



SOUTH AFRICAN HUMAN RIGHTS COMMISSION

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Ref: 19/1/2/3

19 May 2023

Honourable Ms Shahidabibi Shaikh

Chairperson
Select Committee on Security and Justice
National Council of Provinces

Parliament Street
Cape Town
PO Box 15
8000

Per Email: HateCrimesBill9B-2018@parliament.gov.za

Dear Chairperson,

RE: SAHRC Submission on the Prevention and Combating of Hate Crimes and Hate Speech Bill

1. The South African Human Rights Commission (SAHRC / Commission) welcomes the call for written submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9-2018] (Bill) by the National Council of Provinces Select Committee on Security and Justice (Select Committee).
2. The SAHRC has been engaged with the draft legislation since its inception and, over the years, has delivered submissions at both departmental and parliamentary levels. The Commission notes that several of its recommendations have been incorporated into the Bill, including the alignment to the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).
3. Having monitored the passage of the draft legislation over the years and its subsequent placement with the Select Committee for further processing, the Commission wishes to make further succinct comments on the draft Bill. Within its mandate under Section 184(1) and (2) of the Constitution of the Republic of South Africa and its enabling legislation under South African Human Rights Commission

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Commissioners (Part-Time): A C Nissen, J B Sibanyoni; **Chief Executive Officer:** V Mkhize

Act, 2013 (SAHRC Act), the Commission hereby presents its submission on the Bill to the Select Committee.

Submission

4. **Potential Limitation of the Freedom of Expression:** The Commission notes the potential limitation of right to freedom of expression through the introduction of additional grounds to those already contained in Section 16(2) of the Constitution.¹ The Commission reiterates that the fundamental right to freedom of expression may only be limited in certain circumstances.² The Commission is concerned that the current drafting of the Bill's clause on prohibited grounds may go beyond what is constitutionally justifiable. It is therefore recommended that the prohibited grounds should mirror those of Section 16(2)(c) of the Constitution. The Commission further recommends that the Bill is synergised with the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) to avoid three different sets of grounds relating to prohibited speech. Failing to do so may potentially create confusion and inconsistency in the handling of hate speech matters by respective bodies and brings uncertainty in the body of law governing hate speech.

5. **Penalties:** The Commission notes the change under Clause 6(3) of the Bill and that the penalty for the offence of hate speech has been increased from "paying a fine or imprisonment for a period not exceeding three years" to "paying a fine or imprisonment for a period not exceeding eight years or both." The Commission is of the view that imprisonment for a period up to 8 years, even as a maximum penalty, may exceed those of other State parties to the ICERD. Furthermore, comparative research³ has revealed that hate speech laws vary among different countries as well as its related penalties. In the Commission's view, hate speech should not be treated as a more serious offence than hate crimes it is in fact a lesser crime. The Commission is concerned that the Bill may give the impression that a court may issue a reprimand to a person who commits a hate crime, but this option is unavailable in the case of a person who is convicted of hate speech. The Commission therefore recommends that penalties for hate crimes and hate speech be similarly addressed in the Bill.

¹ Section 16 (2) (c) "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm"

² Section 36 of the Constitution. See further UN HRC, General Comment 34, Article 19: Freedom of opinion and expression, CCPR/C/GC/34, para. 22; Articles 19(3) and 20 of the International Covenant on Civil and Political Rights.

³ Hate speech penalties in different countries can be summarised as follows:

- a) Canada: Hate speech is a criminal offense in Canada under the Criminal Code. The maximum penalty for hate speech is two years in prison;
- b) Germany: Hate speech is illegal in Germany. The maximum penalty for hate speech is up to 5 years in prison;
- c) Kenya: The punishment for hate speech can be up to 3 years in prison, and/or a fine.

6. **Clause 4(3):** It is unclear from the current drafting, what the differentiating factors are between a hate speech matter being dealt with through civil remedies, (as provided for in PEPUDA), common law remedies such as *crimen injuria*, and criminal complaints under the Bill. The Commission therefore recommends that the Bill stipulates that the criminal route would be reserved for egregious or serious cases which ought to be proven beyond reasonable doubt. Similarly, less serious cases must be addressed by other means e.g., through the Equality Court, which enables mediation. In the Commission's experience, the Equality Court, as an alternative dispute resolution mechanism, provides more harmonious outcomes that results in positive and enduring social outcomes. While the Commission welcomes the introduction of clause 4(3) it recommends that the DPP should be guided in his or her decision whether to approve criminal prosecution in such matters by some guidance and reference to the seriousness of the hate speech offence in question. The Commission therefore recommends that the clause reads as follows:

“Any prosecution in terms of this section must be authorised by the Director of Public Prosecution having jurisdiction or a person delegated thereto by the DPP concerned, which authorisation should only be granted inter alia in the event that the alleged offense is of a serious nature and has caused material harm.”

7. The Commission extends its availability to further engage the Select Committee on the content of the draft Bill and looks forward to its expeditious finalisation.

Yours sincerely,



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South African Human Rights Commission

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