38 and 39 above.

122. The emphasis on protecting the fundamental rights to religious freedom and freedom of expression can clearly be seen in the above international human rights instruments. **Explicit protection of the fundamental right to religious freedom is the norm and includes** – as an integral component of that right – **the right to manifest freely and without fear or hindrance, one's religious convictions and beliefs in public through observance and practice**.

123. From the above examination of international law, it is clear that the right to freedom of expression in international law contains two parts:

I. States have an obligation to protect the right to freedom of expression (and the right to freedom of religion); and

[168] Including, but not limited to, the *UDHR*, the *ICCPR*, the *Banjul Charter*, the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, *ICERD*, and the *Durban Declaration*. (See paragraphs 25 and 26 above for a full examination.)

II. States have to prohibit (though not necessarily criminalise) hate speech.[169]

124. Should Parliament fail to ensure that the Bill meets the six-part Rabat threshold test – and that this test's criteria are expressly set out in the Bill - this will lead to a violation of the Republic's obligations under the *ICCPR*.

125. *FOR SA* recommends that the Bill recognises and upholds all international instruments (and not only some) pertaining to **South Africa's binding international law obligations** to uphold 1) freedom of expression and 2) freedom of religion while 3) prohibiting hate speech, as well as the **UN Rabat Plan of Action**.

H: IMPACT OF HATE SPEECH LAWS:

Chilling Effect on Freedom of Expression:

126. Another major problem with the current definition of hate speech in the Bill, is the major chilling effect that the criminalisation of speech could have on the fundamental right to freedom of expression – which, as already stated above, "***lies at the heart of a democracy***".[170]

127. As already stated above, the UN's position is that more speech, not less, is the answer to combat hate speech.

128. Specifically, the Rabat Plan of Action says that "*Criminal sanctions related to unlawful forms of expression should be seen as a last resort measures to be applied only in strictly justifiable situations.*"[171]

129. *FOR SA*'s position is that South Africa already has sufficient legal sanctions available in the form of *PEPUDA* and the common law crime of *crimen iniuria* to combat hate speech. The **criminal sanctions the Bill, therefore, seeks to introduce** are unnecessary and therefore **not strictly justifiable as required by the Rabat Plan of Action**.

130. Section 16 of the *Constitution* guarantees the right to freedom *of* speech – not the right to freedom *from* speech (or offence). This constitutional guarantee is a recognition that we live in a pluralistic society where people who hold diverse beliefs and views on matters, should be free to express their views openly and without fear of punishment. The price tag of this freedom is

[169] *Qwelane* at para 88. See footnote 1.
[170] *Masuku* at para 17.
[171] Rabat Plan of Action at para 34. (Own emphasis.)

that we need to be willing to tolerate views that are different to our own – even views that we may find to be personally offensive, disturbing or shocking. Again, this was affirmed by the Constitutional Court in Qwelane, where the Court said that "*[e]xpressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech... offensive speech is protected by freedom of expression*."[172]

131. George Orwell once famously said: "***If liberty means anything at all, it means the right to tell people what they don't want to hear!***" This is what free speech in a truly free society really means. Without the freedom to offend, free speech and free thoughts cannot truly exist. Ideas are indeed sometimes dangerous things, especially ideas that seek to challenge the *status quo* or existing orthodoxy.
132. The question is not whether the views were perfectly correct, or were hurtful, insulting and offensive, but whether the enforcers of the criminal law and justice system should be empowered to tell the difference. Where does the greater risk lie: allowing citizens to speak controversially and offensively, or allowing the state to censor what it considers to be controversial and offensive?[173]

133. In this regard, we would do well to reflect on our own history and the fact that "*the regime of racism in South Africa was maintained not only by brutality – guns, violence, restrictive laws. It was upheld by elaborately extensive silencing of freedom of expression*" (Nadine Gordimer).

