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**ASSOCIATION OF CHRISTIAN MEDIA (ACM) COMMENTS ON THE CENSORSHIP BILL
“HATE CRIMES AND HATE SPEECH BILL (B9B-2018)”
TO THE NATIONAL COUNCIL OF PROVINCES: SELECT COMMITTEE ON JUSTICE**

May 2023

SUMMARY

The risks of the bill

The definition of ‘hate speech’ in the Bill is overly broad and will likely lead to criminal charges and threats by special interest groups that would chill reporting and public debate. Hate speech should not be defined any more broadly than unprotected speech in Section 16(2) of the Bill of Rights. Christian media includes artistic, reporting and religious expression. The political philosophy allowing free speech arose from Biblical beliefs of the need to preach the good news, the incompetence of the state to determine what that is, and a pessimism about human nature.

Special interest groups have repeatedly misconstrued Christian teaching on sexuality and marriage as ‘hate speech’, which discourages discussion. Existing, civil and criminal law and codes of conduct adequately protect against real ‘hate speech’ and there is no need for new legislation. First preference is to scrap the bill, second preference to delete the ‘Hate Speech’ aspects of the Bill, and third preference to mitigate the wording of the bill to reduce the risk of innocent people being punished or intimidated.

Proposed changes to reduce harm to innocent people

The change of only a few words can make a big difference. First priority is first to remove ‘be harmful’ from 4(1)a(i) the offence of hate speech, leaving just ‘incite harm’. Second to insert the word ‘physical’ before ‘harm’ in the exemptions clause 4(2), otherwise the exemptions clause offers little protection. Third, to delete the vague categories ‘social’ and ‘economic’ from the definition of ‘harm’. Fourth to shorten the list of grounds to align with the unprotected grounds in the Bill of Rights. Fifth to reduce the maximum penalty

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of eight years. Sixth to broaden the religious exemptions clause to include 'by a religious organisation or individual in public or private'. Seventh, to narrowly define criminalised hatred in intensity and against people only rather than ideas or behaviours. Eighth to define 'promote, propagate or advocate' as public and intentional, excluding casual comments.

The Preamble should refer to S15, 19 and 31 of the Bill of Rights and S16 of the Universal Declaration of Human Rights. 'Matters of public interest' should be defined. 'Bona fide' should be deleted from the exemptions clause 4(2). 'Emotional, psychological, social and economic' should preferably be deleted from the definition of harm, but if not then qualified preferably as 'deep' or 'gross' not just 'substantial'. The onus is on the state to motivate for the inclusion of 'grounds' beyond those unprotected by the Bill of Rights. The inclusion of 'gender identity and expression' is unprecedented and may chill those defending women's private spaces and sports. 'Sexual orientation' should be removed, but if not, then defined narrowly. The familiar term 'intersex' is preferred to 'sex characteristics'. Regulations in terms of the Act, should be advertised for public comment and Parliament's 60 days' notice should be reckoned excluding the parliamentary recess. Limit non-physical harm to a fine and not imprisonment (S6).

The motivations for the bill are flawed

The claim that this bill is required by the Bill of Rights or International law is false and will likely be found in contravention of both. The Bill of Rights requires any limitations of Freedom of Expression to be strongly motivated including the consideration of less restrictive means. The International Convent on Civil and Political Rights has only three grounds, unlike the ten in this bill and balances with other rights. It has not been ratified by the South African parliament. The bill does not comply with the United Nations RABAT Plan of Action for Hate Speech. European Union policy documents call for clear definitions, narrow grounds and protection of religious and political free speech. Academic articles cited in favour are mainly about hate crimes and not hate speech. No research is cited on unintended impacts and no effectiveness statistics are given. Hate speech laws have seriously harmed free speech in so called 'good countries'.

The countries cited as case examples by the Department of Justice do not have laws with the scope and severity of this bill, and show no proven effect reducing homicides statistics. Without additional budget, the law would divert scarce resources from the justice system. It would backfire in making the prosecution of hate crimes more difficult in that the motive would need to be proven beyond reasonable doubt. The ruling party National Conference, 2017 called for better enforcement of existing law rather than a new law.

Oral submission

We request the opportunity to make an oral submission and answer questions.

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INTRODUCTION

The Association of Christian Media

The ACM is a non-profit network of Christian media organisations that share a vision of reaching people with the Gospel. The ACM strives to be a unifying force that fosters efficient, effective and sustainable Christian media organizations and a greater representation of the Christian worldview within secular media. The Association of Christian Media's vision is to extend God's Kingdom and inspire, serve and support Christian media in Southern Africa. The ACM currently has over 70 members and our members include radio stations, print media, TV channels, electronic media, content providers, churches and individuals involved in mainstream media.

Historical and biblical context

While our principal concern is Christian religious freedom of speech, this is impossible to protect without protecting free speech more broadly, since the state is not competent to decide what is the bona fide Christian message. Religious, political and free expression overlap and are mutually dependent. Such broad freedoms arose to accommodate Christian beliefs such as: Christ's command to teach his message (Matthew 28:19-20), the independence of the church from the state (Matthew 18, 1 Corinthians 5-6), the equality and dignity of all men created in the image of God (Genesis 1:27), and the sinfulness of man (Genesis 3), which leads to a pessimistic view of human nature, modest political goals (not utopianism) and avoidance of concentration of power. Political philosophers rephrased these ideas from Christian theologians. This enabled more free, prosperous and peaceful societies.

A consensus on balancing rights has evolved among those sharing this worldview, and untested changes should be made with caution. More optimistic and controlling political philosophies have backfired disastrously, being replaced with the next. The latest optimistic and controlling political philosophy, 'critical theory' tends to accuse any disagreement with its ideology of 'hate speech'. Much of the world's population do not have freedom of religion or speech, it was not adopted by any state before the seventeenth century. These rights if not defended can be lost, as has recently occurred in Hong Kong.

Misuse of 'hate speech' allegations for religious persecution include: Päivi Räsänen, Finnish MP and former Minister of Police currently on trial for posting a Bible verse on Instagram, Simeon Chetty, Durban street evangelist sued under the Equality Act for saying that Jesus is greater than the Hindu god Krishna. Zizipho Pae accused of for disagreeing with 'same-sex marriage' at the University of Cape Town. A feminist activist in the United Kingdom was threatened with arrest on allegation of a hate crime for saying that a "woman is an adult human female".

Freedom of Expression in the context of other rights

Freedom of expression is one of a 'web of mutually supporting rights in the Constitution. It is closely related to freedom of religion, belief and opinion (S15), the right to dignity (S10) as well as the right to freedom of association (S18). These rights read together protect the rights of individuals not only individually to form and express opinions, of whatever nature but to also establish associations and groups of likeminded people to foster and propagate such opinions. Amendments this section therefore does not only have a bearing on the right in question but also influences many other rights that are intrinsically linked to it. Our submissions will also consider whether the proposed changes pass the S36 (limitation clause) muster. On a practical level the proposed bill goes further than the clear intention of S16 by increasing the number of protected grounds from four to eighteen and providing a new definition of "harm" that includes "emotional, psychological, physical, social, cultural or economic harm"

Scope of comments

These comments only respond to the 'hate speech' element of the bill which affects freedom of speech and thus directly affect the core work of the members of the ACM. For ease of reference the issues are responded to in the order they appear in the bill, although in many cases they are inter-related. The abbreviation 'S' before a number means 'Section'.

