**THE FW DE KLERK FOUNDATION**

*Upholding South Africa's National Accord*

To: The Select Committee on Security and Justice.

For attention: The Honorable S Shaikh (Chairperson)

Per email HateCrimesBill9B-2018@parliament.gov.za

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

Date: 22 May 2023

**CONCISE SUBMISSION ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9-2018]**

A. INTRODUCTION

Dear Chairperson,

1. We refer to your invitation for written submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] ("the Hate Speech Bill"), submitted to Parliament and referred to the Select Committee on Security and Justice.
2. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 ("the Constitution").
3. To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their



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constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa. At the outset, the Foundation wishes to state that the hard work of building a free, open and equal society is very much a work in progress. The Foundation has studiously condemned acts motivated by hate based on race, gender or any form of discrimination and will continue to do so.

4. We do, however, assert that the constitutional right to freedom of expression should be strenuously defended. Indeed, it is an essential prerequisite for democratic governance to ensure "accountability, responsiveness and openness", in terms of the founding values in section 1 of the Constitution
5. We must also point out that recent jurisprudence and decisions of the South African Human Rights Commission show a marked - and sometimes openly acknowledged - tendency to apply different standards to the evaluation of hate speech according to the race of the offender. It is our hope and expectation that the Bill will protect all South Africans, irrespective of their race, from hate speech threats to their human dignity and security.

6. By way of general introduction, we would like to warn against the danger of the proposed legislation in a multi-racial, multi-linguistic and multi-faith country, where much of the legitimate political debate centres on widely differing, but sincerely held, views on race, culture, language and religion. It was for this reason that the authors of the Constitution, in line with international law, drafted very limited exceptions to the right to freedom of expression in section 16(2).



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7. The Foundation previously commented on the 2016 draft Prevention and Combatting of Hate Crimes and Hate Speech Bill (2016 Bill) and the much-improved 2018 version. As such, the Foundation welcomes the opportunity to make concise submissions to the Committee on the Hate Speech Bill.

Commented [TD1]: Can pull out more from 2019 submission Part A later

We trust that our submission will assist the Committee in its deliberations regarding the Hate Speech Bill. We are also available to make a verbal submission if required.

**EXECUTIVE SUMMARY**

1. HATE CRIMES

Although the Foundation is in favour of distinguishing hate crimes from ordinary crimes to allow proper data collection, reporting and prosecution, it is concerned over the lack of definitions for the key elements, such as "prejudice" and "intolerance". In the Foundation's opinion, protected characteristics should relate to a natural person's "unchangeable characteristics" and should not include characteristics such as "political affiliation or conviction" and "occupation or trade". We recommend that the definition of a "victim" should not include juristic persons, because hate crimes are motivated by aversion to characteristics - such as race, gender, religion or sexual orientation - inherent in natural persons.

2. HATE SPEECH

The provisions in the Bill relating to hate speech are unacceptable for the following reasons.

a. They are unconstitutional. They go far beyond the limitations on freedom of expression defined in section 16.2 of the Constitution and the definition of hate speech in Promotion of Equality and



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the Prohibition of Unfair Discrimination Act (PEPUDA), as confirmed by the Constitutional Court in the *Qwelane v South African Human Rights Commission and Another (Qwelane).*

b. The Bill would, for the reasons set out below, seriously limit the core right to freedom of expression which is essential for an open system of democratic government as required in section 1 of the Constitution. The limitation of this right would in no way be justifiable in an open and democratic society based on human dignity, equality and freedom - and would accordingly fail the test laid down in section 36 of the Constitution.

c. The Bill is unnecessary. Adequate provision for the punishment of hate speech is already available in the Promotion of Equality and the Prohibition of Unfair Discrimination Act (PEPUDA) and in terms of *crimen injuria*. For this reason he Bill fails the test in section 36(e) of the Constitution because there already exist less restrictive means to achieve its ostensible purpose.

d. The Bill does not meet the requirements of the rule of law in section 1(c) of the Constitution because there are no clear or adequate definitions for "hate", "the promotion and propagation of hatred", "social disruption" and "harm". Without such definitions the Bill falls far short of the requirement for legal clarity which is an essential element of the rule of law.

e. The authors of the Bill have not given adequate consideration to international law as required by section 39(b) of the Constitution. In particular, they have not considered the clear guidelines for the determination and punishment of hate speech set out in the 2017 OHCHR Rabat Plan of Action and the Recommendations of the International Convention on the Elimination of Racial Discrimination (ICERD).



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f. Although provision is made for the exemption from the provisions of the Bill for journalists, academics, artists and religious practitioners, the circular nature of the exemptions makes them meaningless. Also, there is no reason why these categories of people should enjoy a greater right to freedom of expression than ordinary citizens, politicians, or members of NGOs exercising their political rights and their rights to freedom of expression in sections 20 and 16 of the Constitution. The provision also offends their right to equality before the law and to equal protection and benefit of the law in eras of section 9(1) of the Constitution.

g. The Bill would affect private communication to other individuals - contrary to the *Qwelane* judgement and the recommendations of the Rabat Plan of Action and the ICERD Recommendations.

h. Most seriously, the provision in the Bill for a draconian prison term of eight years for transgressing the very broadly and uncertainly defined offence of hate speech, would have a crippling effect on people's willingness to express themselves openly on controversial issues. This would seriously limit the right to freedom of expression which has been found in numerous judgements of the Constitutional Court and other courts to be indispensable for the maintenance of our democratic system of government. The envisaged punishments are also at variance with the guidelines laid down by the Rabat Plan of Action and the ICERD Recommendations on Hate Speech.

i. Unfortunately, recent jurisprudence and decisions of the South African Human Rights Commission show a marked - and sometimes openly acknowledged - tendency to apply different standards to the evaluation of hate speech according to the race of the offender. This tendency is irreconcilable with the foundational values of human dignity, equality and non-racism and with the core right in



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section 9(1) of the Constitution that everyone is equal before the law and has the right to equal protection and benefit of the law. There is no assurance that the hate speech provisions of the Bill would not be applied in the same.

2.3 RECOMMENDATIONS

2.3.1 We recommend that that the current version of the offence of hate speech should be removed, so that hate crimes as a distinct crime can be addressed in terms of our criminal law without further delay.

2.3.2 We furthermore recommend that a working group on hate speech should be established- which should include members from civil society organisations and academia – to conduct a proper review on current legislative remedies relating to hate speech. This working group should also investigate whether there is a pressing societal need to address hate speech within criminal law and report back to the Committee.

2.3.3 We submit that an urgent reform of the Equality Act is required to ensure it is aligned with section 16(2)(c) of the Constitution and that appropriate remedies are provided in terms of the Equality Act, reflecting the nature of such prohibition. Reform of the Equality Act should distinguish expression that is narrowly defined as hate speech in terms of the Constitution, with appropriate remedies, such as administrative fines and/or civil liability. The severity of the penalties should reflect the severity of the degree of hate speech.

2.3.4 We recommend that only as a last resort should statutory criminal measures be considered to



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address hate speech. This should be supported by the working group's findings indicating a pressing societal need for statutory criminal measures to prohibit hate speech, over and above reform of the Equality Act.

2.3.5 If such an offence is created (as a last resort) then it must reflect the prohibition expressed in section 16(2)(c) of the Constitution. It must contain both the elements of "advocacy of hatred" on the prohibited grounds which must "constitute incitement to cause harm". Clear definitions should be provided for "advocacy", "hatred" and "incitement to cause harm", with reference to international law guidelines. Thresholds will need to be built in, relating to the content of the speech, the form, the extent of the public expression, frequency and the status of the speaker. The subsequent criminal penalties must reflect these thresholds.

