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For attention: Mr Gurshwyn Dixon

The Select Committee on Security and Justice

Email: HateCrimesBill9B-2018@parliament.gov.za

Sir

Attached herewith please find submission on Hate Crimes Bill from the United Ulama Council of South Africa (UUCSA)

Kindly acknowledge receipt

Thank You

Yusuf Patel

Secretary General

17 May 2023

WRITTEN SUBMISSIONS TO THE SELECT COMMITTEE ON SECURITY AND JUSTICE OF THE NATIONAL COUNCIL OF PROVINCES ON THE PREVENTION OF HATE CRIMES AND HATE SPEECH BILL [B9B – 2018]

1. INTRODUCTION

In this paper we look at the constitutionality of the Prevention and Combating of Hate Crimes and Hate Speech Bill (the Bill)[1] and how it affects the freedom of religion and freedom of speech rights of the Muslim community as it relates to LGBTQIA+ persons. The constitutional freedoms advocated for in this paper on behalf of Muslims apply equally to all other peoples who hold the same or similar views regarding LGBTQIA+ conduct as Muslims do. So, when we speak herein for Muslims, we also speak for those persons.

Islamic law prohibits homosexual conduct and the freedom of Muslims to teach and preach this is recognised by the Constitution in sections 15 and 16. We submit that the Bill limits these freedoms for Muslims. We submit that the words 'harm' and 'hatred' are not sufficiently defined and result vagueness and uncertainty. Consequently, it renders this criminal statute unlawful. We submit further that the exemptions provided for are vague and uncertain and its application results in unfair discrimination which renders it unconstitutional.

Therefore, we submit that this statute, particularly the areas raised above, will not withstand a constitutional challenge.

[1] Government Gazette No. 41543 of 29 March 2018.

We discuss these submissions in more detail below. We are willing and hereby request that we be permitted to make oral representation on these matters.

South Africa's unique history gave birth to a diverse nation in 1994. Because of the multitude of races, ethnicities, colours and religions that learnt to coexist in this nation, it is proudly referred to as 'the rainbow nation'. In order to build this nation into a people who would forge a new identity as one single people, in the full glory of every colour in its rainbow, Nelson Mandela and his partners crafted a constitution that ensures a place for all who live in South Africa. That constitution ensures that we shall always be both united and diverse. Not one or the other, both. At times we lose our way. In our zeal to cement our own location in the foundation of the nation, we inadvertently nudge our brothers and sisters from their nest. Our constitution, often described as among the best in the world, is designed to shine a light in these moments of darkness so that we may see our way back to the rainbow in our nation.

The preamble of the Constitution of the Republic of South Africa[2] (the Constitution) commits the Republic and its people to establish a society that is based on democratic values of social justice, human dignity, equality and the advancement of human rights and freedoms, non-racialism and non-sexism.[3] Under its objects clause, the Bill says that the objects of the Act are to give effect to the Republic's obligations regarding prejudice and intolerance as contemplated in international instruments. In the preamble, the international instrument referred to is the International Convention on the Elimination of

[2] Act 108 of 1996.
[3] Ibid, preamble.

all Forms of Racial Discrimination (the Convention). Its preamble states that the convention is based on the principles of the dignity and equality inherent in all human beings. It commits itself to the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.

As stated previously, the purpose of this communication is to identify those areas of the Bill which stunt the freedoms of religion and expression rights of Muslims, as well as people of other religions, recognised by the Constitution. Section 15(1) of the Constitution states that 'everyone has the right to freedom of conscience, religion, thought, belief and opinion'.[4] The Constitutional Court stated that the 'essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination'.[5] Therefore, every person in South Africa has the right to have a belief, to express that belief publicly, to manifest that belief by worship and practice and by teaching and dissemination. The section 15(1) right prohibits coercion or constraint.[6] Section 15(1), according to the Constitutional Court, prohibits conduct that coerces persons to act in a manner contrary to their religion and it also prohibits conduct that constrains persons from acting in accordance with their religion.

[4] The Constitution of South Africa, Act 108 of 1996, section 15(1).
[5] S v Lawrence 1997 (4) SA 1176 (CC), 92
[6] [6] *S v* Lawrence 1997 (4) SA 1176 (CC); Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC).

