

**Report of the Select Committee on Security and Justice on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75), dated 8 November 2023.**

The Select Committee on Security and Justice, having deliberated on and considered the subject of the **Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75)**, referred to it on 14 March 2023, reports that it has agreed to the Bill with proposed amendments and reports as follows:

**1. Background**

The **Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75)**, seeks to:

- give effect to the Republic’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations;
- provide for offences as hate crimes and the offence of hate speech and the prosecution of persons who commit those offences;
- provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences;
- provide for the prevention of hate crimes and hate speech;
- provide for the reporting on the implementation, application and administration of this Act;
- effect consequential amendments to certain Acts of Parliament; and to provide for matters connected therewith.

The Bill is tagged as a Bill to be dealt with in terms of Section 75 of the Constitution (a Bill not affecting provinces).

**2. Public participation process on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75)**

The Select Committee on Security and Justice invited stakeholders and interested persons to make written submissions on electronic platforms from 18 April 2023 to 25 May 2023 and in newspapers from 12 May 2023 to 25 May 2023.

The Committee received forty (40) substantive submissions. In addition, the Committee received submissions and petitions through FOR-SA that were delivered to Parliament the day of the deadline.

On 5 September 2023, the Committee took a decision to host public hearings on 19, 20 and 21 September 2023. The secretariat communicated with stakeholders on 8 September and 11 September 2023 and received an overwhelming response, with 31 individuals/organisations indicating their willingness to participate in the oral hearings. There are organisations or individuals that indicated that they declined oral presentations given that they had made their written submission and some did not respond despite follow ups by the secretariat. The Committee received one apology on the day of the hearing, which translates into 30 oral submissions that were made to the Committee. Emanating from the public hearings, the Committee requested certain organisations that had presented to provide further information and received four submissions.

**3. Committee consideration of the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75)**

The Select Committee received a briefing on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75) on 19 April 2023 and thereafter

advertised the Bill for written comment. On 5 September 2023, the Select Committee received a further briefing from the Deputy Minister on the outstanding questions raised by members on the Bill. The Content Advisor briefed the Committee on the written submissions received on the Bill. The Committee took a decision to receive oral hearings. The Committee held public hearings 19-21 September 2023. On 11 October 2023 the Committee received a briefing from the Deputy Minister and Department on its response to the public written and oral hearing submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75) (See Annexure C).

On 18 October 2023 the Committee deliberated on the Bill and received proposed amendments by the DA, which the Department responded to. In the Committee deliberation on 25 October 2023 the Department presented proposed amendments that emanated from the public hearing process as well as areas the National Prosecuting Authority advised would need amending.

On 1 November 2023 the Committee considered and adopted clause by clause amendments and the DA proposed that their amendments (See Annexure B) be considered as well.

#### **4. Committee consideration of the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75)**

##### **Committee deliberation:**

- 4.1. The Committee discussed the definition of hatred and whether the definition of hate speech required expansion. However, after due deliberation the Committee agreed that the definition is clear as the term carries its ordinary dictionary meaning and is aligned to the PEPUDA Act and Qwelane Judgement. The DPP will decide whether to prosecute according to directives set by the NDPP. The courts ultimately will decide whether there was hate or hatred in each particular case.
- 4.2. The Committee considered the penalty in Clause 6, and proposed reducing the maximum sentence from 8 years to 5 years with the understanding that the court will have a discretion and this is a maximum sentence. The importance of having a reasonable sentence was emphasised.
- 4.3. The Committee further supported the notion of making hate crimes and hate speech statutory offences. Committee members emphasised the need for a statutory crime to combat racism as well as prejudice against vulnerable groups, while at the same time continuing to engage in efforts towards greater social cohesion and celebrating diversity.
- 4.4. The Committee emphasised the importance of the Bill and the speedy resolution of the Bill.
- 4.5. Committee members also expressed support for the NPA amendments in that these amendments will serve to improve the Bill and make the Bill more effective in dealing with hate crimes and hate speech and how these matters are dealt with in the criminal justice system. Committee members further expressed support for hate crimes and hate speech being dealt with in the District Courts as well as the Regional Courts as this will ensure that the Regional courts are not overburdened with too many cases.

#### **5. Consensus on the Bill**

On 1 November 2023 the Committee considered the proposed amendments and adopted the amendments Clause by Clause. The detail of each Clause is contained in Annexure A attached.

- a. Clause 1: Mr. TSC Dodovu moved and Mrs. MB Bartlett seconded the proposed amendment and adoption. There was no objection. The Democratic Alliance (DA) abstained from voting.