2.3.6 In the above scenario we are in favour of statutory defences that are again narrowly- defined and reflect the elements of the offence. In this regard, we suggest considering the approach followed in Canada.

C. LEGAL FRAMEWORK

**3.** Hate speech - in the context of the Constitution and International Law

3.1 Section 16(1) of the Constitution guarantees the right to freedom of expresssion. In accordance with section 16(2), that right does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

Commented [TD2]: 2019 submissions- con, equality act, crimen injuria

International law- ICERD req- pull from HOA

Commented [TD3R2]: Qwelane, Masuku- HOA



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3.2 The right to freedom of expression and the demarcation of expression not deserving protection in terms of the Constitution, echo article 19 and 20 of the International Convention on Civil and Political Rights ("ICCPR"). South Africa is bound in terms of the ICCPR to uphold civil and political rights. Any measures proposed to curb civil and political rights must therefore be in line with the ICCPR.1

3.3 Section 16(1) of the Constitution, in line with article 19 of the ICCPR, guarantees everyone the right to seek, receive and impart information and ideas in all forms and provides that-

"(1) Everyone has the right to freedom of expression, which includes –

a. freedom of 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."

3.4 The United Nations Human Rights Committee's comment (UNHRC Comment) on article 19 of the ICCPR,2 emphasised that the right to freedom of expression "constitute[s] the foundation stone for every free and democratic society."

[1] South Africa ratified the ICCPR in 1998.

[2] United Nations Human Rights Committee. *International Convention on Civil and Political Rights*. General comment No.34 on article 19, freedom of opinion and expression. CCPR/C/GC/34.12 September 2011.



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3.5 In the matter of South African National Defence Force Union v Minister of Defence,[3] the Constitutional Court emphasised that -

> "Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society…" (own emphasis)

3.6 However, the right to freedom of expression is not absolute right, which is also emphasised in article 19(3) of the ICCPR. The right can be legitimately restricted to protect the rights of others, such as the right to dignity and equality, as claimed in the preamble of the Bill. It will, however, have to pass the limitation threshold of section 36 of the Constitution (the right limitation inquiry).

3.7 Furthermore, certain forms of expression, due to their nature and impact, are not protected in terms of international law and our Constitution. Article 20 of the ICCPR specifically provides that law must limit certain forms of expression, such as:

> "1. Any propaganda of war shall be prohibited by law.
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." (Own emphasis)

[3] 1999(4) SA 469 (CC).



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3.8 Section 16(2) of the Constitution mirrors article 20 of the ICCPR and explicitly provides that the right to freedom of expression does not extend to -

> "(a) propaganda for war;
>
> (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."

3.9 Any legislative prohibition of hate speech must ensure that the expression prohibited falls within the parameters of section 16(2)(c) of the Constitution. The express phrasing of section 16(2)(c) of the Constitution mirrors article 20(2) of the ICCPR and it specifically provides that hate speech must have the following components:

1. The expression must constitute advocacy of hatred based on race, ethnicity, gender or religion; AND
2. must constitute incitement to cause harm.

Commented [TD4]: May no longer be relevant given changes to Bill which say "and"

3.10 It is crucial to take note that unless the expression prohibited falls within the narrow scope of section 16(2)(c) of the Constitution, there is a limitation of the right to freedom of expression, which can only be justified if it succeeds the limitation threshold in section 36 of the Constitution.[4]

[4] This approach was confirmed in the Constitutional Court matter of *Islamic Unity Convention v Independent Broadcasting Authority 2002* (4) SA 294.



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3.11 The Camden principles on Freedom of Expression and Equality (the Camden principles),[5] provide interpretative guidance on the meaning of the elements of hate speech in terms of article 20(2) of the ICCPR. The Camden principles state that national legal systems should provide clear definitions for the following key terms of hate speech which should be in line with the following:

- "Advocacy" - "is to be understood as requiring an intention to promote hatred publicly towards the targeted group".[10] A further comparative study by ARTICLE19 provides that "advocacy is present when there is a direct call for the audience to act in a certain way. The Court should consider whether the speech specifically calls for violence, hostility or discrimination."[6]
- "Hatred" and "hostility" - "refer to intense and irrational emotions of opprobrium, enmity and detestation towards the targeted group".[7]
- "Incitement" - "refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups." A comparative study by ARTICLE19, expands on the meaning of "incitement" by stating that "to qualify as incitement, the

[5] The principles were compiled by the global organisation ARTICLE19, on consultation with United Nation officials and academic experts. For the full reference see - ARTICLE 19, Global Campaign for Free Expression, *The Camden principles of Freedom of Expression and Equality, April* 2009.
[6] ARTICLE 19, Global Campaign for Free Expression, Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred, Work in Progress. A study prepared for the regional expert meeting organised by the Office of the High Commissioner, Vienna, February 8-9, 2010.
[7] See note 9 at page 10 of the publication.



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speech would have to reach a certain level of intensity - in terms of its frequency, amount and the extent."[8] ARTICLE 19 also agrees that the speech should be of public nature and that although incitement is an inchoate crime - "some degree of risk or resulting harm must be identified".[9] (own emphasis)

3.12 South African jurisprudence on section 16(2)(c) has found in a similar vein that "advocacy of hatred" must be statements which are reflective of extreme emotion.10 Secondly, the requirement of "incitement to cause harm" must be present. The mere expression is not enough.

**Commented [TD5]:** Is this true in light of qwelane?

3.13 In the matter of Freedom Front v South African Human Rights Commission ("Freedom Front" matter), this was interpreted to mean a call to act in a certain manner, meaning an intention to incite, to produce harm, which could be physical or emotional. The "harm" element does not necessarily mean the harm has to manifest but there has to be objective likelihood of it occurring.[11]

[8] See note 11at page 13 of the publication.
[9] See note 11 at page 15 of the publication.
[10] See *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC). See also I Currie & De Waal J. The Bill of Rights Handbook, 5th Edition. At page 375-376.
[11] See I Currie & De Waal J. The Bill of Rights Handbook, 5th Edition. At page 377.



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3.14 The Freedom Front matter has emphasised that the question should be "whether a reasonable person… within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm."[12]

3.15 Therefore, it is very clear that the prohibition of hate speech in the Constitution and with reference to article 20(2) of the ICCPR involves expression of a severe form of detestation on the grounds of race, ethnicity, gender or religion, which if objectively considered in relation to the context of the expression, create a real likelihood that it could cause harm to members of the targeted group. These are the parameters to apply.

3.16 In Qwelane,[13] section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("the Equality Act") was challenged as overbroad and vague given its extension of section 16(2)(c) of the Constitution.

3.17

3.18 The provisions of the Equality Act relevant to this controversy are section 10(1) and the definition of "prohibited grounds" in section 1.

3.18.1 Pursuant to the judgment of the Constitutional Court in Qwelane, section 10(1) of the Equality Act reads as follows:

[12] At 1283.
[13] *Qwelane v South African Human Rights Commission and Another* 2021 (6) SA 579 (CC) (*Qwelane*).



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"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."

3.18.2 The definition of "prohibited grounds" in section 1 are:

"(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)"

3.19 In Qwelane, the court held it is "not only the rights to equality and dignity that our Constitution seeks to protect. The right to free speech is equally protected. The right to freedom of expression, as enshrined in s 16(1) of the Constitution is the bench mark for a vibrant and animated constitutional democracy like ours".[14]

[14] *Qwelane* at para 67. Emphasis supplied.