134. 30 years into constitutional democracy, we dare not go back to a time when the State told us what we may and may not speak, what we may and may not hear, and where censorship (rather than free speech) was at the order of the day.

135. If the State were to start dictating what is and is not acceptable speech based on content or opinion based upon its conception of "the greater good", that would amount to blatant viewpoint discrimination which is unacceptable within a democratic and pluralistic society such as ours.

136. Further, once the State is given the power to determine what speech is acceptable and what is not, it becomes a slippery slope and the question is, where will it stop? Having banned "offensive" words that are perception-based, is there any principled stopping point except one based on the discretion or whim of the state?

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[172] *Qwelane* at para 103. (Own emphasis.)
[173] Legal philosopher Ronald Dworkin stated in *Freedom's Law: The Moral Reading of the American Constitution (1996), at 200*: "*Governments insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one – no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.*"

137. The right to free speech (including religious speech) is a vitally important right in our constitutional democracy, and as such it should be jealously guarded. Freedom of Expression ensures a society with a culture of critical conversation, encouraging everyone to tolerate the views of others and protecting the right of dissenters.[174]

138. If certain speech were to be criminalised, the effect would be that freedom of speech would be suppressed due to the fear of someone taking offence at something said and then filing a criminal complaint with the authorities. As a result, debate on issues such as what is true and untrue, right and wrong, just and unjust, good and bad, would effectively be shut down by self-censorship. The constitutional promise of free speech for all would be reduced to an empty promise on a piece of paper.

139. As such, hate speech laws are actually very illiberal, but potentially also very dangerous. In the words of former US Federal Judge Michael McConnell: "*Speech is constitutionally protected – not because we doubt the speech [may] inflict harm, but because* ***we fear censorship more***." [175] Thus, while it is true that people may misuse their right to free speech and even use it to offend, this is a risk that open and democratic societies must take.

Chilling Effect on Freedom of Religion:

140. Another major problem with the current definition of hate speech in the Bill, is the major chilling effect that it could have on the fundamental right to freedom of religion, belief and opinion.

141. As discussed in paragraphs 46 above, this right includes *"the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*".[176]

142. While we commend the inclusion of a religious exemption clause[177] in the current version of the Bill, we are concerned by statements on made 30 May 2018 made by the Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery, MP, to the effect that the exemption clause would probably **only apply to statements made from the pulpit and not to**

[174] Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa, p 10.
[175] Own emphasis.
[176] *S v Lawrence; S v Segal; S v Solberg* (CCT 38/96; CCT 39/96; CCT 40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176 at para 92.
[177] Clause 4(2)(d) of the Bill.

statements made by individuals.[178] This statement is gravely concerning and without any merit.

143. Firstly, on the plain wording of the religious exemption clause, there is no room for such distinction or limitation.

144. Moreover, section 15 of the *Constitution* (guaranteeing the right to freedom of religion, including religious speech) belongs to everyone, everywhere in the Republic. It, therefore, belongs as much to the pastor in the pulpit as it does to the person who shares his religious convictions and beliefs on the street, in the workplace or in any other setting or forum. To limit the application of the religious exemption clause to sermons, implies that the conscience, convictions and beliefs of individual believers are somehow less sacred and worthy of protection than those of their pastors. This clearly is not supported by either the *Constitution* – which specifically protects religious expression in section 15 – or the case law.

145. Equally concerning, is that on 21 September 2022, the Hon Deputy Minister **made statements to the opposite effect in respect of the exact same clause**.[179] It is gravely concerning that even the Department of Justice (the drafter of the Bill) does not seem to be clear on what the ambit of the new criminal offence of hate speech is.

146. *FOR SA* agrees that no one (whether a pastor or an individual believer) in whatever setting (whether in the pulpit or elsewhere) should be allowed to make statements that advocate hatred and incite violence. We strongly condemn any such instances of real hate speech – whether against any race, another religion, members of the LGBT community or any other group of persons.