What can go wrong?

A criminal sanction (with the risk of a jail sentence) would lead journalists and media presenters to err drastically on the side of caution and chill legitimate free speech such as a sarcastic remark or newspaper cartoon. A mathematical and debating method of proving falsehood of a theory is 'reductio ad absurdum'. i.e. Working from the assumptions of a false theory to its absurd conclusions. Proponents of the theory may construe 'reductio ad absurdum' argument as ridicule and thus 'hate speech'. There is a difference between ridicule of an 'idea', which forms part of debate versus ridicule of a 'person' as a human being. Nevertheless, there is no clear distinction in this 'hate speech law'.

Motivation for clear rather than vague wording

Multiple international legal authorities argue the need for clear rather than vague wording to avoid abuse of hate speech legislation.

For example Qwelane Footnote 181 cites "Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression "Hate Speech and Incitement of Hatred" (7 September 2012) A/67/357 at para 41(a) and para 41 which states that:

"The Special Rapporteur wishes to underscore that any restriction imposed on the right to freedom of expression, on the basis of any of the above-mentioned instruments, must comply with the three-part test of limitations to the right, as stipulated in Article 19 (3) of the Covenant. This means that any restriction must be:

- '(a) Provided by law, which is clear, unambiguous, precisely worded and accessible to everyone;*
- (b) Proven by the State as necessary and legitimate to protect the rights or reputation of others; national security or public order, public health or morals;*
- (c) Proven by the State as the least restrictive and proportionate means to achieve the purported aim."*

Multiple edits are proposed in the following document to clarify the meaning.

Understanding relationships between key parts relevant to Censorship of Speech in the Bill

A Plain English outline of the Bill, without comment on the merits follows:

The **Preamble** summarises some relevant clauses in the Constitution and International Law, which will influence the interpretation of the Bill.

The **Definitions** provide the precise legal meanings of words used in the bill, otherwise the dictionary definitions apply.

A list of '**grounds**' within the definitions are a list of issues on which allegations of 'hate speech' can be based. (10 lines of 18 words).

The most important word in the definitions is the word '**harm**', which is then used twice in S4. In conversational English, this normally means 'physical harm'. In civil law it can include 'psychological harm', but in this bill also means 'social and economic' harm. '**Social** harm' is defined as 'undermining social cohesion'.

The key word '**hatred**' which is used in 4(1) is not defined.

S 4(1) **Defines the crime** of 'hate speech'. To be found guilty, the words must be hateful and cause harm. The harm could be directly from the words or in inciting others to harm.

S 4(2) Provides **exemptions** (not part of the crime) for academic, artistic, media and religious freedom. At the end of section 4(2) is a sentence which explains that the exemptions don't apply to **incitement** to cause "harm". In other words, it gives exemptions against the direct impact on the hearer, but not against any motivation of other people to do something. An accused person can use one of these four exemptions as a defence, but if the court decides that what they said caused 'emotional, psychological, social or economic' harm then it can dismiss the defence. The person who claims this exemption must be

considered '**bona fide**' academic, artistic, media or religious – some people and some contexts will not pass this.

S 6(3) Provides for **penalties** for those found guilty in terms of S 4 (up to eight years in jail for a first offence)

S10 Allows the government to make more detailed **regulations** on the bill, but they have to submit these to parliament. If parliament doesn't respond in 60 days, they lose their chance to check it.

CLAUSE BY CLAUSE COMMENTS ON THE BILL

Preamble

Comment

The preamble in the text approved by the National Assembly is unbalanced, referencing some rights but not others. As a criminal law, most cases of hate speech charges will be heard in a magistrates court. Inclusion of the relevant balancing provisions will assist the ease of reference of the magistrate. The preamble also needs to cite S15 (Freedom of Religion); S19 (Political rights) S31 (Rights of cultural and religious communities); and the Universal Declaration of Human Rights S16 (Protection of the family).

Political rights include campaigning for a cause, includes the right to criticise court decisions, to campaign for or against changes to the law including amendments to the Constitution.

Proposed mitigation

Under 'And mindful that –'

“Section 15 of the Constitution recognises that everyone has the right to freedom of conscience, religion, thought, belief and opinion.”

Political rights 19. (1) Every citizen is free to make political choices, which includes the right—(c) to campaign for a political party or cause

“Section 31. of the Constitution recognises the right of persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to

a. enjoy their culture, practise their religion and use their language; and

b. form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”

Under 'And bearing in mind that –'

“The Universal Declaration of Human Rights includes the statement S16 “Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family...The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

Definitions: List of grounds

The text as approved by the National Assembly:

““grounds” means any of the following grounds: (a) Albinism; (b) ethnic or social origin; (c) gender; (d) HIV or AIDS status; (e) nationality, migrant or refugee status or asylum seekers; (f) race; (g) religion; (h) sex; (i) sexual orientation, gender identity or expression or sex characteristics; or (j) skin colour;”

Unprotected grounds in the Bill of Rights and the limitations clause

Any grounds for criminalisation of 'hate speech' beyond 'race, ethnicity, gender or religion' (S16(2)(c)) is a limitation of the Right to Freedom of Expression (S16), the Political Right to campaign for a political cause 19(1)(c), Freedom of Religion, belief and opinion (S15) and Cultural, Religious communities (S31) of the Bill of Rights. Constitutionally, the onus is on those advocating for any other category to strongly motivate such limitation in terms of S36 the limitation clause in the Bill of Rights, which includes the consideration of 'less restrictive means' (S36(1(e))).

The unprotected grounds in S16(2)(c) of the Bill of Rights are derived from article 20 of the International Covenant on Civil and Political Rights, and have substantial international precedent as 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' as S36 of the Bill of Rights. The other grounds listed in the proposed bill do not have such international precedent consensus and testing.

Almost all of the motivations for the proposed bill, cite examples of constitutionally unprotected grounds, but the bill itself is far broader. Such motivations are then the equivalent of misleading 'bait' and 'switch'

advertising – the unethical practice of attracting customers with a discounted product not in stock and then selling an expensive product to those who arrive.

Failure to consider less restrictive means

Existing 'less restrictive means' (S36) include civil legal remedies such as the Equality Act and Film and Publications Act, defamation common law. Existing criminal sanctions include the Riotous Assemblies Act the Intimidation Act, 1972, and Crimen injuria common law. There are also numerous subsidiary authorities within society that moderate and regulate speech, such as institutional and professional codes of conduct. Alternative 'less restrictive means' could include an amendment to the Criminal Procedure Act requiring the consideration of 'hatred' as a factor in aggravation of sentence and/or specific investigation into mitigating the harms of social media.

Flaws in motivation for additional grounds

Flaws in motivation for the additional grounds given by the Department of Justice include: the conflation of 'hate speech' with 'hate crimes', conflation of 'discrimination' with 'hatred speech' and 'crime', assumptions all crimes are motivated by group hatred (rather than lust, money, soft targets or interpersonal or economic disputes); reliance on high profile case examples without context of proportion of crime statistics, and a failure to prove the proposed law would achieve the stated objectives, failure to consider less restrictive means, focus on social media case examples without focus on social media solutions, failure to consult law enforcement on prioritisation strategies for crime.

Other motivation against a long list of grounds

The list of proposed 10 lines of grounds (18 words total) should be narrower but is broader than those in either the Equality Act or the Equality clause (S9) of the Bill of Rights.