- b. Clause 3: Mrs. MB Bartlett moved and Ms. A Maleka seconded the proposed amendment and adoption. There was no objection. The DA abstained from voting.
- c. Clause 6 of Annexure A:
  - i. Mr. TSC Dodovu moved and Mrs. MB Bartlett seconded the proposed amendment.
  - ii. The Committee voted on Clause 6 (See Annexure A) as moved by Mr. TSC Dodovu and Mrs. MB Bartlett by show of hands. There were 6 members in favour of the proposed amendment and 4 members against the proposed amendment.
- d. Clause 6 of Annexure B:
  - i. Mr. G Michalakis moved and Mr. CFB Smit seconded the proposed amendment (See Annexure B point 2).
  - ii. The Committee voted on Clause 6 (See Annexure B) as moved by Mr. G Michalakis and Mr CFB Smit by show of hands: There were 4 members in favour of the proposed amendment. There were 5 members against the proposed amendment. In terms of Rule 153(3) the question is decided on the majority of votes cast.
- e. Clause 7: Mrs. MB Bartlett moved and Ms. A Maleka seconded the proposed amendment and adoption. There was no objection. The DA abstained from voting.
- f. Clause 8: Mrs. MB Bartlett moved and Ms. A Maleka seconded the proposed amendment and adoption. There was no objection. The DA abstained from voting.
- g. The Committee considered the further proposed amendments by Mr. G Michalakis and seconded by Mr. CFB Smit (See Annexure B point 1 and point 3):
  - i. Expanding Hate speech provisions: Annexure B point 1: The Committee voted on the matter by show of hands: There were 3 members in favour of the proposed amendment. There were 6 members against the proposed amendment.
  - ii. Definition of Hatred: Annexure B point 3: The Committee voted on the matter by show of hands: There were 3 members in favour of the proposed amendment. There were 6 members against the proposed amendment.

The Select Committee on 1 November 2023 agreed to the adoption of the Bill with proposed amendments (See Annexure A).

The Parliamentary Legal Advisor confirmed that –

(i) all amendments are constitutionally and procedurally in order within the meaning of Joint Rule 161; and

(ii) no amendment affects the classification of the Bill.

## **6. Minority view**

The Democratic Alliance noted it is fundamentally opposed to all forms of hate crimes and hate speech, but it submitted that it could not vote in favour of the Bill, based on the following:

- a) In criminal law, elements of the crime need to be clearly defined to ensure that the public knows the nature of the crime before it is committed. This is not done with regards to the definition of “hate”, and the definition of “hate speech” in its current form is too wide.
- b) Clause 4(2) is too narrow, creating the risk of limiting free speech. The lack of a definition as in (a) above, in the Party’s opinion, increases the need for clarity and a broader clause.
- c) The DA is of the view that the sanction as contained in the initial Bill that was introduced in the National Assembly, would be more appropriate and in line with sanctions handed down to date for similar crimes.

## **7. Recommendation**

The Select Committee on Security and Justice, having considered the **Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (National Assembly – sec 75)**, referred to it on 14 March 2023 and classified by the JTM as a section 75 Bill, recommends the Council pass the Bill with proposed amendments (See Annexure A).

**Report to be considered.**

## Annexure A: Proposed Amendments

### SELECT COMMITTEE ON SECURITY AND JUSTICE: PROPOSED AMENDMENTS TO PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B 9B – 2018]

#### CLAUSE 1

1. On page 3, in line 14, to delete “nationality, migrant or refugee status or asylum seekers;”, and to insert the following:  
“nationality, migrant, refugee or asylum seeker status;”.
2. On page 3, in line 27, to delete “an”.
3. On page 4, in lines 1 to 5, to delete the definitions of “court” and “Criminal Procedure Act”
4. On page 4, in lines 9 to 11, to delete the definition of “Director of Public Prosecutions”.
5. On page 4, in line 21, to delete “nationality, migrant or refugee status or asylum seekers;”, and to insert the following:  
“nationality, migrant, refugee or asylum seeker status;”.
6. On page 4, in lines 32 to 34, to delete the definition of “National Director of Public Prosecutions”.

#### CLAUSE 3

1. On page 5, in line 3, after “a” to insert “person with one or more characteristics or a”.

#### CLAUSE 5

1. On page 5, in lines 49 to 51, to delete the following:  
“, when adducing evidence or addressing the court on sentence in respect of an offence under this Act, consider the interests of a victim of the offence and the impact of the offence on the victim and”.
2. On page 5, in line 55, after “statement” to insert the following:  
“: Provided that a prosecutor may obtain a victim impact statement from—
  - (i) someone, in the event of the victim’s death, authorised by a family member of the victim or a group of persons with whom the victim associated or supported; or
  - (ii) an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.”.

#### CLAUSE 6

1. On page 6, in line 24, to delete “eight”, and to insert “five”.

#### CLAUSE 7

1. On page 7, in line 6, after “that” to delete “as many”.
2. On page 7, in line 6, after “prosecutors” to delete “as possible”.

