

Sec. 15 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) enshrines the fundamental right to freedom of conscience, religion, thought, belief and opinion (hereafter religious freedom).

Freedom of expression lies at the heart of democracy,¹ and is closely connected to freedom of religion – itself a hallmark of free societies.² For this reason, the mere fact that the Bill criminalises expression (which necessarily includes religious expression) is deeply problematic.

The *Constitution* and various binding international legal instruments require South Africa to uphold the right to freedom of expression and the right to freedom of religion. The Bill is so wide that it will result in South Africa failing to meet (and even contravene) its important constitutional and international legal obligations.

South Africa's international law obligation to prohibit hate speech is already met through existing criminal law (most notably the common law crime of *crimen iniuria*) and civil law (most *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* (hereafter the *Equality Act*)).

Also, South Africa is not required to criminalise hate speech – civil sanctions are sufficient. This is aligned with the United Nation's assertion that more speech, not less, is the key means to address hate speech. Also, the [Rabat Plan of Action](#) cautions that imposing criminal sanctions for hate speech is a last resort measure that should only be applied in strictly justifiable situations.

1. The wide definition of "hate speech":

This definition of 'hate speech' is wider than both the *Constitution* and *Equality Act's* definitions of hate speech. This is due to *inter alia* the Bill's wide definition of *harm*, failure to define *hatred*, expanded *list of grounds*, and weak circular exemption clauses. **The definition of hate speech must be improved (tightened).**

2. The wide definition of 'harm':

The Bill's definition of harm is too wide. Disturbingly, it is wider than the Constitutional Court's definition of harm in [Qwelane v South African Human Rights Commission 2022 \(2\) BCLR 129 \(CC\)](#) (hereafter *Qwelane*) – which was decided in terms of the *Equality Act* (a civil law).

¹ [National Coalition for Gay and Lesbian Equality v Minister of Justice](#) 1999 (1) SA 6 (CC) at para. 137.

² [Prince v President, Cape Law Society](#) 2001 (2) SA 388 (CC) at para. 25.

It must be borne in mind that the Bill imposes criminal (not civil) sanctions for hate speech. A criminal hate speech law should set a higher threshold than a civil hate speech law. Yet, the Bill's required degree of harm (i.e. "substantial") is lower than that of the *Equality Act* (i.e. "deep").

For the same reason, it is concerning that the Bill includes emotional harm (i.e. hurt feelings) which is highly subjective. The Bill also includes social and economic detriment, neither of which are even included in the *Equality Act's* definition of harm. Social harm is legally novel and nebulous concept and the definition provided by the Bill does not provide much clarification.

Disturbingly, this means the Bill's definition of harm (which is related to criminal hate speech) is wider than the definition of harm in relation to civil hate speech. **The definition of harm must be improved (tightened) and the required degree of harm must be set higher.**

3. **The failure to define novel and/or controversial grounds:**

The *Constitution* includes only four grounds for hate speech: race, ethnicity, gender and religion. In contrast, the Bill contains many more – including grounds not listed in the *Equality Act*. Some of the grounds relatively new concepts and/or are controversial and have contested and/or fluid meanings. For example: gender identity, gender expression and sex characteristics.

For the sake of legal certainty and fairness, it is important to understand what each ground means – especially novel and/or contested concepts. **New and controversial grounds must be defined.**

4. **The failure to define 'hatred':**

The *Hate Speech Bill* fails to define hatred – the quintessential element of the crime of hate speech. Without hatred, there is no hate speech. For the sake of legal certainty and fairness, it is important to understand what hatred means. **Hatred must be defined.**

5. **The self-defeating exemption clauses:**

The so-called 'religious exemption clause' patently circular. Essentially, it consists of the same elements as the crime of hate speech itself – advocacy of hatred that constitutes incitement to cause harm based on one or more of the grounds. Effectively, only harmful religious expression is exempted.

Practically, this offers little protection because the definition of *harm* is too wide, *hatred* is not defined, and the meaning of some *grounds* is unclear. **The religious exemption clause must be strengthened.**

Implication for religious freedom:

Any limitation of expression, including religious expression, beyond what is constitutionally defensible, is unacceptable in a free and democratic society. For religious persons, this means that their fundamental constitutional right to exercise and enjoy their faith freely (through many different expressions, whether in public or private, alone or in community) will be undermined by the threat of potential prosecution or unnecessary fear-based self-censorship.

Traditional or conservative religious views which have been held for centuries (for example on marriage, sexuality, and gender) are coming into increasing conflict with the political and social views of some sectors of society.

The inclusion of vague concepts such as emotional harm and social harm, and failure to define hatred as well as novel and/or contested concepts around sex and gender (and related concepts) – coupled with the weak religious exemption clause – puts religious persons at risk of potential prosecution for hurting feelings or even undermining the social cohesion of South Africa – for merely respectfully expressing their sincerely held beliefs as based on the holy text of their particular faith (or for not agreeing with the worldviews of others).

This is a constitutionally indefensible limitation and violation of the fundamental right to freedom of religion.

Also, it is plainly irrational that the Bill will make it easier for a person to be found guilty of the crime of hate speech (and risk imprisonment) than a civil hate speech offence (and be ordered to pay a fine or apologise).

Conclusion

We would urge the Select Committee to consider seriously the concerns of the religious communities of South Africa and ensure the necessary amendments are made to ensure that *bona fide* expressions of religious belief and opinion are fully protected from the threat of any form of criminal sanction.

Warm regards,