Some grounds are redundant and overlap with unprotected grounds and are thus unnecessary, but provide a precedent to extend the list. For example 'asylum seekers' overlaps with 'ethnicity', 'nationality' and 'religion'. 'Skin' colour' overlaps 'race' or 'ethnicity'.

The Organisation for Security and Cooperation in Europe cautions "*A list that is too long or too vague can undermine the concept of hate crime and provide opportunities for abuse or misuse*". (Hate Crime Laws: A Practical Guide, Published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2009)

Proposed mitigation in definitions

The first preference is that since in the bill 'grounds' lists those only applicable to 'hate speech' and not 'hate crimes', to define the above list for 'grounds':

"grounds" means any of the following grounds: (a) race, (b) ethnicity, (c) gender or (d) religion"

The second preference is to shorten the list as much as possible as for example in Option 2 in Draft bill of 14 Feb 2023:

"grounds" means any of the following grounds: (a) Albinism; (b) ethnic or social origin; (c) gender; (d) HIV and AIDS status; (e) nationality, migrant or refugee status or asylum seekers; (f) race; or (g) religion;

Grounds likely to lead to false allegations of hate speech

The text approved by the National Assembly includes:

"(i) sexual orientation, gender identity or expression or sex characteristics; or"

Particularly problematic is the conflation of unchanging physical with changing behavioural characteristics: 'sex characteristics' (intersex) (physical) with 'sexual orientation' and 'gender identity or expression' (behavioural). The latter novel characteristics 'gender identity or expression' are not even found in the Equality clause (S9) of the Bill of Rights or the Equality Act. Each of these need to be considered separately.

There have been repeated allegations of 'hate speech' on grounds of 'gender identity and expression' against those seeking to protect women's personal spaces and sports from biological males, refusing to

use gender inverted pronouns and personal names, giving counselling to overcome gender dysphoria, opposing the promotion of gender-change ideology, and exposing the harms of medical and surgical attempts to mask the gender of children. 'Gender identity' has the obstacle of someone having to go through a difficult process to change, but 'Gender expression' can be varied from one day to the next and would leave women's private spaces and sports unprotected. The demand to use inverted gender pronouns constitutes 'compelled speech', normally only found in totalitarian states and is an infringement of S15, S16 & S31 of the Bill of Rights. The term 'gender identity' normalises 'gender dysphoria', and its inclusion as a ground in the hate speech bill may be used to try to criminalise who do not agree with this.

Likewise repeated allegations of 'hate speech' on grounds of 'sexual orientation' against those who protect the family by opposing sexual relations outside of marriage between a biological male and a biological female. This then undermines the above listed Constitutional Rights and S16 of the Universal Declaration of Human Rights.

The Bible teaches that God created two genders, male and female (Genesis 1:27), impersonating the opposite gender is prohibited (Deuteronomy 22:5) and marriage is between a man and a woman (Genesis 2:24).

'Intersex' is a rare physical genetic abnormality (also known as hermaphroditism), with around 1:10,000 with plausible gender ambiguity, who then need to choose one to identify with. It can't be used as an argument to coerce those who believe gender is binary. The inclusion of the term has not been adequately motivated (with the onus being on those who wish to include it). Nevertheless, it is less controversial and if it is included, the term 'intersex' used in previous drafts of the bill is preferred to the confusing term 'sex characteristics'.

'social origin' is a vague term that is not unprotected by S16(2), does not have international precedent and has not been adequately motivated in terms of the limitations clause S36.

Definitions: Harm

Text in the bill passed by the National Assembly

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

Comment #1 Forms of harm

The normal English meaning of the word 'harm' is 'physical harm'. This definition expands the meaning of harm to include 'emotional, psychological, physical, social and economic' harm.

Of these 'social' is the vaguest and thus most dangerous. Every opinion expressed on social issues involves a trade-off that benefits one group and disadvantages another, and is likely to offend some category. There is no legal precedent for the meaning of 'social harm'. While it is conceded that speech can lead to social harm, no definition has been proposed which would allow the court to objectively determine who is guilty in a manner that warrants the limitation of rights in terms of S36 of the Bill of Rights.

'Economic' harm would not be a problem if it meant 'physical destruction of property', but then it would be redundant, since physical harm is already included. Economic harm may be misused to criminalise economic boycotts and consumer activism.

'Psychological harm' was accepted by the Constitutional Court in Qwelane, a civil case based on the Equality Act. It is questionable whether this would be agreed to as a limitation in terms of S36 for a criminal penalty. The Supreme Court of Appeal cites argument by a witness that church teaching against homosexuality is hurtful (para 32). The South African Gay Rights Charter, by the "Organisation for Gay and Lesbian Activism", published by UCT Law Department's 'Developing Justice' series in 1992, sets the goal of prohibiting teaching that homosexuality is sinful by law.

While some people may be 'hurt' by certain teachings in the Bible, the Supreme Court of Appeal in its judgment on Qwelane para 69 noted that people of faith may find it hurtful when atheists call their beliefs

'fairy tales'. It cites Pierre De Vos saying "Do we really want to go back to a situation where we are so scared to express our deeply and sincerely held and honest opinions that we shut up because we fear we might be found guilty of hate speech?"

On the positive side, the vague term 'cultural harm' which was removed from an earlier draft.

Comment #2 Level of descriptive words for emotional and psychological harm

The following words could be used to qualify psychological harm:

1. Any (no threshold)
2. Substantial (measurable) (Used in the proposed National Assembly text)
3. Strong
4. Severe
5. Deep (Used in Qwelane civil Concourt judgment)
6. Gross (Stronger than Deep) (For the suggestion of 'gross', credit: ForSA note on the Hate Speech Bill 15 February 2023).

It is problematic that the qualification 'substantial' used in the National Assembly text is several steps lower than the Constitutional courts 'deep' used in the Qwelane judgment, while in fact the threshold for a criminal sanction should be higher (i.e. either remove psychological harm altogether or use 'gross').

Mitigation Option A

The National Assembly Committee considered the following compromise option on 14 February 2023. 'social', which can be used to stifle public debate.

"OPTION 2 "harm" means deep emotional, psychological or physical detriment that objectively and severely undermines the human dignity of the targeted individual or groups;"

It is less damaging and should be reconsidered. Firstly, the word 'deep' is narrower than 'substantial'. Secondly, it omits 'economic', which could be abused to prevent the use of boycotts. Thirdly, it omits vague 'social' harm.

This option still retains the problematic 'emotional, psychological' harm, which would be preferable to leave out altogether. It also uses the general qualifier of 'human dignity' which is only actually relevant to emotional, psychological harm and not physical harm.

Mitigation Option B

Using the word 'gross' as stronger than 'deep' and using the qualifier of dignity on psychological rather than physical would then rephrase the proposal as:

"harm" means physical detriment or gross emotional, psychological detriment that objectively and severely undermines the human dignity of the targeted individual or groups;"

Mitigation Option C

A preferred option for the definition in a criminal bill would be *"Harm" means physical detriment*".

Mitigation Option D

Another compromise option would be two separate definitions with correspondingly different consequences in the exemptions Section 4(2) and penalties (S6).

"Non-physical harm" means deep emotional, psychological detriment that objectively and severely undermines the human dignity of the targeted individual or groups"

If the latter definition was included, then the exemptions clause would be worded to exclude incitement of 'physical harm' only, and the penalty clause with the proposed eight-year penalty only applying to 'physical harm' and a lower penalty to 'non-physical harm'.

