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OF SOUTH AFRICA

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Hon Ms S Shaikh, MP
Chairperson
Select Committee on Security and Justice

And

Mr Gurshwyn Dixon
Committee secretary
[redacted]

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

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

Submission to the Portfolio Committee on Justice and Correctional Services

Prevention and Combating of Hate Crimes and Hate Speech Bill, 2018 [B9B-2018]

Introduction

1. The Free Speech Union of South Africa (FSU SA) is a non-profit organisation that promotes freedom of speech and opinion, and stands up for anyone who is, or risks being, penalised for exercising these rights.

2. The FSU SA promotes free speech and raises criticism and concern when it is being threatened. It is in this context that we make the submissions that we do. Ideally people should be free to express themselves, without the sanction of law, however odious that expression may be.

3. Originally introduced in 2016, the original Hate Speech Bill (the Bill) was somewhat draconian as it would have ended our constitutional freedom of expression by banning insults and ridicule. The revision of the Bill in 2018 and this year, removed the most harmful provisions. This submission relates to the revised 2018 Bill.

The new test for hate speech

4. The Bill's definition (and prohibition) of hate speech now reads (Section 4):

> "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 be harmful or to incite harm and promote or propagate hatred based on one or more of the [listed] grounds is guilty of the offence of hate speech."

5. To be guilty of hate speech, a person must meet each of the following requirements:

5.1 Intention

5.2 Publication, propagation, advocacy, making available, or communication to one or more persons of

5.2.1 anything;

5.2.2 that in a manner that could reasonably be construed;

5.2.3 to demonstrate a clear intention;

5.2.3 to be harmful or to incite harm; and

5.2.4 to promote or propagate hatred

5.3 Based on a ground listed in the Bill as:

5.3.1 Albinism;

5.3.2 Ethnic or social origin;

5.3.3 Gender;

5.3.4 HIV or AIDS status;

5.3.5 Nationality, migrant, or refugee status, or asylum seekers;

5.3.6 Race;

5.3.7 Religion;

5.3.8 Sex;

5.3.9 Sexual orientation, gender identity or expression, or sex characteristics; or

5.3.10 Skin colour.

6. Since there must be an intention to publish, propagate, advocate or communicate hate speech, we submit that one cannot be guilty of hate speech if one **accidentally or negligently** publishes, etc. If the Bill is enforced to punish hate speech that is negligently published, we submit would be a gross injustice and *ultra vires*.

7. The view being published, propagated, advocated, or communicated, can be **anything**, from a political statement to a braai rant. In *Afriforum NPC v Nelson Mandela Foundation Trust and Others (371/2020) [2023] ZASCA 58 (21 April 2023)* the Supreme Court of Appeal held that 'anything' includes 'gratuitous, public displays of the old South African flag amounted to hate speech'.

8. An intention must be aimed at **being harmful or inciting others to harm**, **and promoting or propagating hatred**. 'Harm' is defined as '"substantial emotional, psychological,

physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups"'. Both 'harm' and 'hatred' must occur; it is not sufficient to have one or the other.

9. If the harm is not related to hatred, or if there is propagation of hatred without any harm or incitement to harm, it would not qualify. If the Bill is enforced to punish harmful speech that is not related to hatred, or hateful speech that does no harm, we would submit that this would be a gross injustice and *ultra vires*.

10. The hatred must be based on one of the 10 or so listed grounds.

11. While the elements which have to be proved will be onerous, as the test for proving a criminal offence is 'beyond a reasonable doubt', we submit below that the Bill is unconstitutional and therefore so is the offence.

The constitutional test

12. The test proposed by the Bill might seem rigorous, but it is well beyond what the Constitution envisions. It limits freedom of expression to a much greater degree than what the Constitution allows.

13. The Bill's wider definition of 'hate speech' must be replaced by terms contained in section 16(2)(c) of the Constitution, verbatim preferred.

14. Section 16(2)(c) of the Constitution is the enabling provision for a legislative ban on hate speech, and provides as follows:

"2. The right in subsection (1) does not extend to … advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

15. Hate speech under the Constitution also involves the intentional advocacy of hatred that constitutes incitement, which incitement must be to cause harm. However, unlike the Bill, it may only be based on the **four grounds** 16(2) (c), so it is much less restrictive.