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3.20 Indeed, since the advent of democracy, the right to enjoy freedom of expression has been "fiercely promoted and jealously guarded in this country".[15]

3.20.1 In SANDU,[16] O'Regan J highlighted the importance of the right to freedom of expression as follows:

"Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its 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. The Constitution recognises that individuals in our society need to be able to hear, form, and express opinions and views freely on a wide range of matters."[17]

3.20.2 In Democratic Alliance,[18] it was held that the right to freedom of expression:

"is valuable for its intrinsic importance and because it is instrumentally useful in protecting democracy, by informing citizens, encouraging debate and enabling folly and mis-governance to be exposed. It also helps the search for the truth by both individuals and society generally. If society represses views it considers unacceptable they may never be exposed as wrong. Open

[15] *Masuku and Another v SA Human Rights Commission obo South African Jewish Board of Deputies* 2019 (2) SA 194 (SCA) (*Masuku SCA*) at para 16.
[16] *South African National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC) (*SANDU*).
[17] Para 7.
[18] *Democratic Alliance v African National Congress & another* 2015 (2) SA 232 (CC) para 122.



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debate enhances truth finding and enables us to scrutinise political argument and deliberate social values."[19]

3.20.3 Therefore, "[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced".[20]

3.20.4 In Laugh it Off,[21] it was recognised that we are "obliged to delineate the bounds of the constitutional guarantee of free expression generously".[22]

3.20.5 The freedom of expression right must be "treasured, celebrated, promoted and even restrained with a deeper sense of purpose and appreciation of what it represents in a genuine constitutional democracy, considering our highly intolerant and suppressive past".[23]

3.20.6 For that reason it "bears emphasis that expression of unpopular or even offensive beliefs does not constitute hate speech".[24]

[19] Para 122.
[20] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC) (*Economic Freedom Fighters*) at para 155.
[21] *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) (*Laugh it Off*).
[22] Para 47.
[23] Economic Freedom Fighters at para 2.
[24] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022 (4) SA 1 (CC) (*Masuku*) at para 79, citing *Handyside v United Kingdom* (1976) 1 EHRR 737 ([1976] ECHR 5).



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3.20.7 Expressions that are merely hurtful are insufficient to constitute hate speech[25]

3.21 In Qwelane,[26] against this backdrop the Constitutional Court referred to Whatcott,[27] where the Supreme Court of Canada held:

"Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which 'ridicules, belittles or otherwise affronts the dignity of' protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way."[28]

And

"Representations that expose a target group to detestation tend to inspire enmity and extreme ill-will against them, which goes beyond mere disdain or dislike. Representations vilifying a person or group will seek to abuse, denigrate or delegitimise them, to render them law less,

[25] *Qwelane* at para 13.
[26] Para 80.
[27] *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467 (Whatcott).
[28] *Whatcott* at para 109. Emphasis supplied.



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dangerous, unworthy or unacceptable in the eyes of the audience. Expression exposing vulnerable groups to detestation and vilification goes far beyond merely discrediting, humiliating or offending the victims.[29]

3.22 In light of the prominence of the freedom of expression right in the Constitution, and its central role in a democratic dispensation, the bar for finding hate speech is high. The requirements for prohibition must be applied fully, painstakingly, methodically and meticulously before the conclusion is reached that hate speech in contravention of section 10(1) is established. To demand less would be to disregard the centrality of the right to freedom of expression in our constitutional order.

3.23 As the Constitutional Court recognised in Qwelane that the "very purpose of regulating hate speech" is that public hateful expression "undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination and violence".[30] The purpose of hate speech prohibitions is to "remedy the effects of such speech and the harm that it causes, whether to the target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination". The prohibition of hate speech "seeks to protect against the dissemination of

[29] para 41. Emphasis supplied.
[30] *Qwelane* at para 118.



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hatred that causes or incites harm, in that it undermines the dignity and humanity of the target group".[31]

3.24 The Constitutional Court in Qwelane specifically distinguished "hurtful speech" from "hate speech", making the point that "hurtful speech does not necessarily seek to spread hatred because of their membership of a particular group, and it is that which is being targeted by s 10 of the Equality Act".[32] This informed the reasoning of the Court in Qwelane that the earlier inclusion of the term "hurtful" in section 10(1) of the Equality Act constituted an unjustifiable limitation on the freedom of expression right.[33]

3.25 In Qwelane the Constitutional Court placed beyond question the notion that the test in section 10(1) is objective:

"It is plainly an objective standard that requires a reasonable person test. This is based on the gloss 'reasonably be construed' and 'to demonstrate a clear intention', implying an objective test that considers the facts and circumstances surrounding the expression, and not mere inferences or assumptions that are made by the targeted group."[34]

3.26 It restated that position in Masuku.[35]

[31] Para 130.
[32] Para 139.
[33] Para 144.
[34] Para 96. Emphasis supplied
[35] *Masuku* at para 122.



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3.27 In the same vein, the Constitutional Court in Masuku recorded as a point of commonality between the parties in that case that "witnesses may not be asked what they understood the words to mean or what they meant by the words as this undermines the objective test".[36] In other words, neither the intention of the speaker nor the subjective response of the recipient are relevant to the determination.

**Commented [TD6]:** Victim impact statement

3.28 In applying the objective test in Qwelane, the Constitutional Court held that the following considerations are important to the determination: "who the speaker is, the context in which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred".[37]

3.29 On the question of prohibiting hate speech by creating criminal statutory penalties, it is important to take note that article 20 of the ICCPR does not require that the legislative means State parties are required to apply to regulate hate speech must include criminal statutory penalties.

3.30 There is clear guidance from the United Office of the High Commissioner for Human Rights (OHCHR) on this aspect in the form of the Rabat Plan of Action on the prohibition of

[36] *Masuku* at para 146.
[37] *Qwelane* at para 176.



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advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Rabat Plan of Action).[38]

3.31 The Rabat Plan of Action emphasises that article 20 of the ICCPR requires a high threshold as fundamentally any limitation of speech "must remain an exception."

Therefore, even legislative provisions curbing hate speech must also adhere to "legality, proportionality and necessity".22 Legislative provisions curbing hate speech therefore must be "clearly and narrowly defined"; "must respond to a pressing societal need"; must be the "least intrusive measure available"; "not overly broad" and not "wide and untargeted".[23]

**Commented [TD7]:** Please add footnotes from initial 2019 submission pdf, pulled in weird

3.32 The Rabat Plan of Action furthermore makes the following key recommendations, vital for the Committee's attention on analysing the proposed criminal offence in clause 4(1) of the Bill, read with the proposed penalties in clause 6(3):

- A "clear distinction should be made between 3 types of expression": 1. expression

[38] United Nations. Human Rights Council. Annual Report of the United Nations High Commissioner for Human Rights. Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred. A/HRC/22/17/Add.4 (Appendix - Rabat Plan of Action). The Rabat Plan of Action is the result of a multi-stakeholder consultative process following various workshops hosted by the OHCHR and it contains conclusions and recommendations.



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that constitutes a criminal offence; 2. expression that is not criminally punishable but may justify a civil suit or administrative sanction; 3. expression that does not give rise to criminal or civil liability but still raises concern in terms of tolerance."