Definitions: Social detriment (Proposal to delete or narrow definition)

Social detriment, expands on the meaning of 'social' within the definition of 'harm' and is thus placed logically with it rather than in alphabetical order.

The text approved by the National Assembly reads:

“social detriment’ means detriment that undermines the social cohesion amongst the people of South Africa;”

Comment

An example of a problem: calling for independence of a province or disagreement with sexual behaviour could be framed as 'undermining the social cohesion of the people of South Africa'. It is argued that the only type of undermining 'social cohesion' that should invoke criminal sanctions is that which is likely to lead to physical violence and that is already covered by the word 'physical' in harm.

A second problem is that when 'social cohesion' is undermined by a controversy leading to controversy, there is an initial 'statement', which leads to a 'reaction' which may include multiple statements for and against and possibly physical actions, which may be deemed 'harm'. Is the initial statement then the cause of the 'undermining social cohesion', or subsequent reactions and counter reactions. Who and how many will they prosecute. This will be very difficult for the court to objectively determine.

For example, in the United Kingdom, a feminist group staged a campaign and protest with the slogan 'a woman is an adult human female'. A group of trans activists staged a counter protest, claiming discrimination against biological males claiming to be women, which clashed with the feminist protest. The trans activists laid a charge of 'hate speech'. Did this clash 'undermine social cohesion'? Maybe. Do we want the police stopping the debate or judging who is causing the conflict? No.

There have been multiple instances both in South Africa and internationally where street preachers seeking to convert those of other religions or lifestyles are threatened with or suffer actual violence from their hearers. In countries with 'hate speech' legislation, such street preachers have on multiple cases been arrested, threatened or removed by police. Should the police be restraining the preachers or those seeking to silence them?

Mitigation

'**Social**' as a criminalised sub-category of 'harm' should be deleted, but if not then 'social detriment' should be defined more narrowly.

A possible narrower definition could include 'threatening public order'. That would infer speech likely to lead to unlawful actions on a substantial scale. It would exclude simply a controversial social media exchange. Nevertheless, it is difficult to propose a wording that is not itself fraught with risks.

Definitions: Hatred (Proposal to add definition)

Comment

The bill criminalises hate speech in S4(1), but fails to define it. This leaves open to abuse the risk that anyone who feels offended by a statement may frame it as 'hatred'. The following definition will reduce the risk of innocent people going to jail or other criminal penalty.

Without a specific definition of 'hatred' the dictionary definition of 'intense dislike' (Oxford dictionary) would be the default meaning. While this may be appropriate for common English conversation meaning, it is too broad for a criminal law prosecution definition. It must be narrowed to refer firstly in terms of intensity, second intent and third target. There is a subtle difference in English meaning between 'hatred' of an idea, concept, behaviour, symbols or ideology and 'hatred of people'.

For example, the Bible's teaching Proverbs 8:13 says 'To fear the Lord is to hate evil...' Amos 5:15 'Hate evil, love good; maintain justice in the courts'; Psalm 36:2 'For in his own eyes he flatters himself too much

to detect or hate his sin'. It is argued that only hatred of 'people' and not behaviours, ideologies, symbols or concepts should be criminalised.

The Constitutional Court in Qwelane, para 81 defines hatred as '*extreme detestation and vilification...*' and that it should not serve to '*stifle ideology, belief or views*'.

Mitigation proposed

The following definition fulfilling the above criteria of intensity, intent and target is suggested:

"Hatred" means extreme detestation, vilification, enmity, ill-will and malevolence against a person or group of people and not merely strong or offensive disagreement with an idea or practice"

Definitions: Promote, propagate or advocate (Proposal to add definition)

Comment

The bill uses 'promote, propagate or advocate' in S4(1), but fails to define it. The following narrower definition requires 'intention' and 'scope' of publication, and would reduce the risk of firstly a casual comment and secondly a comment made in private and published by someone else, being criminally sanctioned. The proposed definition below would more closely fit the Bill to the recommendations of the United Nations RABAT Plan of Action for Hate Speech.

Mitigation proposed

"promote, propagate or advocate" means to publicly and actively support, instigate, exhort, or call for'

Definitions: Public interest (Proposal to add definition)

The bill currently has no definition of 'public interest', which is mentioned in 4(2)(c). It is suggested the bill insert the following definition of 'public interest' copied from the Film and Publications Act:

"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:"

Definitions: Sexual orientation (Proposal to add definition)

If 'sexual orientation' is included in the list of grounds, then it needs to be narrowly defined to prevent scope creep. The purpose is to avoid other sexual behaviours such as paedophilia, zoophilia, fetishism, sadomasochism, incest, furry, adultery, autogynephilia or promiscuity claiming legal protection within the definition of sexual orientation. There is both advocacy and academic literature describing many of these others as 'sexual orientations'.

Proposed mitigation

'Sexual orientation' means 'an enduring pattern of romantic or sexual attraction to persons of the opposite sex, the same sex or to both sexes. It does not include any other sexual attractions, preferences or behaviours.'

S4(1)(a) Crime of hate speech

The text approved by the National Assembly

"4. (1) (a) Any person who intentionally publishes, propagates, advocates, makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

(i) be harmful or to incite harm; and

(ii) promote or propagate hatred,

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

Comments on 4(1)(a)(i)

In 4(1)(a)(i) the words 'be harmful' infer the direct harmful impact of the words themselves, as separate and different from 'incite harm' in the second part of the same sentence. This is broader than the unprotected speech in 16(2) of the Bill of Rights and thus would require motivation in terms of the limitations clause S36. Less restrictive means include the common law crime of *crimen injuria*, which is defined by the South African Law Commission as "*unlawfully, intentionally and seriously impairing the dignity of another*" or by the Oxford dictionary as "*a wilful injury to someone's dignity, caused by the use of obscene or racially offensive language or gestures*" and the Equality Act.

Proposed mitigation

The following narrower option which deletes 'be harmful' was considered by the National Assembly Parliamentary Committee.

"OPTION 2

(1) (a) *Any person who intentionally publishes, propagates, advocates makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—*

- (i) *incite harm; and*
- (ii) *promote or propagate hatred,*

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

Comments on 4(1)(a)(ii)

"4(1)(a)(ii) *promote or propagate hatred*" apparently is intended to mean the same as 'advocate hatred' in S16(2) of the Bill of Rights. This should be clarified by the proposed definition of "**promote, propagate or advocate**" (see earlier under definitions), which will also better align the Bill with the United Nations RABAT Plan of Action for Hate Speech.

S4(1)(b&c) Broad definition of publication of 'hate speech'**The text approved by the National Assembly reads**

"4(1)(b) *Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is—*

- (i) *accessible by any member of the public; or*
- (ii) *accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence.*

4(1)(c) *Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which that person knows constitutes hate speech as contemplated in paragraph (a), which is accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence."*

Comment

Subsections 4(b) and (c) then categorise as an offence, not only the person who utters the words of 'hate speech', but also anyone who communicates it (b) .

The change in the 2018 draft is the need for the person to know the words are 'hate speech'. How this would be proven is unclear since the definition of hate speech is already unclear and open to interpretation.