16. The Bill, however, does not simply outlaw hate speech based on the four constitutional grounds of race, ethnicity, gender, and religion, but on an additional six grounds (totalling 10, albeit with 'grounds within grounds', generously totalling 18). The inclusion of grounds such as such as "social origin," "gender identity," and "gender expression," may be the subject of discrimination, but the inclusion in the definition of "hate speech" debases the grounds of genuine hate speech.

17. When the Constitution sets the parameters of a government's legislative power and these parameters are disregarded, such transgressions are unlawful. In other words, if the Constitution says government may only prohibit hateful and harmful expression based on four grounds, if government then prohibits such expression on any other or any more than those four listed grounds, it would be unconstitutional.

18. The Department has submitted in writing that 'the grounds in section 16(2)(c) of the Constitution are restricted and society has evolved beyond these grounds. As a result, "analogous" grounds may be included'.

19. The FSU SA refutes this. If it were correct, the Bill would demote the constitutional text from a supreme law to the status of a guide. To suppose that a society can "evolve" beyond the

parameters of a supreme constitution, and in so doing government may simply disregard the constitutional limits on its powers, is to suppose that constitutional supremacy is at an end.

20. As Dr Anthea Jeffery writes in the IRR's submission of 2021, 'That the recognised grounds in Section 16(2) are limited to four is not an oversight and cannot be ignored'. The FSU SA argues that the constitutional grounds are limited in order to ensure that freedom of speech is limited as little as possible.

21. The correct approach is to regard the constitutional text as ultimately authoritative and not attempt to go beyond it.

Harm

22. A problem arises with regard to how 'harm' is defined in the Bill.

23. The Bill defines 'harm' as "substantial emotional, psychological, physical, social, or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups."

24. The Bill also includes a "juristic person" under the definition of "victim." This means that organisations – say, for example, the Democratic Alliance (DA) – could be the "victim" of "emotional, psychological … social or economic detriment" based on hatred for its "social origin."

25. Traditionally, "harm" in law has been regarded as physical harm. We submit that undoubtedly, that the drafters of section 16(2)(c) of the Constitution had in mind "physical harm" when

they said that “freedom of expression does not extend to incitement to cause harm”.

26. They are unlikely to have had “emotional, psychological … social or economic detriment” in mind, because, after all, many of us have a perfectly legitimate desire to social or economic detriment to others.

27. For example, those who hate racists and wish to boycott their businesses and advocate that others do the same, do so to cause social and economic – even emotional – detriment to those racists. The racists might claim that racism is part of their religion (as in the case of the Nation of Islam, the Church of Creativity, or the Dutch Reformed Church’s approach to *apartheid* prior to 1986), which is a protected ground.

Exemptions

28. The Bill ostensibly introduces various exemptions from the hate speech prohibition:

28.1 Good faith engagement in artistic activity,

28.2 Scientific or academic inquiry,

28.3 Fair and accurate reporting or commentary, or

28.4 Proselytising of religious beliefs.

These four exemptions would not count as hate speech, provided they do “not advocate hatred that constitutes incitement to cause harm based on one or more of the grounds.”

29. In formulating these four exemptions, another basic constitutional law error has occurred. The Bill has effectively codified three of the four items on the list of freedom of expression found in section 16(1)(a)-(d) of the Constitution. It has also codified the section 15 right to freedom of religion.

30. The error is that section 16(1) refers to a general right to freedom of expression, which simply "includes" the listed types – freedom of the press and other media, freedom of artistic creativity, and academic freedom and freedom of scientific research. These items were not intended to be exhaustive of freedom of expression, so the Bill's codification of them is misguided. With respect to Section 15, it not only refers to freedom of religion, but also freedom of conscience and opinion, which the Bill excludes.

31. Of the four types of free expression listed in Section 16(1) of the Constitution, the second – freedom to receive or impart information or ideas – is not included in the exemptions in the Bill. The Bill then ends up not exempting much of substance at all.

32. In reality, the exemptions are not exemptions at all when the proviso – to not advocate hatred that constitutes incitement to cause harm – is included. The offence of hate speech applies to each excepted activity with that proviso. The proviso should be redrafted, therefore, to allow all the contemplated good-faith exemptions except those that amount to incitement to cause **physical harm**.

