TEL: +27 (0)74 355 0775
EMAIL: INFO@CAUSEFORJUSTICE.ORG
WEBSITE: WWW.CAUSEFORJUSTICE.ORG
ADDRESS: 147 MAIN ROAD, SOMERSET WEST, 7130, SOUTH AFRICA

Our Reference: Hate Crimes and Hate Speech Bill
Date: 25 May 2023

The Select Committee on Security and Justice
National Council of Provinces
Parliament of the Republic of South Africa
CAPE TOWN

By Email: HateCrimesBill9B-2018@parliament.gov.za; gdixon@parliament.gov.za

Honourable Chairperson and Committee,

RE: SUBMISSIONS ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9B – 2018]

1. We refer to the abovementioned matter, specifically to the call for comments issued by the Honourable S Shaikh, MP on behalf of the Select Committee on Security and Justice, inviting the submission of written comments on the Prevention and Combatting of Hate Crimes and Hate Speech Bill [B9B-2018] ("the Bill").

2. Cause for Justice ("CFJ") hereby thanks the Committee for the opportunity to provide these written submissions and to participate in the law-making process. Thank you also for granting an extension of the deadline for comments to 25 May 2023.

BACKGROUND TO CAUSE FOR JUSTICE

3. CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.

4. Four of CFJ's five core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) the protection and promotion of human dignity/worth, (3) the protection of the vulnerable in society (social justice), and (4) ensuring accountable government action.

5. We previously made both written and oral submissions on the previous version of the Bill to the Portfolio Committee on Justice and Correctional Services in the National Assembly.

6. CFJ also delivered written submissions to the Department of Justice and Constitutional Development ("the DJCD") on the then Draft Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016 ("the 2016 Bill") in January 2017.[1]

CONTENT OF SUBMISSIONS

7. Our submissions are structured as follows:

- Justification for creating a new criminal offense of "hate speech"
- Hate speech – Clause 4, read with Clause 1
- Clause 4(1)(a) – Scope and elements of the "hate speech" offence
  - Proposals to clean up drafting
  - Limit hate speech offense to public communication
  - Limit hate speech offense to incitement to cause harm
  - Definition of "harm": Limit to psychological, physical and economic detriment
  - Definition of "grounds": Limit to grounds in section 16(2)(c), Constitution
  - Add definition of "hatred"
- Clause 4(2) - Exemptions
  - Proposals to clean up drafting
  - Sub-clause 4(2)(a)
  - Sub-clauses 4(2)(b)-(d)
  - Add sub-clause 4(2)(e)
  - Add sub-clause 4(2)(f)
  - Deletion of self-defeating proviso
- Clause 9 - Prevention of hate crimes and hate speech
- Public hearings within Select Committee process

[1] "*CFJ Submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B – 2016]*", Submissions by Cause for Justice, 31 January 2017.
Available at: <https://causeforjustice.org/wp-content/uploads/2018/05/Hate-Crime-and-Hate-Speech-Bill_Cause-for-Justice-submission_31.01.2017.pdf>.

JUSTIFICATION FOR CREATING A NEW CRIMINAL OFFENSE OF "HATE SPEECH"

8. All newly proposed legislation must be properly motivated, seeing as the state has a duty to act rationally and are accountable to the people they have been appointed to serve, to apply public funds in the public interest in the most efficient way possible.

9. Legitimate justifications for introducing new legislation may include –

9.1 To ensure compliance with South Africa's international law obligations; and/or

9.2 To address some public concern, protect and/or vindicate rights, or regulate some aspect of societal life – to the extent that legislative intervention is rational (complies with the rule of law and principle of legality), and is reasonable and justifiable taking into account the factors in section 36 of the Constitution of South Africa (1996) and other relevant factors, such as -

- whether the introduction of new legislation is the least restrictive means available to the state to achieve the purpose(s) sought to be achieved by way of the legislation, and
- whether existing legal remedies and provisions are in/sufficient to achieve the purposes for which the new legislation is sought to be introduced.