In Fourie, the Constitutional court said that there are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. These provisions, taken together, affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the right to be different'.[7]

The Fourie court continued and said that in each case that was decided on these constitutional provisions, space has been found for members of communities to depart from a majoritarian norm,[8] and that these provisions, collectively and separately, acknowledge the rich tapestry constituted by civil society, indicating, in particular, that language, culture and religion constitute a strong weave in the overall pattern.[9]

The lessons that we learn from the wisdom of our highest court is that South Africa is constituted from a multitude of different coloured strands. When they are woven together, they strengthen each other, and altogether, they make for a formidable nation. However, when this heterogeneity is sacrificed at the altar of a contrived sense of equality then the real sacrifice is the soul of our nation. Every instance in which we dictate to religious persons that they must practice less of their religion, or that they must practice their religion differently, in a manner that we decide, that is when we eviscerate the soul from

[7] Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC); Christian Education South Africa v Minister of Education 2000 (4) SA 757 (CC), 23.
[8] Minister of Home Affairs v Fourie 2006 (1) SA 524 (CC).
[9] Ibid.

the person. Then, in our overzealous activism to manufacture an egalitarian society, we remove the colour from our rainbow. Instead of building a people where everyone respects each other's dignity, our efforts get us nothing except a nation of Frankensteins. A country full of people who are unable to recognise themselves. Instead of having respect for each other, because one built up the other, we hate each other because, in order to give to one, we take from the other.

2. ISLAMIC LAW

Islamic law prohibits homosexual conduct. It does not prohibit homosexual thoughts or feelings. Islamic theology holds further, that a Muslim who denies this law in Islam has, by operation of law, apostatized from Islam.

Our Supreme Court of Appeal, in Mohmed and Another, said that it is a firmly established principle in our law that neither the courts nor the legislator may stand in judgement or interfere with the truth, reasonableness or just interpretation of these beliefs of Muslims (or any religion, but we speak for Muslims herein).[10] The Mohamed court then said that one cannot deny the right of those who are legitimately charged with the protection of the Muslim faith to seek to safeguard what they consider to be the fundamental and critical tenets of their faith.

[10] General Assembly of Free Church of Scotland and Others v Overtoun and Others [1904] AC 515 (HL Sc at 644 – 5, as quoted by the Supreme Court of Appeal in Mohamed and Another v Jassiem 1996 (1) SA 673 (A) 713J – 714A.

These principles operate merely as theoretical safeguards for the free practice and declaration of the above Islamic beliefs. In practice however, Muslims, leaders and laity alike. self-sanction out of a continuous fear of legal condemnation as a result of the vagueness and uncertainty of hate speech and hate crime legislation and jurisprudence.

It is our view that the current Bill before parliament, perpetuates the confusion as we shall show in what follows. It is our submission that the Bill, in its current form, coerces Muslims to act in a manner that is contrary to their religion and constrains Muslims from the full manifestation and expression of their religion and religious rights under the Constitution. Our objection surrounds the vagueness and ambiguity of the words ‘harm’ and ‘hatred’ and the weak and circular nature of the religious exclusion in subsection 4(2)(d).

We strongly propose clearer definitions for the words ‘harm’ and ‘hate' and that the expression and religious exemptions in sections 4(2)(a) and 4(2)(d) be redrafted to be in line with the exemptions in sections 4(2)(b) and 4(2)(c).

3. HATE SPEECH – HARM AND HATRED

Section 4 of the Bill says that any person who intentionally publishes propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be **harmful** or to incite **harm** or to promote or propagate hatred is guilty of an offence of hate speech. The word harm,

as defined by the Bill, means any emotional, psychological, physical, social or economic harm.

The definition for the word 'harm', in section 1 of the Bill does not provide a clear and proper definition. It is also circular in nature in that it says that the word harm means […] harm. The words (adjectives) emotional, psychological, physical, social and economic, simply create categories of harm, they do not tell us what harm is. Accordingly, without a clear definition of the word harm, sections 4(1)(a)(i), 4(2)(a) and 4(2)(d) are vague and unclear.

Regarding this vagueness, the Constitutional Court said that 'a norm (rule) cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.'[11] The same court said in another case that 'it is an important principle of the rule of law that rules be stated in a clear and accessible manner.'[12]

Further sections of the Bill which are vague and unclear are sections 4(2)(a) and 4(2)(d). I will concentrate on the latter section as it relates to Muslims. This section says that the provisions of subsection 4(1) do not apply in respect of anything done (any conduct) as contemplated in subsection 4(1) if it is done in **good faith** in the course of engagement in the ***bona fide*** interpretation and proselytising or espousing of any religious tenet, belief,

[11] State President v Hugo 1997 (4) SA 1 (CC).
[12] Dawood & Another v Minister of Home Affairs 2000 (3) SA 936 (CC)

teaching, doctrine, or writings to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection 4(1)(a).

Essentially, the section says that a person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm; or promote or propagate hatred, based on one or more of the listed grounds, shall **not** be guilty of an offence of hate speech if it is done **in good faith** in the course of engagement in … the ***bona fide*** interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does **not advocate hatred that constitutes incitement to cause harm**, based on one or more of the grounds referred to in subsection (1)*(a)*.