#### CLAUSE 8

1. On page 7, in line 12, to delete “and”.
2. On page 7, in line 15, after “Authority” to insert the following:  
“and  
(c) prescribe the information that must be collected and collated by the clerks of the court and Registrars of the High Court,”.
3. On page 7, in lines 16 and 17, to delete “and to provide quantitative and qualitative data,”.

## **Annexure B: Amendments not agreed to**

**1.**

### **Section 4: Offence of hate speech**

*(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, literary, comedic or satirical 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 belief, opinion or religious conviction as protected in section 15 of the Constitution;*

*(e) political debate;*

*(f) the sharing of anything done in good faith contemplated in (a) to (e) above that does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds.*

**2.**

### **Section 6: Penalties**

**Section 6 to be replaced in its entirety by the following:**

*(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.*

**[i.e. return to initial section 6]**

**3.**

### **Definitions**

*“hatred” means*

*a) an extreme emotion of detestation, enmity, ill-will and malevolence towards members of an identifiable group;*

*b) predicating on the destruction of such group; and*

*c) which leads to the direct and intentional vilification and ill-treatment of members of such group.*

## Annexure C

### SUMMARY OF SUBMISSIONS TO SELECT COMMITTEE ON SECURITY AND JUSTICE: PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL, 2018; and RESPONSE BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

- \* Table 1 reflects general comments and the DoJ&CD's response;
- \* Table 2 provides a clause by clause summary of the submissions and the DoJ&CD's response;
- \* Annexure "A" is a note dealing with "the efficacy and impact of similar legislation in other countries" that was submitted to the Portfolio Committee;
- \* Annexure "B" is a note in respect of "Issues raised in the Portfolio Committee in respect of the Bill"; and
- \* Annexure "C" is a research note dealing with "Comparative Foreign Law and International Law on Hate Crimes and Hate Speech".

**Table 1:**

NAME OF INSTITUTION/INDIVIDUAL COMMENTS/RECOMMENDATIONS	DoJ&CD RESPONSE
<p><b>FW De Klerk Foundation</b></p> <p>1. Recommends that criminal law should be a last measure to address hate speech. Foundation is in favour of statutory defences that are narrowly defined and reflect the elements of the offence.</p>	<p>1. Noted.</p>
<p><b>Democratic Alliance, Google</b></p> <p>1. Lack of justification for the Bill. Government has failed to provide statistics on incidents of hate speech since the implementation of PEPUDA.</p> <p>2. The Bill is attempting to double legislate for hate crimes, by taking circumstances which would ordinarily be taken into account at the sentencing stage where an underlying crime exists.</p> <p>3. The Bill poses a risk of the government using the provisions of the Bill to curtail speech or actions it finds politically undesirable, the usage of existing legislation and mechanisms are a safer solution. The Bill in its current form may have a chilling effect on free speech.</p>	<p>1. See Annexures "A" and "B" which were prepared and submitted to the PC in response to the same issue that was raised in PC.</p> <p>2. The introduction of underlying offences as hate crimes, among others, enable the SAPS Criminal Record Centre to record offences as hate crimes that were committed as a result of the convicted person's prejudice towards a certain person with certain characteristics. Aggravating factors are not recorded in Criminal Records. The introduction of hate crimes also sends out a very strong message that such offences should not be tolerated in an open and democratic society.</p> <p>3. It is not clear how a statutory offence of hate speech may become a stronger "tool" to curtail free expression. The Films and Publications Act, 1996, contain similar provisions which were recently approved by Parliament. The common law offence of <i>crimen injuria</i> could just as easily be employed as a political tool to stifle freedom of expression.</p>