This would put at risk of criminal sanction not only those 'advocating hate speech' as unprotected speech in terms of Clause 16(2)(c), but also anyone reporting on 'hate speech' or hosting a debate with an advocate of 'hate speech' or quoting 'hate speech' even in criticising the 'hate speech'. As a case example, in June 2016 national news media reported a man claiming the Bible taught that black people were inferior and must be servants. His statements were not only racially offensive, but factually misrepresenting the Bible. He then accepted a challenge to debate this on an ACM member radio station, but was unable to substantiate his claims from scripture. The audio recording was posted on the internet, shared and reported

on by other news media. The public debate discredited his claims and resolved the matter. Had this 'Hate speech bill' been law, the radio station, the organisation posting the debate and the news media sharing and reporting on it all would have been at risk of criminal sanctions.

If for example, someone took a photograph of an offensive protest slogan, with which they disagreed and posted it on social media, would they then also be guilty of hate speech? Does this then criminalise social media companies hosting user generated content? Are those who share (e.g. retweet) offensive content also guilty.

Proposed mitigation

The first preference is to delete these sections altogether.

The second preference are the proposed edits to strengthen the exemptions S(2) and narrow the definition of 'harm' that can then reduce the risk of misuse of S4(1), but even these edits would not fully mitigate the risk.

S4(2) Exemption clause (Misleading and powerless)

The text approved by the National Assembly

(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 engagement in any bona fide—

(a) artistic creativity, performance or expression;

(b) academic or scientific inquiry;

(c) fair and accurate reporting in the public interest or the publication of any information, commentary, advertisement or notice; or

(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.

Comment: Problem #1 Motivating to a cause other than physical harm is unprotected (Critically important)

S4(2) purports to protect religious, academic, artistic and media freedom. Nevertheless, the problematic last sentence "*that does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds.*" means it actually only protects against the actual harm of the words spoken, not incitement of others to do harm. There would be no problem if 'harm' meant only 'incitement to physical harm', since this should not be protected, but the definition of harm includes also 'social, psychological and economic harm'. Thus a person motivating against 'same-sex marriage could be deemed 'social' or 'psychological' harm or a boycott could be deemed 'economic harm'. There would then be no protection against motivating others to a cause.

The table below graphically illustrates the problem (last column highlighted).

	Direct impact of words spoken	Direct impact of words spoken	Incitement of others to do	Incitement of others to do
	Physical harm	Psychological, Social harm	Physical harm	Psychological, Social harm
Exemption clause	Exempted.	Exempted	Not exempted	Not exempted
Comment	Not need exemption as words not cause physical harm (no problem with law, but law not needed).	Exemption positive good (no problem with law).	* Not want exempted (no problem with law). * But law not needed, because illegal already.	Do want exempted (Problem with law)

What was the intent of this controversial sentence

The arguments for this controversial last sentence by the Department of Justice to the National Assembly Parliamentary Portfolio Committee were:

Firstly, a previous poorly worded 2018 draft of the bill referred to S16 of the Bill of Rights. “...in accordance with section 16(1) of the Constitution of the Republic of South Africa, 1996;”. There is similar wording in the Film and Publications Act. In other words, the intent was that the exemption clause should not exempt people from ‘advocacy of hatred’ based on the unprotected grounds (race, ethnicity, gender or religion) in this cause.

The rewording was necessary because this clause in the Bill of Rights is not a prohibition but just a lack of protection. Nevertheless, the re-wording is much broader than 16(2)(c) and that in the International Covenant on Civil and Political Rights from which the clause is derived, because the definition of ‘harm’ in the bill is broader than the ordinary English meaning of ‘harm’ which normally means ‘physical harm’. While the Concourt did condone also ‘deep psychological’ harm in the Qwelane Equality Act civil case, it did not condone ‘social or economic harm’, and it is doubtful if it would condone ‘psychological harm’ in a criminal case.

Secondly, in verbal deliberation with the parliamentary committee defending the sentence, the Department of Justice assumed ‘harm’ meant ‘physical harm’ (they would not wish to protect for example a church minister inciting violence under pretext of religious freedom). This latter principle is agreed, but the Department of Justice did not agree to insert the word ‘physical’ to clarify this.

Conclusion: To give the exemption clauses meaningful force and to align with the intended meaning of the drafted sentence in its original context, the words ‘physical’ must be inserted before ‘harm’.

Comment: Problem #2 Can be interpreted as in religious meetings only

The religious exemption could be narrowly interpreted to protect only statements made in religious meetings and not in public debate. The addition of the words ‘in public or private’ would help to clarify this.

While ‘proselytising’ does cover ‘evangelism’ (which typically takes place outside religious meetings), it may not be interpreted to cover expression of religious opinion that relates to social policy debate rather than conversion.

Proposed mitigation of comments #1

The following much better alternative text was considered by the National Assembly (Working draft 10 February 2023). This should be reconsidered. Changes underlined below.

“OPTION 2

(d) interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings by a religious organisation or an individual in public or private, that does not advocate hatred that constitutes incitement to cause physical harm, based on one or more of the grounds.”

Comment: Problem #3 ‘bona fide’ narrows protection

The clause already has the qualification of ‘good faith’. The term ‘bona fide’ is often used to describe an accredited professional or member. For example, it may be interpreted to protect only a ‘bona fide’ journalist in fair or accurate reporting and not a citizen journalist blogger. Or it may protect only a recognised leader and not an ordinary person with religious conviction. It may protect only a recognised artist and not an ordinary persons art. Or it could be used to interpret that the comments of pastor made causally outside of a church, rather than in a sermon are not protected.

For example, some political leaders, organisations and institutions identify and agree with a particular religious ethos although they may not personally observe every aspect of that religion. Such persons may then be deemed not ‘bona fide’. This can then has a secondary impact in that those who are more religiously observant seek to gather support to a cause from those who are likeminded, but less observant.

The overwhelming majority of South Africans identify with a religious belief in the census but do not regularly attend religious meetings and are not members of religious organisations.

The words 'bona fide' are included in the Equality Act, but have never been tested through a challenge at the Constitutional Court. The words creates the onus on the accused to prove that they are 'bona fide'. Removing the words 'bona fide' gives broader protection.

Proposed mitigation: delete 'bona fide'

"(1) if it is done in good faith in the course of engagement in any ~~bona fide~~—

Comment: Problem #4 Broaden media protection

The text approved by the National Assembly reads:

"(c) fair and accurate reporting in the public interest or the publication of any information, commentary, advertisement or notice; or"

Firstly, it is argued that publication should be clarified to include 'distribution'. The 'publisher' of a book for example is not the same as a 'distributor'.

Secondly, the original 2018 draft of the clause referred to S16(1) of the bill of rights and indicates that the protection in 4(2)(c) was derived from the first two sub-clauses (a) and (b) in the Bill of Rights.

"16(1). Everyone has the right to freedom of expression, which includes

- a. freedom of the 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."*

The inclusion of 'b' in addition to 'a' provides constitutional protection to the expression of ordinary citizens beyond professional journalists. Its paraphrasing into the bill indicates the intent to mirror this constitutional protection in the second half of the sentence 'c'. It should then be inferred that 'commentary' in '4(2)(c)' includes 'ideas' in 16(1)(b).

The bill text parallels that in the Equality Act (Promotion of Equality and Prevention of Unfair Discrimination Act) S12. *"No person may— (a) disseminate or broadcast any information: 15 (b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: provided that bona fide engagement in artistic creativity, academic and scientific inquiry. fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section"*

Proposed mitigation

"(c) fair and accurate reporting and debate in the public interest or the publication or distribution of any information, commentary, advertisement or notice; or"

Comment: Problem #5

A person could potentially be prosecuted for publishing something he wished to point out for purposes of removal.