10. Considering the preamble and clause 2 of the Bill, and paragraphs 1 and 4 of the Memorandum on the Objects of the Bill, the stated justification for introducing the legislation is to give effect to the country's international law obligations, by inter alia creating and prosecuting newly created criminal offences, including provisions to prevent and combat these crimes.

11. Having regard to South Africa's international law obligations in this context, it has to be concluded that the creation of a new criminal offence of "hate speech" is not something the state has an obligation to do. See in this regard the discussion and analysis in paragraphs 22 to 41 of the written submission of Freedom of Religion, South Africa ("FOR-S-A") (entitled "International Legal Framework"), which we hereby endorse and adopt as our own for purposes of this submission. We submit that existing South African law already complies with international law obligations in respect of hate speech.

12. In addition, to the extent that hateful speech may be a problem, existing South African law is sufficient to address such problem. For these purposes we assume that freedom of expression is a vitally important right in South Africa's constitutional democracy and the combating of hate speech is an equally eminent objective.

12.1 We refer in this regard to paragraphs 63 to 80 of FOR-S-A's written submissions to the Committee, entitled "Problem 1 – The Bill is unnecessary", which we hereby endorse and adopt as our own for purposes of this submission.

12.2 We furthermore endorse the analysis and submissions of the Association of Christian Media ("ACM") in respect of "Answering flawed motivations for the Bill" at page 21 to 23 of their written submission to the Committee.

13. We accordingly submit that the hate speech component of the Bill is unnecessary and/or that government has not discharged its obligation of providing adequate motivation and factual basis for the addition of a new criminal offence of "hate speech" to the law books of South Africa.

14. ***PROPOSAL 1:*** Based on the aforementioned, we propose that the hate speech component of the Bill be scrapped in its entirety, including all related definitions and provisions.

HATE SPEECH – CLAUSE 4, READ WITH CLAUSE 1

15. **In the alternative** – to our **proposal 1** above – in the event that the Committee decide to support the creation of a new criminal offense of "hate speech", we submit that the hate speech provisions in the Bill are wider than the scope of hate speech in section 16(2)(c) of the Constitution. To the extent that this is the case, the Bill limits freedom of expression (protected expression) requiring it to pass the limitations test of section 36 of the Bill of Rights.

16. Section 16(2)(c) of the Constitution defines hate speech (one of three categories of unprotected expression) as follows:

Advocacy of hatred that –

- ***is based on race, ethnicity, gender or religion, and***
- ***constitutes incitement to cause harm.***

17. In addition, legislation must be sufficiently precise so as not to be vague and/or overbroad, which would result in it being unconstitutional.

CLAUSE 4(1)(A) – SCOPE AND ELEMENTS OF THE "HATE SPEECH" OFFENCE

PROPOSALS TO CLEAN UP DRAFTING

18. We propose the following textual amendments to clarify the legislative intent and enable the text to achieve its purpose in the most efficient manner:

19. ***PROPOSAL 2:*** Amend clause 4(1)(a) as follows:

19.1 4. (1) (a) Any person who intentionally publishes, ~~propagates, advocates,~~ **imparts, expresses or** makes available ~~or communicates anything~~ **any communication** to one or more persons in a manner that could reasonably be construed ~~to demonstrate~~ **as demonstrating** a clear intention to—

19.2 (ii) promote**, advocate** or propagate hatred,

LIMIT HATE SPEECH OFFENSE TO PUBLIC COMMUNICATION

20. The Constitutional Court in the matter of *Qwelane v South African Human Rights Commission and Another ("Qwelane")* [2] found, correctly we submit, that hate speech does not include private communications.[3]

21. The reference in paragraph [118] of *Qwelane* to – "Hate speech prohibitions, ***even those that attach civil liability***, should not extend to private communications, …" puts it beyond contestation that hate speech prohibitions attaching **criminal** liability cannot extend to private communications.