- Domestic legal frameworks on incitement to hatred should be guided by express reference to article 20(2) of ICCPR and should include "robust definitions for key terms such as hatred; discrimination, violence, hostility, etc."[24] The Plan recommends considering the Camden principles to guide definitions, as discussed above.
- Criminal sanctions to curb hate speech should be "seen as last resort measures to be applied only in strictly justifiable situations".[25] Civil sanctions, administrative sanctions and the right to correct should also be considered.
- A "six-part threshold test" was proposed for expressions considered a criminal offence, which includes consideration of the following factors on criminalising hate speech:

    - 1. Context: "Analysis of the context should place the speech within the social and political context prevalent at the time the speech was made and disseminated."[26]
    - 2. Speaker: "The speaker's position and status in the society should be considered … especially in the context of the audience to whom the speech is directed."[27]



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- 3. Intent: Article 20(2) of the ICCPR "provides for 'advocacy' and 'incitement' rather than mere distribution or circulation of material."
- 4. Content and Form: This is a "critical element of incitement." Consideration must be given to "degree to which the speech was provocative and direct, as well as the form, style, nature and arguments deployed in the speech."[28]
- 5. Extent of the speech act: Consideration should be given to the reach of the speech, its public nature, its magnitude and the size of the audience. Other factors include "means used, frequency, quantity and extent and whether the audience had the means to act on the incitement."[29]
- 6. Likelihood, including imminence: Some degree of risk of harm must be identified.[30]

3.33 The Rabat Plan of Action recommendations are critical guiding factors on determining the constitutionality and alignment of the proposed criminal offence of hate speech with South Africa's compliance with the ICCPR.

**4.** An analysis of the provisions of the Bill



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4.1 Ad clause 3(1) - the offence of hate crime as read with clause 1 of the Bill

4.1.1 The Foundation is in favour of distinguishing hate crimes from ordinary crimes. This will ensure proper prosecution of these specific incidents and lead to proper data collection on this specific crime, which appears to be greatly needed in South Africa.[31]

4.1.2 We also submit that the distinction will not only give effect to article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)[32], but also to section 12 of the Constitution, which relates to the right to freedom and security of the person.[33]

4.1.3 We are however, concerned about the lack of definitions for the key elements of the offence. It is vital that clause 1 of the Bill provides clear definitions for "prejudice" and "intolerance" and for listed characteristics such as "gender identity" at clause (1)(o).

4.1.4 Furthermore, the additional protected characteristic in clause 1(k) "political affiliation or conviction" broadens the ambit of protection unnecessarily and was not originally included in the 2016 version of the Bill. We fear the inclusion of this characteristic for purposes of hate crimes may pave the path to its inclusion as a ground for purposes of hate speech-



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which would seriously stifle free debate on a wide range of issues and could be used to silence critique of the ruling party.

**Commented [TD8]:** Do you agree? Although not part of hate speech anymore want to mark exception

4.1.5 We, however, submit that the protected characteristics listed in clause 3(1)(a) should be closely connected to the person's dignity. The Organisation for Security and Co- Operation in Europe (OSCE), which is the worlds' largest regional security organisation, states in their practical guide on hate crimes that a "protected characteristic" should be an "unchangeable characteristic", related to the self-worth of a person.[34]

4.1.6 To this extent we submit that both clause 1(j) which related to an "occupation or trade" and clause 1(k) relating to "political affiliation" cannot be considered unchangeable characteristics related to the dignity of a person.

4.1.7 The definition of a "victim" should also not include reference to a juristic person, as it loses sight of the fact that the crime is motivated by a characteristic inherent to the dignity of a person, being a natural person. A juristic person in our view can never qualify to be a carrier of human dignity, which has been confirmed by the Constitutional Court.[35]

4.2 Ad clause 4(1)(a) of the Bill: The offence of hate speech read with clause 1 of the Bill: Does it fall within the parameters of section 16(2)(c) of the Constitution?



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4.2.1 As previously stated, one first needs to determine whether the expression prohibited in terms of the clause 4(1)(a) falls within section 16(2)(c) of the Constitution. If it does then one does not need to proceed with a limitation inquiry in terms of section 36 of the Constitution, as the expression is not constitutionally-protected.

4.2.2 We do however submit that even if the expression prohibited falls within section 16(2)(c) of the Constitution, the legislative means curbing such expression must - in accordance with the Rabat Plan of Action - still adhere to the principles of "legality, proportionality and necessity."

4.2.3 We reiterate in this instance that section 16(2)(c) of the Constitution only relates to "advocacy of hatred" that is based on "race, ethnicity, gender or religions" and that "constitutes incitement to cause harm."

4.2.4 Therefore, clause 4(1)(a) of the Bill exceeds the hate speech parameters of section 16(2)(c) of the Constitution.

**Commented [TD9]:** Please renumber from 2.2.4 here

4.2.5 Turning to the analysis again, a key concern on considering clause 4(1)(a) as a start is that no definitions are provided for key elements of the offence namely: "publishes"; "propagates"; "advocates"; "anything"; "harmful"; "incite"; "promote" and "hatred" in clause 1 of the Bill. This glaring failure makes the legal analysis of the provision very



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difficult as it is unclear what constitutes "harmful" and what is meant by "anything".

4.2.6 Only the element of "harm" is defined in clause 1 to mean "any emotional, psychological, physical, social or economic detriment". This definition itself is glaringly broad, as it is unclear what is meant by "social" harm, for instance, as no guidance is provided in the Bill.

4.2.7 Furthermore, only the terms "advocates" and "hatred" are constitutionally-aligned (with reference to section 16(2)(c) of the Constitution) and "incite harm" finds resonance in "incitement to harm". However, even if these exact constitutionally- aligned terms were used in a statutory criminal offence, clear definitions must be provided to avoid arbitrary application by law enforcers and to ensure the public knows what conduct could lead to such severe penalty. This would be line with the Rabat Plan of Action.

4.2.8 A further core concern with clause 4(1)(a) is that even if one only focuses on the provisions which find resonance with section 16(2)(c) of the Constitution such as "advocacy", "hatred" and "incite harm" - on reading it in its entirety it falls clearly outside section 16(2)(c) of the Constitution and article 20(2) of the ICCPR.

4.2.9 It appears that the drafters have essentially broken up the key components of hate



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speech as understood in terms of international law and section 16(2)(c) of the Constitution. This is demonstrated below.

4.2.10 If one reads clause 4(1)(a)(i) and again only focuses on the constitutionally-aligned terminology, then it appears that an offence is committed when:

- a person who "advocates" - "anything" or "communicates" (which we suppose relates to the definition of "communication", but it is unclear what "anything" means);
- to "one or more persons" in a manner;
- "that could reasonably be construed to demonstrate a clear intention" to either
- be "harmful or incite harm" and which is
- based on one of the prohibited listed grounds listed in (a)-(j)

4.2.11 There is no requirement that what is being "advocated" must be hatred towards the targeted group, which is intended to "incite harm". There is therefore no threshold built in for the expression as understood in terms of international law.

**Commented [TD10]:** Do we agree with this?

4.2.12 Again, we reiterate international law principles on article 20(2) of the ICCPR indicate clearly that we are dealing with severe emotions of detest towards a targeted group on a listed ground.



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4.2.13 Furthermore, as pointed out earlier, no definition is provided for "harmful" whereas "incitement" in terms of the Camden principles has the connotation that there is an "imminent risk of discrimination, hostility or violence" that could occur against people of the targeted group if the statement is not prevented.[40]

4.2.14 Since the Bill fails to define "harmful", which would have allowed the public to test the threshold created in this instance with reference to the Rabat Action Plan's six- part threshold test, one cannot simply equate harmful with "incitement to cause harm".