33. However, the exemptions do not provide cover for the community that wishes to boycott the religious racists' businesses, or the political activists seeking to cause detriment to the DA socially or economically. An additional exemption, for

sincere political expression – not extending to advocacy or incitement of physical harm – should be added.

34. The very addition of a "juristic person" to the definition of "victim" suggests that the Bill could provide the cover for eliminating freedom of speech when one criticises a political party. This is disturbing for no other reason than any attempt to squash criticism of a political party, particularly in a situation such as the current political climate, would provide cover for all sorts of malfeasance.

35. Even the threat of prosecution by a political party would have a stifling effect on people.

Selective prosecution

36. The two major problems identified above – too many protected grounds and too wide a definition of 'h'arm – could have a chilling effect on dynamic civil and political engagement, particularly in light of the very real possibility of selective prosecution.

37. It is not outside the realm of possibility that the Bill will be used opportunistically to persecute harmless (but no less offensive) estate agents and retired *tannies* who forgot that the 1960s are over, while leaving powerful people like Julius Malema free to incite racial violence <u>on a genocidal scale</u>.

38. Yoliswa Yako of the Economic Freedom Fighters (EFF), during the deliberations of the parliamentary Portfolio Committee on Justice and Correctional Services on 26 October 2022, made it clear that she was worried that the Bill could be used to go after those advocating "anti-racism", which concept the FSU SA regards as arguable at best.

39. Deputy justice minister, John Jeffery, replied to Yako that the Department of Justice takes her concerns seriously, and that government will ensure “anti-racists” are not persecuted. It is very disturbing to hear a deputy minister declare that somehow the executive would determine that holding a certain position would attract protection: that is the responsibility of the judiciary.

40. The FSU SA proposes that the Bill be scrapped entirely. The existing Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda), which prohibits hate speech on civil (not criminal) grounds, and the doctrine of *crimen injuria* which criminally punishes the most severe instances of dignity-harming expression, suffice.

41. Taking expression of a non-coercive threat from the realm of the civil into the realm of the criminal creates a dangerous chilling effect in society.

42. If this is not done, then the Bill should be amended to reflect section 16(2)(c) of the Constitution and redefine “harm” to refer only to “physical harm”.

Conclusion

43. The Bill is both unconstitutional and unnecessary, and should be abandoned rather than pursued.

44. If unevenly applied, the hate speech provisions are likely to add to racial polarisation and racial hostility, rather than reducing these ills. In addition, insofar as the country needs hate speech provisions, the key requirement is to narrow those already contained in Pepuda, not enact new provisions that are equally in breach of the Constitution.

45. The hate crimes provisions in the Bill are equally unnecessary, as the courts already have the capacity to take racial motivation into account as an aggravating factor in deciding sentence.

46. Turning hate speech into a crime is particularly objectionable – and especially so when the potential for the abuse of criminal defamation rules is already well known and has been particularly evident in many African states.

47. Liability should remain civil, rather than criminal. Enforcement must be even-handed, and penalties should focus on public apologies, community service, and the payment of damages in appropriate instances.

48. The government should seek to build on the racial goodwill already so strongly evident across the country, as IRR opinion polls have repeatedly and consistently shown.

49. It would be regrettable, however, if the crime of hate speech were to be added to the overwhelming burden our justice system is under. Society should be left to manage it.

50. Defending a criminal charge of hate speech can also be ruinously expensive for a defendant, while the taxpayer foots the bill, on an unlimited basis, for the prosecution.

51. The reprehensible racial utterances and conduct of the few are often depicted as being representative of the many by the tripartite alliance. Political parties should abandon their own racial rhetoric, commit themselves unambiguously to the constitutional value of non-racialism, jettison policies that depend on racial classification and racial preference.

52. Political parties should focus on promoting the growth, investment and employment that are most needed to promote social cohesion and help the poor and disadvantaged get ahead.

The FSU SA appreciates this opportunity to submit this representation. We request the committee to hold public hearings for the sake of thoroughness on a crucial issue which will diminish the exercise of free speech.

Free Speech Union of South Africa **24 May 2023**

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