22. ***PROPOSAL 3:*** We accordingly propose the following amendment to clause 4(1)(a):

"… to one or more persons**, other than by way of private communication,** in a manner …"

LIMIT HATE SPEECH OFFENSE TO INCITEMENT TO CAUSE HARM

23. The right to freedom of expression is foundational to any truly democratic society. Despotic regimes are known for controlling – and censoring – speech and other expressions. Therefore, hate speech legislation should not chill protected freedom of expression. Citizens' ability to express, without fear of reprisal or retaliation, a diverse range of robust opinions and beliefs, is crucial for the flourishing of a constitutional democracy.

24. To the extent that the definition of hate speech in the Bill is wider than the definition in subsection (c) of section 16(2) of the Constitution, the definition in the Bill will be open to constitutional challenge.

25. In the context of hate speech, the Constitution does not prohibit *harmful* speech (i.e. where the *speech* itself is intended to harm or causes actual harm to a victim). In such circumstances, existing criminal law and civil law remedies and recourse exist and would apply to vindicate the victim and/or to hold the perpetrator accountable by way of criminal and/or delictual liability.

26. The harmfulness or not of speech is irrelevant for purposes of hate speech. What is required is ***incitement*** (of others – potential or actual hearers, readers or recipients of communication) to cause harm. Whilst it may be acceptable to only require harmful intent for purposes of civil liability under PEPUDA[4] (which we disagree with), we submit that it would be an unreasonable and unjustifiable limitation of freedom of expression to attach criminal liability for hate speech in

[2] 2021 (6) SA 579 (CC).
[3] *Qwelane* at para 118.
[4] The Constitutional Court in *Qwelane* accepted, without considering the question, that harmful speech, when tied to advocacy of hatred, as sufficient to ground civil liability for hate speech, even in the absence of incitement to cause harm.

circumstances where the alleged offender has not ***incited*** or ***intended to incite*** (others to cause) harm, but merely expressed something that harmed the hearers, readers or recipients.[5]

27. Therefore, clause 4(1)(a)(i) should only refer to a clear intention to "incite harm", but not to "be harmful".

28. ***PROPOSAL 4:*** We accordingly propose the following amendment to clause 4(1)(a):

(i) ~~be harmful or to~~ incite harm; and

CLAUSE 4(1)(A) – CONCLUSION

29. In summary, we propose that clause 4(1)(a) be amended as follows, based on our proposals 2 to 4 above:

4. (1) (a) Any person who intentionally publishes, ~~propagates, advocates,~~ **imparts, expresses or** makes available ~~or communicates anything~~ **any communication** to one or more persons**, other than by way of private communication,** in a manner that could reasonably be construed ~~to demonstrate~~ **as demonstrating** a clear intention to—

(i) ~~be harmful or to~~ incite harm; and

(ii) promote**, advocate** or propagate hatred,

based on one or more of the grounds, is guilty of the offence of hate speech.

DEFINITION OF "HARM": LIMIT TO PSYCHOLOGICAL, PHYSICAL AND ECONOMIC DETRIMENT

30. The Bill defines "harm" as *"substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups"* in clause 1.

31. It is crucial to know what exactly each of the referenced types of harms entail. A lack of legislative certainty is a recipe/incentive for litigation. In addition, uncertainty and fear of contravening unclear provisions of the Bill, would have a chilling effect not only on freedom of expression, but other fundamental rights and freedoms as well.

SOCIAL HARM/DETRIMENT

32. The inclusion of "***social harm***" is particularly alarming. Even in academic circles, "social harm" is still an emerging and highly contentious issue with no basis in the jurisprudence of our courts.

[5] For the meaning of incite or incitement, see *[190] Nkosiyana* 1966 (4) SA 655 (A) 658-659.

33. The definition of "social harm" in clause 1 is too vague and overbroad to pass constitutional muster and should be deleted.

EXISTING AND ACCEPTED APPROACHES TO HARM IN SOUTH AFRICAN LAW

34. In the **common law of delict**, harm is a prerequisite for liability.[6] In terms of the **Aquilian action**, harm traditionally consisted in monetary loss sustained due to physical damage to a person or property. In recent times, it also includes monetary loss resulting from injury to the nervous system and pure economic loss.