4.2.15 We therefore submit that one cannot reasonably interpret the current version of clause 4(1)(a)(i) to fall within the parameters of section 16(2)(c) of the Constitution. This is especially so, considering a statuary criminal offence is created, and each element of the offence has to be defined in order to provide the public with clear guidelines on what conduct is being prohibited. It must be clear what the threshold is in this instance. This would also be in line with the Rule of Law.

4.2.16 Furthermore, if one reads clause 4(1)(a)(ii) and again if one only concentrates on the constitutionally-aligned terminology - an offence is committed when:

- a person "advocates" - "anything" or "communicates";
- to "one or more persons";



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- "that could reasonably be construed to demonstrate a clear intention" to either
- promote or propagate "hatred" on
- based on one or more of the listed grounds in (aa) - (oo)

4.2.16 The above is highly problematic as section 16(2)(c) of the Constitution requires the "advocacy of hatred" to be causally connected to "incitement to cause harm ". Both elements must be present. This causal connection is also reiterated in article 20(2) of the ICCPR.

4.2.17 On the current provision of clause 4(1)(a)(ii) there is no need for whatever is being "advocated" to be linked to the likelihood to cause "harm" to the targeted group. The provision only requires that the "advocacy of hatred" on the listed grounds "promote or propagate hatred."

4.2.18 However, "promote or propagate hatred" (which again is not defined) cannot be equated to "incitement to cause harm". This is especially so if one considers that the drafters used the term "propagate" in similar fashion to "advocacy" in the first part. The verb "propagate" in terms of the Oxford English Dictionary means to "spread and promote (an idea, theory, etc.) widely". There is no element of harm or likelihood that harm might occur in the notion of "propagate".



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4.2.19 Harm to this targeted group does not need to manifest but there must be an objective likelihood of it happening. This was confirmed in both the Freedom Front and Qwelane matter, and in terms of the Rabat Action Plan. This aspect is critical to the definition of hate speech and without which the expression prohibited in terms of clause 4(1)(a)(ii) falls outside article 20(2) of the ICCPR and section 16(2)(c) of the Constitution.

4.2.20 Furthermore, the expression prohibited in both clause 4(1)(a)(i) and (ii) is not restricted to only public expression as reference is made to "one or more persons". This is contrary to the guiding principles on article 20(2) in the ICCPR, as detailed in the Rabat Plan of Action.

4.2.21 The Rabat Plan of Action's six-part threshold emphasises that consideration should be given to the public nature and size of the audience. As detailed further below, this approach is also contrary to approaches seen in foreign jurisdictions, such as Canada, where emphasis is on the public nature of the expression.

4.2.22 Lastly in relation to clause 4(1)(a), the prohibited grounds in terms of (a)-(j) by far exceed the four limited grounds of section 16(2)(c) of the Constitution of "race, ethnicity, gender or religion." These listed grounds are also aligned with article 20(2) of the ICCPR. No definitions, other than for "intersex" are provided and which again



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might create confusion on application.

4.2.23 There might however be an argument to be made that the additional listed grounds could be justified in terms of section 36 of the Constitution in a modern society and in response to a clear societal need. However, read in conjunction with the rest of clause 4(1)(a), the provisions exceed the parameters of section 16(2)(c) of the Constitution.

4.2.24 One will therefore need to test whether the limitation on the right to freedom of expression can still be saved by section 36 of the Constitution.

4.3 Ad clause 4(1)(a) and (2) read with clause 6(3) - An analysis of the clause in terms of the limitation inquiry of section 36 of the Constitution

4.3.1 Since the expression prohibited in clause 4(1)(a) exceeds section 16(2)(c) of the Constitution, we are dealing with constitutionally-protected expression. One must therefore test whether the criminal offence created for such expression is a justifiable and reasonable limitation on the right to freedom of expression in a democratic society, weighing up the factors listed in section 36 of the Constitution.

4.3.2 This is not simply a question of whether the expression prohibited justifies legislative



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regulation, but rather, whether this drastic measure, which involves criminalising constitutionally-protected expression, is justified in terms of section 36 of the Constitution.

4.3.3 The first two factors section 36 of the Constitution emphasises are the consideration of the nature of the right and the importance of the purpose of the limitation.



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4.3.4 In this regard, the following rights must be balanced out in this Bill - namely the right to dignity and equality against the right to freedom of expression - as highlighted in the preamble of the Bill. The importance of the right to freedom of expression in a young and democratic society has been expanded on earlier and we reiterate that it is a crucial to stimulate political and social debate in a democracy.

4.3.5 On consideration of the right to dignity, one must keep in mind that our Courts have confirmed that it does not only involve an individual's self-worth but also how the public perceives the individual's worth.[41] Any infringement on the right to dignity must be viewed in context of the communication with reference to the tone, the audience and how the reasonable person would perceive the communication.

4.3.6 It is therefore crucial that proper thresholds are built in any proposed legislation that aims to regulate speech. As detailed further below, the offence created in clause 4(1)(a) provides low thresholds in relation to the magnitude of the consequences. Legal remedies already exist in terms of the law of defamation and criminal defamation, which can be specifically enforced if a person's dignity or self-worth is infringed.



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4.3.7 On the consideration of the right to equality, we submit it is important to keep in mind that equality does not imply homogenisation of behaviour but it implies the celebration and acceptance of differences.[42] It is vital in a democracy that the right to express diverse views - no matter how unpopular or offensive - be protected to facilitate "the search for truth by individuals and society generally."[43]

4.3.8 The preamble of the Bill highlights section 9(3) and (4) of the Constitution, concerning the right to be protected from unfair discrimination. It is unclear why the right not to be unfairly discriminated against is highlighted, as various legislative means already exist, such as the Equality Act, which specifically gives effect to section 9(4) of the Constitution.[44]

4.3.9 The curbing of hate speech is not about the fairness of discrimination. The purpose of curbing hate speech is to protect people from a targeted group (who share a characteristic such as religious beliefs) from further potential violence because of extreme public manifestations of hatred being directed at this targeted group. Therefore, the right to freedom and security of the person should be emphasised in any legislative proposal prohibiting hate speech.[45]

4.3.10 In relation to the importance of the purpose of the limitation, in terms of section 36(1)(b)



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of the Constitution, it is agreed that the State is obliged to protect vulnerable people from potential harm that could incur due to hatred being advocated against them based on a protected characteristic. However, again in this case, the hate speech prohibition would have had to fall within constitutionally-aligned parameters of section 16(2)(c) of the Constitution - which would not have triggered section 36 of the Constitution. There are different means the State could apply to combat intolerance, if that was the purpose, without applying legislative regulation.

4.3.11 Sections 36(1)(c) and (d) of the Constitution provide weighing up the nature, extent and the relation between the limitation and its purpose. On this consideration one should read clause 4(1)(a) with clause 4(2), and clause 6(3) relating to penalties.

4.3.12 The analysis of the nature and extent of the limitation is also made difficult with lack of definitions of the elements of the offence which include "publishes"; "propagate"; "advocates", "anything"; "harmful"; "incite harm" "promote"; "propagate" and "hatred".

4.3.13 One could only reasonably draw reference to those terms which have a constitutional and international law counterpart - being "advocate"; "incite harm" and hatred", which has a threshold built in from a comparative international law perspective, as previously illustrated. However, with the rest of the terminology used one is left in the dark on the threshold that would justify this drastic punishment.