The Canadian hate speech law includes an exemption:

"intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group"

Proposed mitigation

Rephrasing to fit the wording of the current bill could be:

"(e) pointing out, for the purpose of removal, matters perceived to produce or tending to produce feelings of hatred"

Consolidated mitigation proposal for 4(2)

Based on the above, the following consolidated exemptions clause is proposed (additions underlined and deletion ~~strikethrough~~):

“4(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 engagement in any ~~bona fide~~

(a) artistic creativity, performance or expression;

(b) academic or scientific inquiry;

“(c) fair and accurate reporting and debate in the public interest or the publication or distribution of any information, ideas, commentary, advertisement or notice; or”

(d) interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings by a religious organisation or an individual in public or private,

(e) pointing out, for the purpose of removal, matters perceived to produce or tending to produce feelings of hatred

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

Of the above, the most high priority change is the insertion of the word ‘physical’ before ‘harm’. Without this, the exemption offers little protection.

S6 Penalties**Text as approved by the National Assembly**

“6(3) Any person who is convicted of an offence referred to in section 4 is liable to a fine or to imprisonment for a period not exceeding eight years, or to both a fine and such imprisonment.”

Comment

Section 6 of the bill provides for up to eight years in prison for a first offence (a previous draft proposed three years for a first offence and up to five years for a subsequent offence). Actual and threatened civil ‘Hate speech’ litigation under the Equality Act has already severely inhibited public debate on controversial issues. Even if ultimately the accused is vindicated, years of stress and legal costs have a severe effect. With the threat of jail sentence, the effect on legitimate free speech would be greater. Up to eight years is more than the penalty for house breaking (five years for a first offence and seven for a second offence). By comparison the maximum penalty in Canada is two years.

The maximum penalty does not differentiate between a person inciting violence and a person expressing an opinion someone else disagrees with. Punishment should prioritise life, then property, then emotions. S6 of the bill conflates all three.

Ironically, Thomas Helwys, the first to publish a book proposing the separation of church and state and freedom of speech and religion was unjustly jailed for the rest of his life in the Tower of London. John Bunyan, who preached without state permission spent twelve years in prison, ironically wrote in jail the most popular book written in English after the Bible, ‘Pilgrims progress’. With double irony, the book describes a fictional characters being falsely accused, unjustly tried, and found guilty and sentenced for their preaching. Draconian penalties risk putting us back there.

The following links to the debate in the National Assembly Portfolio Committee that led to the proposed eight-year sentence. https://www.youtube.com/watch?v=t_4ASX5KsqE&t=2465s

- The first argument was that this is a maximum and the courts should be trusted to decide the matter. Answer: Hate speech cases are highly emotive and that the courts have not been consistent in logic or following precedent and have varied greatly on appeal in deciding Equality Court cases.
- The second argument was based on examples of alleged ‘hate crime’ (not hate speech), while the eight-year penalty in 6(3) is for ‘hate speech’. This is then a ‘bait and switch’ argument. The penalty for a ‘hate crime’ is in 6(1) and 6(2).
- The third argument was a hypothetical case example in which there was an incident of hate speech followed by an attack on foreign nationals, but insufficient evidence to prove incitement. Answer: If the

bill is motivated, actual examples are needed where existing law allegedly failed, to determine if this is valid and if so, the problem was enforcement or law failure - and the scenario tested against existing law and options for wording in the bill.

- The fourth argument that jail would be a deterrent to the wealthy, who would be less deterred by a fine. Answer: As an example, Finnish law imposes fines in proportion to the equivalent months of a persons salary.

Proposed mitigation

The earlier draft penalty for three years for a first offence and five for a second offence is less damaging. The following text from the Draft Bill, approved by cabinet, should be reconsidered:

“OPTION 1

6(3) *Any person who is convicted of an offence referred to in section 4 is liable, in the case of—*

- (a) *a first conviction, to a fine or to imprisonment for a period not exceeding three years, or to both a fine and such imprisonment; and*
- (b) *any subsequent conviction, to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.”*

A less damaging option would differentiate between incitement of physical harm and other forms of harm (new text proposed underlined). It is submitted that no one should be jailed for non-physical harm.

“OPTION 2

6(3) *Any person who is convicted of an offence referred to in section 4 is liable, in the case of—*

- (a) *a conviction of incitement to physical harm, to a fine or to imprisonment for a period not exceeding three years, or to both a fine and such imprisonment; and*
- (b) *a conviction of incitement to non-physical harm to a fine”*

S10 Regulations

The text approved by the National Assembly reads:

“10(2) Regulations made under this section—

- (a) *must be submitted to Parliament for approval 60 days prior to the publication thereof in the Gazette;*
- (b) *which are not approved within the 60-day period referred to in paragraph (a) are deemed to have been approved by Parliament; and”*

Comment #1

The risk is that regulations can be introduced just before a parliamentary recess or festive season period, thus allowing potentially damaging regulations to pass without scrutiny by parliament.

Proposed mitigation (addition)

(d) *Draft regulations must be advertised for public comment for a 30-day period, starting at least 60 days prior to being submitted to Parliament’.*

(e) *“The reckoning of days shall exclude parliamentary recess periods, public holidays or the festive season period between 15 December and the 10 January.”*

This additional statement on reckoning of days could be included either in the definitions or in section 10. Precedent is in the National Environmental Management Act EIA Regulations on Public Comment periods.

The text approved by the National Assembly reads:

“10(2) Regulations made under this section— (c) which may result in expenditure for the State, must be made in consultation with the Cabinet member responsible for finance.”

Comment #2

The bill correctly provides that the regulations that may result in expenditure by the state must be made in consultation with the Cabinet member responsible for finance. Nevertheless, the Principal Act will itself result in substantial additional law enforcement costs to the Police and National Prosecuting Authority (NPA), which if not costed and provided as additional budget, will detract from their other crime fighting capacity.

Proposed mitigation

Prior to approving the bill, request the Cabinet member responsible for finance to approve a budget for the implementation of the bill after consulting with the NPA and Police.

Comment #3

Non-binding interpretative guideline document(s) on objective interpretation of speech could be helpful in avoiding mis-identification of 'hate speech' within context. For example:

- Comparison of humans with animals can in some contexts degrade human dignity or 'de-humanise the vulnerable'. In other instances, comparison with animals can be innocent or highlight positive metaphorical attributes of an animal.
- Humour and satire can at times be offensive, but within context is not always 'hate speech'.
- The use of 'reductio-ad absurdum' or 'argument from absurdity' does not mean that the speaker is promoting the extreme absurd conclusion.
- Criticism of an ideology, behaviour, religion or god is not the same as hatred of people who identify with these.
- Judging within context: For example it is easy to misinterpret the intent of a statement if one does not consider the context what the same person or organisation said before or afterwards. 'Advocacy' with clear intent normally involves a series of statements.
- The recommendations of the United Nations RABAT Plan of Action for hate speech can be helpful for interpretation.
- A guideline document could quote from criteria in precedent legal judgments for ease of reference of a magistrate.

Such issues are too complex and subtle to include in legislation or regulations, but a guideline interpretative document(s) written independently from the bias generated by the emotions of a particular controversy, could reduce the risk of innocent people being threatened or jailed. A difficulty is that a guideline document may itself include bias, and thus it may be helpful for such documents to be drafted with public input and possibly to allow more than one guideline document. A regulation could require the consultation of guideline documents.