35. Under the **action for pain and suffering (*actio iniuriarum*)**, the harm is intangible: Injury to the person, his dignity or reputation.[7] Psychological harm will justify an award of damages if the plaintiff can prove that the shock caused a physical reaction such as a stroke which lead to death, high-blood pressure, collapse, a detectable and recognised psychiatric injury that is not passing, anxiety, depression, impaired sleep or emotional trauma.[8] In order to be successful in a claim for damages for injury to dignity, the claimant must show that the conduct complained of, was subjectively, as well as objectively insulting.[9]

36. ***Crimen iniuria*** is committed by "the unlawful, intentional and serious violation of the dignity or privacy of another".[10] This offence can be related to the Roman law concept of "dignitas", which can be described as "that valued and serene condition in (a person's) social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".[11] Infringement of another's *dignitas*, must be determined by means of an objective and subjective test.[12] With some exceptions, the addressee must be aware of the conduct, but also be humiliated by it. This means that objectively, the conduct must be of such a nature that a reasonable person's feelings will be offended by it.[13]

37. The test for determining the infringement of dignity in the common law,[14] is described as follows by Burchell, as laid down in *Delange v Costa*[15] in the Supreme Court of Appeal: "(a) The plaintiff's self-esteem must have been actually impaired and (b) a person of ordinary sensibilities would have regarded the conduct as offensive, tested by the general criterion of unlawfulness, namely, objective unreasonableness. This then means that the conduct complained of "must be tested

---

[6] Max Loubser (ed) *et al, The Law of Delict in South Africa* 2009: 299.
[7] Currie & De Waal 2013: 256.
[8] Max Loubser (ed) *et al, The Law of Delict in South Africa* 2009: 299.
[9] Currie & De Waal 2013: 256.
[10] Snyman CR, 2008. *Criminal Law*. 5th ed. Durban, SA: LexisNexis Butterworths: 469.
[11] Neethling J, Potgieter JM & Visser PJ 1996. *Neethling's Laws of Personality*. Durban, SA: Butterworths: 48.
[12] "*The Constitutionality of Categorical and Conditional restrictions on harmful expression related to Group Identity*", Thesis by Dr Maria Elizabeth Marais, January 2014, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of Free State: 376.
[13] "*The Constitutionality of Categorical and Conditional restrictions on harmful expression related to Group Identity*", Thesis by Dr Maria Elizabeth Marais: 376.
[14] Burchell JM & Milton J, 2005. *Principles of Criminal Law*. Landsdowne, SA: Juta & Co.: 749.
[15] *Delange v Costa* (433/87) [1989] ZASCA 6; [1989] 2 All SA 267 (A): par 15-17; Burchell JM & Milton J, 2005: 749.

against the prevailing norms of society".[16] These norms are represented by the values and principles contained in the Constitution.

EMOTIONAL HARM/DETRIMENT

38. Emotional shock can result in civil liability, i.e. constitutes a form of harm to which legal consequences can be attached, where it ***causes a recognised form of psychiatric injury***.[17]

39. As such, "emotional detriment" could not be interpreted to mean more or fall outside of the ambit of psychological detriment. However, it could be interpreted to mean something less than "psychological detriment", which could trigger criminal liability for hate speech at a lower threshold. Using civil liability as a yardstick, and assuming that a person should not be sent to jail for an offense for which he/she could not incur civil liability, we submit that "emotional detriment" should be deleted, whilst retaining the "psychological harm".

40. ***PROPOSAL 5:*** We accordingly propose that the definition of "harm" be amended as follows:

"harm" *means substantial ~~emotional,~~ psychological, physical~~, social~~ or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups*

DEFINITION OF "GROUNDS": LIMIT TO GROUNDS IN SECTION 16(2)(C) OF THE CONSTITUTION

41. The Bill purports to expand the grounds for purposes of criminalised hate speech by adding thirteen (13) grounds in addition to the four (4) listed in section 16(2)(c) of the Constitution.