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4.3.14 With no definitions provided, it is unclear how one would distinguish speech prohibited in terms of clause 4(1)(a) - which has the harsh criminal penalty of up to eight years imprisonment, in terms of clause 6(3) - from that which is prohibited in section 10 of the Equality Act.

4.3.15 Clause 6(3) provides no consideration of the content and form of the expression, the frequency of it or the size of the audience or potential audience exposed to it. These were specific factors the Rabat Plan of Action proposed to be built in the six-part threshold test that would justify a criminal sanction.

4.3.16 As stated earlier, clause 4(1)(a) to a large extent resembles section 10 of the Equality Act, and the listing of additional prohibited grounds in the Bill. How would the public be able to distinguish expression that is intended to be "harmful" on a listed ground in terms of the Bill, punishable by imprisonment of up to eight years, from that which is also intended to be "harmful" in section 10 of the Equality Act?

4.3.17 The lack of a threshold built in clause 4(1)(a) in consideration of the above remarks is a critical indicator of the broad and severe nature of the limitation.

4.3.19 Furthermore, it is also concerning that the expression prohibited by this drastic measure



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is not narrowly-defined to only public expression. Clause 4(1)(a) creates an offence if the prohibited expression is made to "one or more persons".

4.3.20 Besides the fact that this expression which "promotes hatred" does not need to hold any likelihood of harm to the targeted group, (falling outside section 16(2)(c) of the Constitution's parameters), it might simply be a vile expression sent only once to one person to constitute an offence punishable by imprisonment of three years.

4.3.21 There is no consideration of the extent or intensity of the speech that would justify criminal sanctions. If we compare it with foreign jurisdictions - which provide for the criminalisation of "promotion of hatred" such as the offence of "wilful promotion of hatred" in terms of the Canadian Criminal Code - explicit reference is made to the condition that it does not include private conversations.[46]

4.3.22 The nature of the limitation is to a certain extent buffered by the inclusion of statutory exceptions/defences stipulated in clause 4(2) for "any bona fide":

a. artistic creativity, performance or other form of expression;
b. academic or scientific inquiry;
c. fair and accurate reporting in the public interest; or



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d. interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings;

that does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds.

The circularity of the exemptions drafting renders its effectiveness obsolete. It further begs the questions: But what about politicians and ordinary citizens participating in robust political debate? Why, in a system based on equality and on everyone's right to receive and impart information and ideas – should artists, academics, journalists and religious practitioners enjoy greater rights to freedom of expression than politicians and ordinary citizens?

**Commented [TD11]:** Please note: 2 separate paras when numbering

However, even in the case of religious communication, the proselytising and interpretation would have to take place in a religious place of worship or constitute some form of formal "proselytising" in public..

4.3.23 We are essentially in support of the inclusion of statutory defences if a statutory offence of hate speech is created. This finds resonance to the approach in the Canadian Criminal Code, which provides statutory exceptions for the offences of "willful promotion of hatred" and "public incitement of hatred".[47]

4.3.24 However, the statutory exceptions/defences provided for in clause 4(2) show a critical flaw in the drafting of the offence created in clause 4(1)(a).



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4.3.25 The exceptions provided in clauses 4(2)(a) and (d) both highlight the elements of "advocate hatred" and "incitement to cause harm" - which resonates with the prohibition of hate speech in section 16(2)(c) of the Constitution. However, these elements do not form the basis of the offence of hate speech in clause 4(1)(a) to which reference is made. Therefore, a contradiction exists.

4.3.26 Furthermore, the drafters of the Bill again (except for clause 4(2)(d)) simply replicated section 12 of the Equality Act, without again ensuring that it is appropriate in this instance.

4.3.27 It is therefore submitted that the extent of the limitation on the right to freedom of expression is unjustifiably wide and the relation between the limitation is not narrowly tailored to the purpose of protecting vulnerable people from potential harm.

4.3.28 Finally, section 36(1)(e) of the Constitution requires the consideration of less restrictive means to achieve the purpose of protecting people's rights to dignity and equality. We reiterate that international law guidance on this point has held that criminal penalties should only be considered as a last resort.[48]

4.3.29 The Equality Act's remedies provide unique legal remedies, which are restorative in



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nature, providing the offender with the opportunity to correct his or her conduct, and the Court has the discretion to refer cases to be prosecuted as well.

4.3.30 In the matter of ANC v Penny Sparrow[49] the payment of damages ordered by the Equality Court was for instance paid to a civil society organisation that aims to eradicate racism. In this same matter, the offender (Ms Sparrow) was also charged under the common law crime of crimen iniuria and she agreed to a plea bargain with the State that involved a fine of R5 000 and a two-year suspended sentence. One cannot reasonably say that prosecution in terms of the common law offence of crimen iniuria for severe cases has not been effective, as Vicky Momberg was sentenced to three-year imprisonment (of which one year was suspended) in March 2018.[50]

4.3.31 Before turning to our conclusion on the limitation inquiry we do submit that the additional list of protected characteristics in clause (1)(a)- (j) might perhaps constitute a reasonable limitation to the right to freedom of expression, if it was in line with those protected characteristics listed in section 9(3) of the Constitution. However, this consideration would in our view only come into play if the limitation itself was narrowly tailored and did not constitute such dire consequences. We therefore submit such justification could only be considered if the expression prohibited fell within the parameters of section 16(2)(c) of the Constitution.



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4.3.32 In conclusion, the current version of clause 4(1)(a) unjustifiably limits the right to freedom of expression. We now turn to a brief discussion of the rest of the clauses in the Bill, to the extent that it is necessary.

4.4 Ad clause 4(1)(b) and 4(1)(c) - the offences of distribution of electronic communication consisting of hate speech in terms of clause 4(1)(a) and displaying or making material available constituting hate speech in terms of clause 4(1)(a)

4.4.1 Since the core of the offences relate to hate speech, as contemplated in clause 4(1)(a), (which we found to be unconstitutional) the offences in these clauses are also unconstitutional. However, we do we feel certain additional concerns in this regard should be raised that were not covered in clause 4(1)(a).

4.4.2 Any such related proposed offences must also be narrowly tailored, and the key elements must be clearly defined, such as "distribute" and "material". It is also unclear what is meant by "makes available" and it potentially provides a very low threshold.

4.4.3 Furthermore, reference to "victim" should only relate to a natural person as a juristic person cannot be a carrier of the protected characteristics listed in clause 4(1)(a)(aa) - (oo).



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4.4.4 Lastly, we reiterate that such related offences must also be public of nature. The Rabat Plan of Action proposes that the public nature of the expression should be a key consideration in the threshold test for criminal sanctions curbing expression. This directly relates to considerations of the frequency and the reach of the expression. Both clauses 4(1)(b)(c) lack this threshold.

4.4.5 Furthermore, if we compare it with foreign jurisdiction, the public nature of the expression is emphasised in such criminal sanctions. For instance, the public nature of such expression is emphasised in the Canadian Criminal Code (as stated before). The European Union's 2008 Council Framework Decision on Combatting Certain Forms of Expressions of Racism and Xenophobia by means of Criminal Law[51] (EU Framework decision), also requires such offences to include "publicly inciting to violence or hatred" (own emphasis).