The vagueness and uncertainty in the above section relate to the following:

1. the meaning and effect of the words 'in good faith';
2. the meaning and effect of the words 'the *bona fide'* and the manner in which '*bona fide*' relates to the rest of the section;
3. the manner in which this section conflates the separate crimes of sections 4(1)(a)(i) and 4(1)(a)(ii); and
4. the differentiation between the application of subsections 4(2)(a) and 4(2)(d) on the one side and 4(2)(b) and 4(2)(c) on the other.

4. GOOD FAITH

Neither section 1 nor section 4 define with sufficient clarity what types of conduct will qualify as good faith. This is a criminal law statute and the principle of good faith is not a clearly defined concept in criminal law. Therefore, if the statute is intended to regulate the conduct of citizens and impose criminal sanctions, then it will require increased precision and clarity.[13] Citizens must know beforehand what conduct will constitute a crime. The effect of this uncertainty regarding the type of conduct which will qualify as having been done in good faith, will be that Muslims (and others) will self-censure. A further result of this uncertainty will be that those who may feel aggrieved by the free expression and other manifestations by Muslims (and others) of their section 15(1) rights (freedom of religion) and section 16 (freedom of expression) will be castigated in public[14] and dragged before the courts.

5. BONA FIDE

This phrase is the Latin equivalent of good faith. Firstly, it is unclear whether *bona fide* in section 4(2)(d) serves only as a qualification for the word interpretation or, because of the conjunctive 'and', as a qualification for the words proselytising and espousing as well. As a qualification for the word interpretation, it implies that state apparatuses, the police and the National Prosecuting Authority, as well as the courts and other tribunals will be

[13] See paragraph 3 above.

[14] Your attention is drawn to a fatwa passed by the Muslim judicial Council (MJC) on 4 July 2022 outlining Islam's Legal and Theological position on homosexual conduct and the resulting condemnation of the MJC in the media by leading human rights NGOs as well as certain academics.

tasked with deciding what qualifies as a *bona fide* interpretation of any religious tenet, belief, teaching, doctrine or writing. This will be unlawful in that it will violate section 15 of the Constitution as well as the doctrine of non-entanglement.

As traversed above, everyone has freedom of religion. In constitutional terms, this means that everyone has the freedom to choose what to believe in and what not to believe in. In this regard, the Constitutional Court said 'as a general matter, the Court should not be concerned with questions whether, as a matter of religious doctrine, a particular practice is central to the religion. Religion is a matter of faith and belief. The beliefs that believers hold sacred and thus central to their religious faith may strike non-believers as bizarre, illogical or irrational. Human beings may freely believe in what they cannot prove. Yet, that their beliefs are bizarre, illogical or irrational to others or are incapable of scientific proof, does not detract from the fact that these are religious beliefs for the purposes of enjoying the protection guaranteed by the right to freedom of religion. The believers should not be put to the proof of their beliefs or faith. For this reason, it is undesirable for courts to enter into the debate ….[15]

Regarding the doctrine of non-entanglement, the Supreme Court of Appeal said that '[a] court should only become involved in a dispute of this kind where it is strictly necessary for it to do so. Even then it should refrain from determining doctrinal issues in order to avoid entanglement. It would thus seem that a proper respect for freedom of religion

[15] Prince v President, Cape Law Society, and Others 2002 (2) SA794 (CC).

precludes our courts from pronouncing on matters of religious doctrine, which fall within the exclusive realm of the Church.'[16]

For these reasons, subsection 4(2)(d), to the extent that it speaks of the 'good faith' and '*bona fide'* interpretation, proselytising or espousing, will be unlawful.

6. CONFLATION OF SUBSECTIONS 4(1)(a)(i) AND 4(1)(a)(ii)

Subsection 4(1)(a)(i) criminalises conduct which is found to be harmful or which incites harm. Subsection 4(1)(a)(ii) criminalises conduct which is found to promote or propagate hatred. These two subsections create separate crimes. It is indeed possible, in fact, the probability is high that a single act can attract the application of both subsections. However, subsection 4(2)(d) first exempts from the application of section 4(1), conduct 'done in good faith in the course of engagement in the *bona fide* interpretation and proselytising or espousing of any religious tenet …. Then, this subsection excludes from the application of the exemption, conduct found to advocates **hatred that constitutes incitement to cause harm**. The conduct described in this subsection, appears not to be the same as the 4(1)(a) conduct. This subsection speaks of a category of hatred that constitutes **incitement to cause harm**. Therefore, this section creates a further confusion, in that it refers to subsection 4(1)(a) but it does not apply the 4(1)(a) criteria 4(1)(a).