147. However, the definition of hate speech in the Bill has already been stretched far beyond that provided for in the *Constitution*, which was deliberately limited so that freedom of speech and expression would be largely unhindered. By contrast, the definition in the current Bill includes speech that anyone could potentially find offensive – even if it is not directed at them. To then single out speech from the pulpit for protection, yet leave all other religious speech in other settings exposed, is a double blow to a fundamental human right. This is particularly true because around the world, hate speech laws are increasingly used against, for example,

[178] A transcript of the briefing can be found at https://pmg.org.za/committee-meeting/26535/.
[179] A transcript of the briefing can be found at https://pmg.org.za/committee-meeting/35616/.

Christians for simply professing the Bible and expressing their sincere religious convictions and beliefs (including Christian street preachers, Christians in the marketplace, etc).[180]

148. Should the Deputy Minister's interpretation be applied/upheld, the overbroad definition of hate speech in the Bill continues to pose a severe threat to religious freedom, because it could be employed to muzzle (and/or have the unintended effect of muzzling) believers across different faith groups from expressing (whether from the pulpit or to a public or private audience) their sincerely held religious convictions and beliefs.

149. It is very possible, as experience has already shown, that the expression of these beliefs may be (mis)interpreted by those who hold to different convictions and beliefs, as *"**[intending] to be harmful** or to incite harm*".[181]

150. By way of example, in terms of the proposed definition of hate speech:

150.1. If a person were to say to their neighbour that, according to the Bible, Jesus is the Way, the Truth and the Life and the only way to the Father,[182] it is entirely possible that he/she could be charged with hate speech based on his/her perceived intolerance towards a particular religion (which holds a different view) and, if found guilty, be sentenced to eight years in jail. (The same argument could apply in respect of certain scriptures from the Qur'an, or any other holy text, being quoted);

150.2. If someone were to share a post on social media that says that while God loves all people, He does not approve of sex outside of marriage (whether heterosexual or homosexual), that person could potentially be charged with hate speech based on his/her perceived intolerance of another person's sexual orientation, <u>even where there is no actual victim</u>!

[180] For the sake of prolixity *FOR SA* has not included proof of the abuse of hate speech laws overseas. Such proof can be given to the Committee upon request. See, however, this article as one such example.
[181] Clause 4(1)(a)(i) of the Bill.
[182] John 14:6.

***FOR SA's* RECOMMENDATIONS:**

151. We recommend that the presumably unintended, but nonetheless unconstitutional, consequences of the definition of hate speech in its current form, be avoided or eliminated by:

151.1. **Omitting the hate speech provisions** (clause 4) from the Bill altogether.

151.2. *Alternatively*, in the event that the hate speech provisions remain in the Bill, remedying the constitutional defects in the definition by:

151.2.1. **Defining harm** as *"gross psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group caused by the expression".* This will **remove problematic types of harm - subjective** (emotional detriment) and **novel and ambiguous** (social detriment) – and insert the degree of harm (gross) that should be appropriately required for a speech crime that can land one in jail;

151.2.2. **Defining hatred** as *"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"*[183] in-line with the *Qwelane* judgment;

151.2.3. **Defining to promote or propagate hatred** as "*the expression, when objectively assessed, actively supports, instigates, exhorts, stirs up or calls for hatred on a listed ground. Advocacy of hatred bears the same meaning*."

151.2.4. **Defining the grounds for hate speech** as *"(a) race, (b) ethnicity, (c) gender, (d) religion, or (e) sexual orientation."*

151.2.5. **Dealing with the Bill's current expanded grounds** by including a clause criminalising ***incitement of imminent violence***:[184] *"Any person who intentionally, publicly publishes, propagates or advocates anything or*

[183] The definition proposed is an amalgamation of what came out of the three (3) Canadian cases the Constitutional Court endorsed in *Qwelane* (see footnote 100 in the Qwelane judgment).
[184] I.e. as opposed to locating these additional grounds under the s16(2)(c) with its limited grounds, locating it under s16(2)(b) of the *Constitution* which has no limitation on grounds.

communicates to one or more persons in a manner that incites imminent violence against any person and/or group of people, will be guilty of an offence."