4.5 Ad clause 6 (3) - Penalties and orders in relation to the offence of hate speech in clause 4(1)(a) of the Bill

4.5.1 The provision of penalties for the offence of hate speech in clause 4(1)(a) has been analysed under the limitation inquiry of clause 4(1)(a). To this extent it is reiterated that due to the fact that no threshold is built into the offence of hate speech in clause 4(1)(a), the severe penalty of imprisonment of up to eight years for an offence in terms



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of Clause 6(3) is unjustifiable.

4.5.2 Again, no consideration is given to the factors listed in the Rabat Plan of Action's six-part threshold test - which includes reference to the context, the content and form or the extent of the speech that the severity of the penalty would also reflect. There is just one type of penalty provided for, with no consideration to any of these factors.

4.6 Other general considerations of the Bill

4.6.1 In addition to the legal analysis of the Bill, the Foundation is of the opinion there are further additional aspects that are more of a social nature that should also be considered.

4.6.2 The preamble of the Bill emphasises South Africa's commitment to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[52] We believe that any legislative tool that aims to curb "prejudices" and "intolerance" in terms of the ICERD, should also provide clear definitions on what constitutes "racial discrimination" in order not to polarise the debate.

4.6.3 We believe in the context of South Africa, the debate on racism and racial discrimination



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is often politicised. Therefore it is necessary that any reference to "racial discrimination" should be in line with the ICERD's definition, which provides that it includes "...any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose of effect of nullifying of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[53]

4.6.4 Furthermore, the Foundation believes it is crucial that the focus on fighting and curbing "racial hatred" and "racial supremacy" should be on education and ensuring that civil servants, politicians and our leaders refrain from language that polarise races and cultures in South Africa. In this regard, we agree with the Rabat Plan of Action's recommendations that "political parties should adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speeches".[54]

THE FOUNDATION'S VIEWS ON THE BILL

1. The offence of hate crime



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1.1.1 Although the Foundation is in favour of distinguishing hate crimes from ordinary crimes to allow proper data collection, reporting and prosecution, the lack of definitions for the key elements, such as "prejudice" and "intolerance", is concerning.

1.1.2 We submit that protected characteristics listed in clause 3(1)(a)-(q) should relate to an "unchangeable characteristic" of a natural person's dignity and therefore "political affiliation or conviction" and "occupation or trade" should be removed from the list.[2]

1.1.3 We furthermore submit that the definition of a "victim" should not include reference to a juristic person, as the crime is motivated by a characteristic inherent to the dignity of a natural person.

2. The offence of hate speech read with the penalties on conviction

2.2.1 We highlight only some of our key findings on the offence of hate speech and our recommendations in this regard below.

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2.2.2 The heading of clause 4 of the Bill, which reads "Offence of hate speech" is fundamentally



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flawed, as it presupposes that the criminal offence created in terms of clause 4(1)(a) of the Bill relates to hate speech, as understood in terms of section 16(2)(c) of the Constitution.

2.2.3 On our analysis, the expression prohibited fell outside the parameters of section 16(2)(c) of the Constitution and we are not dealing here with the criminalisation of hate speech as understood in terms of the Constitution and international law.

2.2.4 To qualify as hate speech in terms of section 16(2)(c) of the Constitution, the expression prohibited must amount to "advocacy of hatred", which is based on the prohibited grounds of "race, ethnicity, gender or religion" and that "constitutes incitement to harm" (own emphasis). Legislation regulating hate speech must ensure the prohibition contains all these elements.

2.2.5 From the outset, the legal analysis was complicated by the fact that the Bill, except for the definition of "harm", failed to provide any definitions for key elements of the offence created in clauses 4(1)(a)(i) and (ii). No definitions are provided for "publishes"; "propagates"; "advocates"; "anything"; "harmful"; "incite harm" or "promote or propagate hatred". There is no indication of the threshold in this instance.

2.2.6 The above is a glaring omission, especially since a statutory criminal offence is created



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with severe, life-changing consequences. A person charged with such an offence needs to know exactly what the charge concerns, to prepare his or her defence.

2.2.7 Furthermore, even if one focuses only on the terms that find resonance with section 16(2)(c) of the Constitution (the definition of which can be sourced from international law guidance and local jurisprudence) - if read in its entirety, it falls clearly outside the parameters of section 16(2)(c) of the Constitution.

2.2.8 For instance, on the current provision of clause 4(1)(a)(ii) there is no need for whatever is being "advocated" to be linked to the likelihood to cause "harm" to the targeted group. The provision only requires that whatever is being "advocated" on the listed prohibited grounds - such as race - could be reasonably construed to "promote or propagate hatred."



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2.2.9 However, "promote or propagate hatred" cannot be equated to "incitement to cause harm", especially if one considers the ordinary meaning of the word "propagate" and the fact that the drafters used the term "propagate" interchangeably to "advocacy" in the first part.

2.2.10 Section 16(2)(c) of the Constitution requires the "advocacy of hatred" to be causally connected to incitement to cause harm". Even though harm does not necessarily need to manifest, there has be a reasonable likelihood that it could occur. Both elements therefore must be present. The core purpose of curbing hate speech is to ensure that this extreme public manifestation of hatred does not expose a vulnerable group of people to further discriminatory attacks.

2.2.11 Lastly, the undefined prohibited grounds in terms of clause 4(1)(a)(aa)-(o) by far exceed the four limited grounds of section 16(2)(c) of the Constitution, which are also aligned with article 20(2) of the International Convention on Civil and Political Rights (ICCPR).We submit that, read in conjunction with the rest of clause 4(1)(a), the provisions exceed the parameters of section 16(2)(c) of the Constitution.

2.2.12 We found clause 4(1)(a) fell outside the scope of expression prohibited in terms of section 16(2)(c) of the Constitution, which would have justified legislative regulation.

2.2.13 The offence created in fact deals with the criminalisation of expression, which is

constitutionally-protected. On considering the factors listed in section 36 of the Constitution, we found the limitation on the right to freedom of expression to be severe and unreasonable. This is especially true considering the nature and extent of the limitation.

2.2.14 The offence to a large extent appeared to be a simple replication of the wording used in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) relating to the prohibition of hate speech.

2.2.15 This replication is problematic as the constitutionality of the hate speech prohibition in the Equality Act itself is a contentious issue. At date of this submission, it forms the basis of a constitutional challenge to be heard by the Supreme Court of Appeal (SCA), and which would impact the outcome of this Bill.

2.2.16 We submit that no threshold is built in clause 4(1)(a) read with clause 6(3), which would justify such criminal sanctions. No consideration is given to the intensity, the frequency or the extent of the expression and there is no provision for correction.

2.2.17 The expression prohibited by this drastic measure is not restricted to public expression and it includes private communication. This is contrary to the recommended international law thresholds and approaches by foreign jurisdictions.

2.2.18 The nature of the limitation is so severe that there is a real danger that the Bill would stifle legitimate political and social discourse and people might be fearful that what they might say or write might make them guilty of this vague offence on the 15 listed grounds.

2.2.19 The statutory exceptions provided in clause 4(2) to a degree buffer the extent of the limitation, but it contains a critical contradiction. Both clauses 4(2)(a) and (d) refer to elements of the offence that are not present in clause 4(1)(a) - namely "advocates hatred" and "incitement to cause harm". These are ironically the elements of hate speech as understood in terms of section 16(2)(c) of the Constitution.

2.2.20 On the consideration of lesser restrictive means in terms of section 36 of the Constitution, it is unclear why current legislative remedies in terms of the Equality Act, which provide restorative measures to curb hate speech (even though ill-defined), are considered inadequate. There have also been successful cases of criminal prosecution in terms of the common law crime of crimen iniuria, in addition to these restorative measures. The memorandum of the Bill also fails to indicate the pressing societal need that would

support such drastic statutory regulation.