ANSWERING FLAWED MOTIVATIONS FOR THE BILL

Failure to address the stated motivation of the bill: social media

A proposal for a 'hate speech bill' was considered and abandoned due to strong objections in 2004. At the start of 2016 certain offensive statements published by individuals on the social media platform 'twitter' were shared by thousands of people (offended by it) and then repeated in other public media. These led to calls criminalise 'hate speech', and this history has been cited by certain political leaders as motivation for this bill. Prior to social media, statements of little-known individuals would not have gained widespread publicity. It would be impossible to prosecute thousands of individuals sharing on Twitter, but the bill as it stands would put broadcasting and print media at risk. A 'less restrictive alternative' in terms of S36 of the Bill of Rights could be an investigation specifically into social media with recommendations, rather than a criminal law applying to all media.

Failure to achieve stated goals of reducing 'hate crime'

Wastage of limited justice resources

The South African Justice System including the Police and the National Prosecuting Authority have inadequate resources to investigate and prosecute serious crimes, leading to dangerous criminals escaping justice and innocent people spending long times in jail awaiting trial. A broad definition of 'hate speech' in this bill would divert these limited resources to minor and ideological disputes. The impact would be more severe than other countries which do not have such over-stretched resources.

More difficult to prosecute real hate crimes

The requirement to prove a 'hate crime' as a separate criminal offence to the underlying crime means the 'motive' must be proved beyond reasonable doubt, which is much more difficult than what prosecutors already do in proving motive for 'aggravation of sentence', which is on the balance of probabilities. This could alternatively be formalised in the Criminal Procedure Act.

Lack of crime statistics showing a decline following hate crime legislation

None of the countries which the Department of Justice has used as examples to motivate this bill (Research Note 26 October 2022) show a measurable difference in homicide statistics trend after the 'Hate crime' legislation was introduced. In some places, the homicide rate actually increased: For example, in Ireland, the homicide rate tripled from the time the law was introduced to peak in 2006 and then declined slightly. In Kenya, the homicide rate doubled after the law was introduced and has not declined. New Zealand homicide rate declined substantially the years just before the law was introduced, then plateaued and many years later went further down. Likely there are many factors influencing the homicide rate. If such laws had any influence, it was minimal. For some countries, statistics were not readily available.

It is onerously difficult to separate alleged 'hate crimes' from general crime statistics, on the question of how one defines a hate crime, how much it is reported, whether it is proven as a motive and vested political and funding interests.

Ruling Party National Conference Resolutions

Certain political leaders motivated the Hate Speech Bill in response to social media posts that offended them. In one instance the offender was prosecuted in terms of existing law, thus showing lack of need for a new law. In another instance that caused offence, there was misreporting on the meaning of what was said in context. The 54th Conference in 2017 resolved "*1.7. Relevant legislation in relation to hate crimes should be better enforced; all forms of racism, crude and subtle, including tribalism or xenophobia, must be eradicated; the mind-set shift from an image of an African as being a victim to being a victor must be addressed.*". The 55th conference in 2022 made no resolution on hate speech. Thus the National Conference wisely re-directed concern towards enforcement of existing law, rather than the proposed Hate Speech Bill. The Bill therefore does not have the support of the General Conference.

Academic research

Firstly, the academic research cited by the Department of Justice in its Research Note is almost all focused on 'hate crimes' and not 'hate speech', which conflates a bait and switch of different issues. Secondly, the

academics only cite civil society organisations supporting not those disagreeing. It is focused on legal definitions of 'hate crimes' and not the effectiveness of legislation. No statistics are cited. No research is cited into the unintended negative effects of Hate Speech and Hate Crimes legislation, although such research is available.

The misleading precedent of so-called 'good countries'

The Department of Justice has cited the example of so called Western 'good countries' with hate speech legislation. In fact, consequences have gone very wrong in many of these countries with for example a Canadian evangelist being unjustly prosecuted for evangelising at an LGBT parade; a feminist activist being threatened by British police for saying that a woman is a biological human female; a Finnish MP currently on trial for posting a Bible verse on Instagram, Pastors being prosecuted in Norway and Holland.

The Constitution

It is claimed that the proposed bill is required by the Constitution. This is incorrect. The constitution leaves only four grounds unprotected in S16 'Freedom of Expression'. Other rights such as S15 Freedom of Religion, S19 Right to campaign for a cause and S31 Rights of Religious communities must also be considered. Any further limitation must be justified in terms of S36, and especially a criminal sanction must be justified. Far from being required by the Constitution, the Bill will likely be found unconstitutional.

International law

The Department of Justice has motivated the bill to comply with international law (copied in the NCOP call for written submissions). This is incorrect.

The International Covenant on Civil and Political Rights

Firstly, the Covenant has not been ratified by the South African parliament and thus is not binding on South Africa as international law.

Secondly, it requires signatories to prohibit hatred on three grounds only: "race, ethnicity, religion", and not the long list of grounds in this bill.

Thirdly, it does not specify that it must be prohibited by a specific 'hate speech bill'. South Africa already has a number of remedies as stated earlier.

Fourthly, it does not specify whether the prohibition is criminal or civil law.

Fifthly, the Covenant has been signed by many countries which do not have a similar law.

Sixthly, the Covenant includes many balancing articles that would counteract the proposed 'hate speech bill' such as article 18 Freedom of thought conscience and religion, article 19 Freedom of Opinion and Expression.

The RABAT Plan of Action

The RABAT Plan of Action is not a treaty obligation but a United Nations Report on Hate Speech. The proposal includes a set of 'thresholds' to warrant restrictions on Freedom of Expression. These include: Context, Speaker (position in relation to the target audience), Intent, Extent (size of audience), Likelihood (of resulting harm). The proposed hate speech bill does not comply with these proposed thresholds.

Racial discrimination and hatred

The "International Convention on the Elimination of All Forms of Racial Discrimination" and related initiatives is firstly focused narrowly on one ground that is unprotected by the S16(2) of the Bill of Rights and thus not controversial. Secondly, South Africa has already complied with this through existing law and does not need a 'hate speech' bill to do so. Further, hatred is already considered an aggravating factor for statutory offences and under the existing common law. Use of this motivation is a 'bait and switch' tactic.

Opinions of United Nations officials and Conference speakers are not international law

International law is binding only when passed by resolution of the member states of the General Assembly and ratified by Parliament. The United Nations employs an advisory staff whose recommendations may be helpful but are not binding and it links with multiple conferences where speakers and delegates voice opinions, and may make recommendations which have no authority on anyone. The Department of Justice has conflated these as if they were International law, which they are not.

Conclusion: The claim the Hate Speech bill is required by International Law is false.

European Union guideline documents on hate speech

The Department of Justice has selectively cited certain European Union policy documents on hate speech, but neglected to cite balancing elements of the same documents with which the current bill does not comply. For example, narrow grounds, clear definitions and protection of religious and political speech.