42. Adding grounds amounts to widening the scope of prohibited expression, i.e. limiting the right to freedom of expression, which requires justification in terms of section 36 of the Constitution. Seeing as attaching ***criminal*** **liability/sanctions** to expression is *a lot more invasive and violatory of constitutional rights* than in the case of ***civil*** **liability**, in terms of for example PEPUDA, there would need to be ***extremely pressing reasons/justification*** for limiting speech by broadened grounds for criminal liability.

43. The 13 proposed additional grounds are:

43.1 Albinism;

43.2 Social origin;

43.3 HIV or AIDS status;

43.4 Nationality;

43.5 Migrant status;

[16] Burchell JM & Milton J, 2005: 749.

[17] *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A).

43.6 Refugee status;

43.7 Asylum seekers;

43.8 Sex;

43.9 Sexual orientation;

43.10 Gender identity;

43.11 Gender expression;

43.12 Sex characteristics; and

43.13 Skin colour.

RATIONALE FOR CHOSEN GROUNDS

44. Section 16(2) of the Constitution recognises only four grounds for hate speech/unprotected expression: **race, ethnicity, gender** and **religion**. As noted above, the Bill attempts to expand the four grounds to 17. In so doing, the DJCD wants to depart a long way from the drafters of the Bill of Rights who put the hate speech exception to protected expression in place a mere 27 years ago. It represents a substantial departure in a very short time span.

45. Such a drastic departure would require ***extremely convincing justification***.

46. In order to test the constitutionality, legality and rationality of government's proposed list of grounds, we formally requested (in our 31 January 2017 submissions) the DJCD to provide us with its reasons for its decision(s) to add an extensive list of new grounds to criminalise hitherto protected expression, as well as all working papers, minutes of meetings, reports, research findings, correspondence and all other material/information in document form (whether hard copy or electronic) that may be relevant or pertain to government's choice of grounds/characteristics.

47. We have as yet not been provided with any response.

48. During the Portfolio Committee on Justice and Correctional Services' deliberations on the Bill, the DJCD provided feedback and produced a research note on the rationale for their choice of "characteristics" for hate crimes and "grounds" for the crime of hate speech. With regards to the grounds for hate speech, the justification for adding grounds over and above the four grounds in section 16(2)(c) of the Bill of Rights, was generally very thin and lacking in factual grounding in the DJCD's feedback and note. There seemed to be better justification for the "characteristics" undergirding the hate crime offence.

49. Through the Portfolio Committee process the DJCD changed its position on the grounds for the crime of hate speech by adding some grounds, removing others, amending and reshuffling some others, which has led to the current list of 17 grounds spread over 10 items.

INTERNATIONAL GUIDANCE

50. The **Organisation for Security and Cooperation in Europe (OSCE)** provides guidance on selecting appropriate protected group characteristics for each state/country in its '*Hate Crime Laws" A Practical Guide*',[18] listing a number of factors to consider in the decision-making process. The main factors/indicators are:

50.1 Markers of group identity (fundamental characteristics);

50.2 Societal fissure lines – divisions that are embedded in the social and cultural history (social and historical context); and

50.3 Whether measures are implementable (implementation issues).

51. The OSCE indicated that at the time of issuing the guidance (2009), 37 of its participating countries had hate crime legislation –

51.1 Almost all of which included 'religious' and 'racial' hatred;

51.2 11 included 'sexual orientation';

51.3 Seven included 'disability'; and

51.4 Six included 'gender'.

PROTECTION OF FREEDOM OF EXPRESSION

52. Hate speech prohibitions that go beyond the scope of unprotected speech in terms of section 16(2)(c) of the Constitution (such as the Bill in this case) carry the grave risk of chilling all forms of speech in ways that are disproportionate to the risks of harm. It is accordingly necessary to limit the application of the Bill so as not to restrict freedom of speech more than is necessary to prevent imminent risk of harm.

53. ***PROPOSAL 6:*** CFJ proposes that the list of grounds be brought in line with the grounds for hate speech in section 16(2)(c) of the Constitution.