[16] De Lange v Presiding Bishop, Methodist Church of Southern Africa and Another 2015 (1) SA 106 (SCA)

7. UNFAIR DISCRIMINATION BETWEEN 4(2)(a) AND (d) CONDUCT AND 4(2)(b) AND (c) CONDUCT

The exemptions applicable to conduct contemplated in subsections 4(2)(a) and 4(2)(d) are conditional. The exemption only applies when the conduct 'does not advocate hatred that constitutes incitement to cause harm'. The exemptions applicable to conduct contemplated in subsections 4(2)(b) and 4(2)(c) are absolute, without any conditions.

This differentiation amounts to unfair discrimination. It is our submission that the conditions to the application of the exemptions in subsections 4(2)(a) and 4(2)(d) must be removed in order to bring them in line with subsections 4(2)(b) and 4(2)(c).

8. UNFAIR DISCRIMINATION OF ALL PEOPLES OF RELIGION

At the heart of an unfair discrimination investigation, is the right to equality and dignity of the victim. This statute, as well as the Equality Act,[17] balances rights of Muslims to believe as they please and to express such beliefs freely and openly without hindrance or reprisal against the rights of the LGBTQIA+ community not be discriminated against.

Regarding the protection of the rights of the LGBTQIA+ community, the Fourie court quoted the following '[t]he fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their

[17] The Promotion of Equality and Promotion of Unfair Discrimination Act, Act 4 of 2000.

invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the State to turn these beliefs – even in moderate or gentle versions – into dogma imposed on the whole of society.' The court then added the following: '[i]t should be added that, conversely, the Constitution does not allow the state to impose an orthodoxy of secular beliefs on the whole of society, including religious organisations conducting religious activities as protected by the Constitution.

Freedom of expression [including the right of Muslims to freely and openly declare their religious beliefs] is an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability[18] and for that reason it is of the utmost importance in the open and democratic society envisaged by the Constitution.[19] In Qwelane[20], the Constitutional court quoted Emerson[21] and said that the right to freedom of expression is founded on the pursuit of truth, its value in facilitating the proper functioning of democracy, the promotion of individual autonomy and self-fulfilment and the encouragement of tolerance.[22]

[18] Economic Freedom Fighters v Minister of Justice and Correctional Services 2021 (2) BCLR 118 (CC) at para 1.
[19] S v Mamabolo 2001 (5) BCLR 449 (CC) (Mamabolo) at para 37.
[20] Quelane v South African Human Rights Commission and Another 2021 CC.
[21] Emerson The System of Freedom of Expression (Random House, New York 1970) at 6-7.
[22] Quelane v South African Human Rights Commission and Another, 1997 CC para 69.

In Islamic Unity Convention the court added the following: 'Freedom of expression is applicable, not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society.'[23]

In order to draw a line beyond which free speech is prohibited, it is not sufficient that the impugned speech is found to be offensive, shocking or disturbing, more is required. If the enquiry ends there then the infringement on free speech will be beyond what the Constitution allows. The Qwelane court quoted the following from the Supreme Court of Canada: 'Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfilment, 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.'[24]

[23] Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294 (CC)
[24] Saskatchewan (Human Rights Commission) v Whatcott 2012 SCC 11; [2013] 1 SCR 467 (Whatcott) at para 109.

With the above, the Qwelane court says what is not hate speech. This means that it is not sufficient for members of the LGBTQIA+ community to be offended or have their feelings hurt to qualify as hate speech and thereby limit the Muslims person's right to free practice of their religious and expression rights. In order to demonstrate what type of speech will qualify as hate speech the court quoted the following: '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 lawless, 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.'[25]

Then the court brings it all together and chisels out the definition for hate speech with the following: 'Thus, it would appear that hate speech travels beyond mere offensive expression and can be understood as "extreme detestation and vilification which risks provoking discriminatory activities against that group". Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not infringe the rights of persons or groups of persons. As

[25] Ibid, para 41.

was recently noted, "[s]ociety must be exposed to and be tolerant of different views, and unpopular or controversial views must never be silenced".[26]

It is our submission that our society and particularly the LGBTQIA+ community is evolving a hypersensitivity to the views of their critics. This hypersensitivity is in itself developing into an intolerance. An unjustifiable intolerance. We submit further that the state (and to an extent the courts), instead of crafting legislation respecting the rights of all the peoples of our rainbow nation, it facilitates the domination of one group over the others. The domination of secularism over religion.

[26] Quelane v South African Human Rights Commission and Another, 1997 CC, para 81.