CONTRADICTIONS IN INTERPRETATION OF BILL ON RELIGIOUS FREEDOM BY PROPONENTS

On some occasions proponents of the bill have denied that the bill would impact religious freedom (Deputy Minister at Parliamentary Committee, 7 September 2022). On other occasions they have indicated that it would (for example Deputy Minister in Parliamentary committee meeting 18 May 2018; John Jeffrey quoted in Times Live 23 January 2023, Deputy Minister and Henrietta Maseko-Jele in Parliament on 14 March 2023). These interpretations cannot be reconciled. Answers to questions posed by Parliamentarians were not been answered clearly, as if this didn't matter. The detail of the wording, its interpretation and impacts on religious freedom does matter. The Department of Justice do not appear to have adequately applied their minds to this.

CHANGES FROM THE DRAFTS OF THE BILL

Positive changes from the drafts of the bill during the National Assembly process, which should be retained include the:

- Definitions
 - Shortening of the list of 'grounds' for hate speech to remove those unmotivated.
 - Removal of the vague 'cultural harm' from the definition of 'harm'.
 - Insertion of the word 'substantial' in the definition of psychological 'harm'
- 4(1) Changing of 'or' to an 'and', which narrows the scope of the crime of 'hate speech'.
- 4(2) Inclusion of the exemptions clause (albeit with flawed wording)
- S10 Requirement to submit regulations to parliament 60 days in advance.

- A significant negative change has been the increase of the penalty limit from three years for a first offence to eight years.

CONCLUSION

This bill would create a chilling effect on legitimate free speech and debate. There is no need for it as existing law and Codes of conduct at Complaints authorities adequately deal with the matter. Preferably, the bill should be abandoned. If not agreed to, delete the 'hate speech' provisions. If not agreed to, reduce the risk of injustice through a series of small edits at multiple point: Narrowing the definition of hate speech in the bill to speech unprotected by section 16(2) of the Bill of rights. Strengthening the exemption clause. Reducing the penalty (S6).

Flawed motivation

The Department of Justice motivations for the need and desirability of the hate speech bill and its components are flawed in terms of the substance of the academic papers cited, the overseas policy documents and case examples, International law, the Constitution, crime statistics. No serious investigation has been made into unintended consequences. There is no need for this bill, nor is it likely to pass the test of Constitutionality.

Reconsideration of Options within bill as at working draft 14 Feb 2003

The following triages changes that could mitigate the risk of innocent people going to jail for 'hate speech' based on alternatives that were already considered in working drafts in the bill. The overall purpose is to narrow the definition of 'hate speech' so that only the most harmful forms of hate speech are criminalised.

Order in bill	Section	Subject	Action	Preferred Option draft 14 Feb '23	Priority
1	Definitions	Harm	Of the options on definition of 'harm', choose option 2 (delete social and economic' harm as too broad).	2 of 2	3
3	Definitions	Social detriment	If 'harm', option 2 is chosen (preferred), then delete definition of 'social detriment'.	2 of 2	6
2	Definitions	Social detriment	If 'harm', option 1 is chosen (not preferred), then mitigate slightly by defining 'social detriment' (see below).	1 of 2	6
4	Definitions	Grounds	Choose option 2 (closest to the narrow grounds in the Bill of Rights and the International Covenant on Civil and Political Rights).	2 of 2	4
5	4(1)a	Offence of hate speech	Remove 'be harmful' (Just have 'incite harm). This is narrower and closer to the unprotected speech in the bill of rights	2	1
6	4(2).	Exemptions clause	The exemption from the exemptions clause at the end of the 'that does not constitute incitement to cause harm'. Change to 'physical harm'. Thus 'that does not constitute incitement to cause 'physical harm'. Without this narrowing, the exceptions can be nullified.	2	2
7	4(2).	Exemptions clause	"by a religious organisation or an individual in public or private". Broadening the religious exception.	2	5
8	6	Penalties	Maximum penalty five years (not eight years). (Prefer less than both – see below)	1	5

Other edits not considered in working drafts that could reduce harm of hate speech bill

Order in bill	Section	Subject	Action	Citation in Bill	Pty
Add	Preamble		Add Reference S15, S19 & S31 of Bill of Rights & S16 of Universal Declaration of Human Rights	N/A	
Edit	Definitions	Grounds	The conflation of 'gender expression' (into 'p' in Grounds and option 1(i)) is very dangerous and without precedent in South African law. The merits of each should be considered separately. Additional reasons available on request. The		

Order in bill	Section	Subject	Action	Citation in Bill	Pty
			acronym 'SOGIESC' is an attempt to equate unchangeable physical characteristics with changeable behaviours.		
Edit	Definitions	Grounds	The previous clear term and deleted definition (below) of 'intersex' (genetic condition) is preferable to the confusing term 'sex characteristics', which is then conflated with other sexual behaviour terms. <i>"intersex" means a congenital sexual differentiation which is atypical, to whatever degree;</i>	Part of defn of grounds	
Add	Definitions	Sexual orientation	If 'sexual orientation' is included in the list of grounds and/or characteristics (prefer not), then it needs to be narrowly defined: 'Sexual orientation' means <i>'an enduring pattern of romantic or sexual attraction to persons of the opposite sex, the same sex or to both sexes. It does not include any other sexual attractions, preferences or behaviours.'</i> The purpose is to avoid other sexual behaviours such as paedophilia, zoophilia, fetishism, sadomasochism, incest, furry, adultery, autogynephilia or promiscuity claiming legal protection within the definition of sexual orientation.	Part of defn of grounds	
Add	Definitions	Hatred	'Hatred' means extreme detestation, vilification, enmity, ill-will and malevolence against a person or group of people and not merely strong or offensive disagreement with an idea or practice"	4(1)	*
Add	Definitions	promote, propagate or advocate	"promote, propagate or advocate means to publicly and actively support, instigate, exhort, or call for'	4(1)	*
Add	Definition	Public interest	"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." Source: Film & Publications Act.	4(2)	
Edit	Definition	Social detriment	'Social' as a criminalised sub-category of 'harm' should be deleted, but if not then 'social detriment' should be defined more narrowly. An example of a problem: calling for independence of a province or disagreement with sexual behaviour could be framed as 'undermining the social cohesion of the people of South Africa'.	Part of defn 'harm'	
Edit	Definition	harm	The qualification 'undermines the human dignity' should only apply to 'psychological harm' and not to 'physical harm'. Any incitement to physical harm is unacceptable (see below edits to both alternatives). The normal dictionary meaning of 'harm' is 'physical injury'. Other categories of harm if included at all must be qualified. See below.	4(1)	
Edit	Definitions	harm	Preferably 'emotional and psychological' should be deleted from the definition of harm, but if not add the word 'gross' as a qualification for psychological harm as stronger than 'substantial' or 'deep'. (Credit FoRSA note 15 Feb 2023)	4(1)	
Edit	4(2)	Exemptions	Remove 'bona fide'. Already have 'good faith'. Makes it harder to use religious exception.	4(2)	
Add	4(2)	Exemptions	Add protection of those who report hate speech for purposes of removal	4(2)	
Edit	6	Penalties	Penalties for 'hate speech' should be reduced if no incitement to 'physical harm'. Comparatively, 'break in an entry' is 5 years, with 7 years for 2 nd offence. Punishment should prioritise protecting life, then property, then emotions.		

Order in bill	Section	Subject	Action	Citation in Bill	Pty
Edit	10	Regulations	Regulations should be published for 30 days prior public comment and the reckoning of days for the 60-day consideration by parliament must exclude the recess period.		

Request to make oral submission

We request the opportunity to make an oral submission and answer questions, based on this written submission.



Graeme Schnell
Chairman of the Association of Christian Media