151.2.6. **Defining hate speech**[185] to expressly **excluding private communications** as follows: "*Any person who intentionally, <u>publicly</u> publishes, propagates or advocates anything or communicates to one or more persons in a manner — (i)<u>to incite harm</u>; **and** (ii)promote or propagate hatred, based on one or more of the grounds is guilty of the offence of hate speech."*

151.2.7. **Clarifying and strengthening the religious exemption clause** (clause 4(2)(d)), to ensure adequate protection of the constitutional right to religious freedom, including religious expression, of <u>all people</u> – not only ministers of religion. In this regard, we propose the following amendment:[186]

"(d) <u>expression</u> of any religious conviction, tenet, belief, teaching, doctrine or writings, <u>by a religious organisation or an individual, in public or in private; or</u>

…

that does not <u>actively stir up enmity, ill-will, detestation, malevolence and vilification against members of an identifiable group</u>, that constitutes incitement to cause <u>gross psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group,</u> based on <u>race, ethnicity, gender, religion or sexual orientation</u>."

151.2.8. Expressly providing **protection for the right and freedom to receive or impart information or ideas** (section 16(1)(b) of the *Constitution*),[187] by inserting after clause 4(2)(d), a new clause 4(2)(e):

"(e) exchange of information or ideas;

…

that does not <u>actively stir up enmity, ill-will, detestation, malevolence and vilification against members of an identifiable group</u>, that constitutes incitement to cause <u>gross psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group,</u> based on <u>race, ethnicity, gender, religion or sexual orientation</u>."

[185] Clause 4(1)(a) of the Bill.
[186] Insertions to existing text are <u>underlined</u> and omissions are placed in [square brackets].
[187] Since the Bill proposes imposing criminal sanctions for hate speech and not merely civil sanctions, like *PEPUDA* does.

151.2.10 By inserting the following sub-clause as clause 6(3)(b) to include and require the consideration of the six-part **UN Rabat Plan of Action** threshold test in determining sentencing: *"6(3)(b) The following factors need to be considered when determining sentencing –*

(i) The context prevalent at the time the within which the expression was made and the likelihood it would have incited harm against the target group in that context.

(ii) The speaker's standing in the context of the audience to whom the speech was directed.

(iii) The degree to which the expression was provocative and direct.

(iv) The expression's reach: the size of its audience, whether the audience had the means to act on the incitement, whether the statement (or work) was circulated in a restricted environment, or widely accessible to the general public."

151.2.9. Removing Clause 10(2)(b) from the Bill so that no regulations may ever be **deemed** to be approved by Parliament.

151.2.10. Amending the Preamble of the Bill to include specific reference to:

- Sections 15 (**freedom of conscience, religion, thought, belief and opinion**) and 31 (**rights of cultural, religious and linguistic communities**) of the *Constitution*; and
- All international instruments (and not only some) pertaining to **South Africa's binding international law obligations** to uphold 1) freedom of expression and 2) freedom of religion while 3) prohibiting hate speech, as well as the **UN Rabat Plan of Action**.

***FOR SA*'s REQUESTS:**

152. We specifically request the Committee to **host public hearings** to ensure an as thorough ventilation of the issues as possible, while simultaneously fully discharging its constitutional obligation to facilitate meaningful public participation.

Warm regards,

Daniela Ellerbeck
Attorney and legal advisor
Freedom of Religion South Africa (FOR SA)
Email: daniela.ellerbeck@forsa.org.za

Liesl Pretorius
Attorney and legal advisor
Freedom of Religion South Africa (FOR SA)
Email: liesl.pretorius@forsa.org.za

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