54. **We hereby earnestly request the Committee to interrogate the DJCD to provide proper justification for the proposed expansion of the grounds for a new hate speech criminal offense beyond the four grounds for unprotected expression in section 16(2)(c) of the Constitution.**

[18] Available on the internet at http://www.osce.org/odihr/36426.

ADD DEFINITION OF "HATRED"

55. The absence of a definition of "hate" or "hatred" contributes to the vagueness and overbroadness of the Bill, which materially affects its constitutionality.

56. We refer in this regard to paragraphs 84 and 151.2.2 / 16.2.2 of FOR-S-A's written submissions on the Bill and hereby endorse their analysis, conclusion and proposed definition of "hatred".

57. ***PROPOSAL 7:*** We accordingly propose the insertion of a definition for "hatred" in clause 1 of the Bill, with wording as proposed in paragraphs 16.2.2 / 151.2.2 of FOR-S-A's written submissions to the Committee.

CLAUSE 4(2) - EXEMPTIONS

58. Clause 4(2) contains four exemptions from criminalised hate speech.

59. We support the introduction of these exemptions (which was not included in the 2016 Bill and which we called for in our January 2017 submissions on the 2016 Bill).

PROPOSALS TO CLEAN UP DRAFTING

60. We propose the following textual amendments to clarify the legislative intent and enable the text to achieve its purpose in the most efficient manner:

61. ***PROPOSAL 8:*** We propose that clause 4(2) be amended as follows:

(2) The provisions of subsection (1) do not apply in respect of ~~anything done as contemplated in subsection (1) if it is done in good faith in the course of~~ **bona fide** engagement in ~~any bona fide~~

SUB-CLAUSE 4(2)(A)

62. Section 16(1)(c) of the Constitution specifically recognises that the right to freedom of expression includes freedom of artistic creativity.

63. According to Currie and De Waal, the need to protect artistic creativity is rather obvious: Since artistic (and literary) works sometimes radically criticise, and comment on, society, government and other powerful persons may desire to control and even silence any uncomfortable and dissenting voices.[19]

[19] Currie & De Waal 2013: 351.

INSERTION OF "LITERARY"

64. Literary works form an important and extensive body of artistic expression and should be specifically included in clause 4(2)(a) to avoid fear of or actual thought censorship.

INSERTION OF "MERIT OR WORTH" TO COMBAT ABUSE

65. ***In order to limit and combat any potential abuses*** of the exemption under clause 4(2)(a), only works, performances or expressions that can reasonably be construed (i.e. in accordance with an objective standard) as having artistic or literary ***merit or worth***, should be protected.

66. ***PROPOSAL 9:*** We accordingly propose that the exemption wording of sub-clause 4(2)(a) be amended as follows:

(a) artistic **or literary** creativity, performance or expression **that could reasonably be construed as having artistic or literary merit or worth**;

SUB-CLAUSES 4(2)(B)-(D)

67. We have no specific comment in respect of these three exemptions.

ADD SUB-CLAUSE 4(2)(E)

68. In order not to discourage healthy discourse in the public interest, we propose the addition of a further exemption to exclude bona fide engagement in matters of public interest from criminality.

69. ***PROPOSAL 10:***

69.1 We propose insertion of a new sub-clause (e):

(e) matters of public interest; or

69.2 Insert the following definition of "matters of public interest" in clause 1:

"**"matters of public interest"** means discussions, debates or opinions on matters pertaining to the common well-being or general welfare of the public or serving the interests of the public and includes discussions, debates and opinions on matters pertaining to religion, belief or conscience;"[20]

[20] This is the definition of "matters of public interest" provided in section 1 of the Films and Publications Act, 65 of 1996.

70. Please note specifically that the definition we propose has been approved by Parliament in the past – it is found in the Films and Publications Act (Act 65 of 1996) and was added to that Act in 2009.

ADD SUB-CLAUSE 4(2)(F)

71. In order not to discourage persons from reporting instances of hate speech for fear of being prosecuted themselves, we propose the addition of an exemption to address this risk.