2.2.21 We found that clause 4(1)(a) unreasonably and unjustifiably limits the right to freedom of expression and we submit that the subsequent clauses - to the extent that they rely on clause 4(1)(a), are also unconstitutional.

D. REMEDIES

1. The Foundation recommends that the hate speech offence in the 2023 version of Bill be removed in its entirety due to its unconstitutionality and that the Bill should only address the issue of hate crimes. We furthermore emphasise that before such drastic, life-altering measures are considered, adequate reform of current legislative measures that already regulate hate speech must be undertaken.

2. We strongly maintain that the statutory criminalisation of hate speech, which is still provided for in the current version of the Bill, should only be considered as an absolute last resort. We unequivocally hold that it is not clear that these drastic measures were the results of all other current regulatory methods failing.

2.1 The Bill's offence of hate speech is deeply flawed, as it does not relate to hate speech as understood in terms of section 16(2)(c) of the Constitution. It in fact prohibits

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constitutionally-protected expression. The severe limitation to the right to freedom of expression - which includes serious criminal sections, including imprisonment of up to eight years – but fails to provide guidance on any thresholds, cannot in our view be justified as a reasonable limitation on the right to freedom of expression.

2.2 In effect, the proposed criminal offence of hate speech, which does not adhere to international law standards relating to public expressions of extreme hatred which constitute incitement to violence or hostility, could have a very negative impact on legitimate political and social discourse. Possibly, of the tens of thousands of private and public communications emanating every day from politicians, journalists, religious leaders and members of the general public, many might "reasonably be construed" to have the intention to incite "emotional, psychological, physical, social or economic detriment" on the basis of their membership of one or more of the 10 grounds listed in the Bill. This would, apart from anything else, make it virtually impossible to implement the Bill as envisaged.

2.3 We are strongly of the view that the current Bill's offence of hate speech is unconstitutional and should be removed. Legislative reform of current laws attempting to curb hate speech should urgently be addressed. We propose a working group to be established to report back to the Committee, as detailed further below. Only as an absolute last resort should statutory criminal measures be considered, which must be aligned with the text of section 16(2)(c) of the Constitution.

2.4 We submit that the offence of hate crimes should be created as soon as possible, as the lack of distinction has obstructed proper recording, monitoring and prosecution of these incidents. We submit that this should follow a separate legislative path, apart from the offence of hate speech.

2.5 In relation to the current offence of hate speech, we reiterate that the right to freedom of expression is an essential requirement for the maintenance of a "multi-party system of democratic government to ensure accountability, responsiveness and openness", in terms of section 1(d) of the Constitution.

2.6 We submit any legislation regulating hate speech must ensure it is strictly limited to the clear and unambiguous text of section 16(2)(c) of the Constitution. The current offence of hate speech in clause 4(1)(a) is far broader than the parameters of section 16(2)(c) of the Constitution. We are therefore in fact dealing with constitutionally-protected expression and the limitation on the right to freedom of expression could only be justified if the limitation was found to be reasonable in terms of section 36 of the Constitution.

2.7 On our analysis of the hate speech offence in clause 4(1)(a) in terms of section 36 of the Constitution, the limitation to the right to freedom of expression was found to be unconstitutional - especially since no threshold is provided that would justify such drastic consequences. We further held that all subsequent provisions relying on the

current version of the offence by reference become unconstitutional.

2.8 Our recommendations relating to the offence of hate speech are four-fold:

We submit that the current version of the offence of hate speech should be removed from the Bill, so that the criminalisation of hate crimes as a distinct crime is not further delayed.

- We recommend that a hate speech working group should be established with stakeholders from civil society, the media, and the Department of Justice and Correctional Services, to conduct a proper review of current legislative measures addressing hate speech. This working group should also conduct research on whether there is a pressing societal need for the criminalisation of hate speech over and above current legislative remedies. We submit there is an urgent need to review the Equality Act and ensure that it is constitutionally aligned with section 16(2)(c) of the Constitution and that appropriate remedies are provided for such severe instances in terms of the Equality Act.

- In the above instance we propose the recommendations of the Rabat Action Plan be seriously considered, regarding distinguishing between different types of

expression which might require some form of State action. This includes expression that falls into the narrow category of hate speech that might in some circumstances justify criminal sanction; expression that is not criminally punishable but may justify administrative sanction and then lastly expression that does not give rise to criminal or civil liability but still raises concerns in terms of tolerance that could be addressed via dialogue initiatives and education for instance.

- Lastly, we recommend as a last resort that if there is a clear pressing societal need - supported by research by the hate speech working group - that indicates the need for criminal statutory measures that cannot be addressed by reform of the Equality Act, then the following must be considered:

  - Such an offence of hate speech must prohibit expression that falls within the narrow category of hate speech as understood in terms of section 16(2)(c) of the Constitution.
  - Clear definitions should be provided for the elements of "advocacy"; "hatred" and "incitement to cause harm". The Camden principles provide clear guidance on such definitions. It should be in line with international law approaches.

    It should be clear in the offence that it relates to public expression and a threshold should be built into the offence - the penalty of which should reflect the severity of the expression. In this regard we refer to the six-part threshold test of the Rabat Action Plan that should be built into such a proposed offence.

This should include consideration of the context, the speaker's position, intent, the content and form, the extent of the speech and the imminence of harm occurring.

- If the above is followed, then we suggest a range of penalties reflecting the severity of the expression and carefully-tailored defences, adequately defined, reflecting the approach in Canada, as discussed earlier.

E. CONCLUSION

Hate speech was already successfully dealt with prior to the introduction of the Hate Speech Bill by the Equality Act. Although this act provided for a civil remedy rather than criminal sanction, it had been used by our courts to make combat hate speech.

The Equality Act allows private citizens to lodge complaints against perpetrators of "hate speech" with penalties that could include an apology or financial compensation. Under the Equality Act, there have been notable cases where individuals have relied on the Act to address instances of hate speech. Two prominent cases that have received attention and have successfully relied on the Equality Act are the Qwelane and Masuku cases. In both cases, the Equality Court and High Court, respectively, ordered an apology and a fine or damages.

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The Hate Speech Bill will create the statutory crime of hate speech. Alarmingly, it would then make it far easier for a person to be found guilty of the crime of hate speech and be sent to jail for up to eight years, than for someone who commits a civil offence (under the Equality Act or crimen injuria) to be ordered merely to apologise.

Although the current version of the Bill is a marked improvement from the 2016 version, the vagueness towards a criminal offence would make people very wary of expressing any personal views that might upset anyone from the 10 categories of potential victims. In so doing, the Bill could lead to self-censorship among people, media, and internet platforms, as they seek to avoid any risk of prosecution. This would undoubtedly stifle free debate on a wide range of topics, and would seriously limit the constitutional right of individuals to express their opinions and ideas with very serious consequences for our constitutional democracy.

Although the Bill does provide exemptions for artistic creativity, academic or scientific inquiry, fair and accurate reporting and religious proselytizing – its draconian limitations will impede the ability of individual citizens to exercise their rights to free speech and to meaningful participation in the marketplace of ideas.

By limiting free speech, the Bill would only serve to drive hate speech underground, which could lead to sudden eruptions of violence and a missed opportunity to tackle the issues of racism and xenophobia which plague unprotected ethnic groups.

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