72. ***PROPOSAL 11:*** We propose the insertion of the following sub-clause:

(f) pointing out communication reasonably suspected of constituting hate speech as contemplated in subsection (1).

DELETION OF SELF-DEFEATING PROVISO

73. The proviso at the end of clause 4(2), which reads *"that does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds."*, renders the envisaged protection of *bona fide* engagement contemplated in sub-clauses (a) to (d)/(f) of no effect. We propose that it be deleted.

74. The purpose of the exemptions is to exclude *bona fide* engagement from criminal liability. The proviso effectively cancels and defeats the proposed protection offered by the exemptions, exposing again *bona fide* expressions to prosecution.

75. ***PROPOSAL 12:*** We propose that the proviso to clause 4(2) be deleted.

CLAUSE 9 – PREVENTION OF HATE CRIMES AND HATE SPEECH

76. Clauses 9(2)(c) and 9(3) purport to oblige cabinet members designated by the President and the South African Judicial Education Institute to develop and implement "social context training".

"SOCIAL CONTEXT TRAINING" AND THREATS TO INDEPENDENCE OF JUDICIARY AND OTHER INSTITUTIONS OF SOUTH AFRICA'S CONSTITUTIONAL DEMOCRACY

77. CFJ does not object to the State and institutions supporting democracy promoting awareness of hate crimes and hate speech, and the prohibition thereof, within the parameters of the Bill.

78. However, CFJ notes with concern that however benevolent the intentions of the drafters of the Bill, the duty created by clause 9(2)(c) and 9(3) to provide "social context training" creates a risk for individuals, groups or officials to do propaganda for their own agendas/ideological

commitments with the force of the state behind them. The risk of state capture and ideological totalitarianism is accordingly in our view real and should be guarded against with all diligence.

CONCERNS REGARDING "SOCIAL CONTEXT TRAINING" GENERALLY

79. In this regard, CFJ is especially concerned regarding "social context training". The Bill does not provide any definition for this highly ambiguous and controversial concept.

80. South Africa is a complex and diverse society. It seems highly improbable that South Africans would easily agree on the nature of South Africa's "social context". Therefore, trying to postulate any one definitive "social context" would be controversial and oppressive.

81. Based on the aforementioned, we propose that all references in the Bill to "social context training" should be deleted.

82. Persons, organisations or institutions in positions of power at any given point in time, may be tempted to prescribe the nature of South Africa's "social context" to ensure that the communicated understanding thereof is beneficial to their own agenda.

THREATS TO INDEPENDENCE OF THE JUDICIARY

83. In terms of the South African Judicial Education Institute Act,[21] the objectives of the South African Judicial Education Institute include promoting the independence and impartiality of the judiciary. This is another reason why judicial officers should not be subject to controversial "social context training".

84. Considering the high levels of corruption and state capture that has been plaguing South Africa, the maintenance of a strong and independent judiciary is essential. Unfortunately, by no fault of its own, the judiciary has had to take strong and necessary stands against other branches of the state and state organs in recent years. Clearly, South Africa cannot afford to open any door to the training of judicial officers that will risk subjecting them to the dictates of other branches of the government, state organs or other powerful role players in society.

85. We therefore submit that it would be irresponsible to keep any references to social context training in the Bill. All references to "social context training" should be deleted.

86. ***PROPOSAL 13:*** We propose that **all references in the Bill to "social context training" should be deleted**.

[21] South African Judicial Education Institute Act 14 of 2008.

PUBLIC HEARINGS WITHIN SELECT COMMITTEE PROCESS

87. We trust that the above submissions will be of assistance to the Committee and look forward to the Committee's response thereto (if any) in due course.

88. **We hereby request the Committee to hold public hearings in respect of the Bill to enable the public to engage in person with the Committee members and enable the Committee to clarify written submissions received.**

89. **We accordingly respectfully request an opportunity to make oral submissions (representations) to the Committee in respect of the Bill.**

Yours faithfully,

Ryan Smit
Executive Director and Legal Counsel