<p><b>Centre for Social Justice</b></p> <p>1. In connection with the balance between free speech and hate speech prevention, the Qwelane and Afriforum v EFF cases provide guidance on the approach to be followed.</p> <p>2. In the Canadian Supreme Court judgement, R v Keegstra to count as hate speech, the communication must advocate or encourage “hatred.” In the expression of hate there must be intention i.e. it must be expressed intentionally, as it is impossible to express an emotion that is of an extreme and intense nature on a negligent, accidental or subconscious basis.</p> <p>3. Who is a victim, given the fact that speech may impair the dignity or invite harm to 80% of the nation or a significant group?</p> <p>4. No mention of growing hate speech on the internet, particularly social media and need to control hate speech and other crimes perpetuated as cybercrimes.</p>	<p>1. The finalisation of the Bill was kept in abeyance pending the Qwelane judgment. It may also be mentioned that the judgment gave rise to a “tightening up” of some provisions of the Bill. The relevant provisions of the Bill have been aligned to the judgment (this will be highlighted during the clause by clause analysis of the Bill).</p> <p>2. Noted. It is submitted that this is precisely what the hate speech provision aims to achieve.</p> <p>3. A victim in terms of clause 1 means “any person, including a juristic person, or group of persons against whom an offence referred to in clause 3 or 4 has been committed”.</p> <p>4. The ambit of clause 4 encompasses instances of hate speech that are committed in cyberspace.</p>
<p><b>Pathsa</b></p> <p>1. Calls for data collection on hate crimes and hate speech, to better inform prevention work.</p> <p>2. Recommends protection from hate crimes or hate speech aimed at young people specifically. Questions whether hate crimes or hate speech, aimed at children or vulnerable persons are recognised under the Act.</p> <p>3. It is noted with reference to free speech and religious freedom that in those religious spaces stigma and discrimination happen.</p>	<p>1. Noted.</p> <p>2. Age forms part of the definition of “characteristics” and not only refers to young people, but also includes older persons against whom hate crimes may be committed. The categories listed in the definitions of “characteristics” and “grounds” have been identified as the most vulnerable persons.</p> <p>3. The Constitution enjoins the Legislature to strike a balance between freedom of expression and other rights. Freedom of expression cannot simply be prohibited, but the formulation of clause 4 of the Bill was, among others, guided by the provisions of S 16(2)(c) of the Constitution.</p>
<p><b>Film and Publication Board</b></p> <p>1. The Bill should not be formulated in a fashion that infringes on the freedom of expression. The Bill in its current form may limit open debate and discussion on topics which carry many differing views and thereby discourage dissenting opinions.</p>	<p>1. The need to strike a fair balance between freedom of expression and other rights, among others, were considered during the formulation of clause 4.</p>



<p>2. Reference should be made in the Bill to the FPB as an enforcement statutory entity, particularly on the online platforms where hate speech is so highly prevalent.</p>	<p>Open debate is a hallmark of an open and democratic society. The Bill aims to criminalise those most egregious forms of speech that causes harm to certain persons to the extent that it among others, undermines human dignity.</p> <p>2. The ambit of the Bill is much wider than the ambit of the Films and Publications Act, 1996. It is doubted whether it is feasible to include the FPB as an enforcement entity in the Bill where it has a restricted statutory mandate. The Department's view is that Chapter 9 Institutions are entrusted with enforcing fundamental rights irrespective of on which platforms those rights may potentially be violated. These institutions are sufficient to enforce fundamental rights.</p>
<p><b>Same Love Toti and The National Diversity Coalition</b></p> <p>1. Lesbian, gay, transgender, intersex and gender non-conforming individuals are faced with the daily threat of hate crimes and hate speech.</p> <p>2. Secondary victimisation at police stations and from other first responders, is a problem that makes reporting cases difficult.</p> <p>3. Implementation of the Bill will require training to SAPS and various other bodies. Expresses the need for the Bill.</p>	<p>1. Noted.</p> <p>2. This issue will have to be addressed, among others, through training of officials.</p> <p>3. Noted.</p>
<p><b>Shemah Koleinu</b></p> <p>1. Combating forms of hate crime against LGBTQIA+ individuals will strengthen efforts to address hate crimes and hate speech targeting the LGBTQIA+ community, providing them with the necessary protections and promoting their rights and dignity.</p>	<p>1. Noted.</p>
<p><b>Association of Muslim Professionals</b></p> <p>1. Opposes the Bill. The provisions of the Bill are vague and ambiguous. The Bill is over-reaching in its ambit, scope and effect. The potential for the abuse of the Bill in resisting legitimate expression and dialogue far outweighs its possible benefits.</p> <p>2. The Bill undermines the constitutionally enshrined rights to freedom of expression and religion. The expression of conscientiously held religious and faith based views are likely to be criminalised as constituting hate speech under the provisions of the</p>	<p>1 and 2. The Constitution enjoins the Legislature to strike a balance between freedom of expression and other rights. Freedom of expression cannot simply be prohibited, but clause 4 of the Bill was, among others, guided by the provisions of S 16(2)(c) of the Constitution and the provisions of PEPUDA.</p>

Bill.	
<p><b>ACDP</b></p> <p>1. The Bill contravenes S 36 of the Constitution by unreasonably and unjustifiably limiting various constitutional rights, specifically freedom of (religious) expression, and being unnecessary due to other existing laws that have been used successfully to combat hate speech both civilly and criminally (i.e. the less restrictive means test in S 36).</p>	<p>1. Clause 4 was “tightened up” as a result of the Qwelane judgment and is much stricter than the introduced version thereof. In addition it creates certain freedom of expression exemptions.</p>
<p><b>Media Monitoring Africa (MMA)</b></p> <p>1. The Bill should provide for monitoring and reporting mechanisms that are aimed at informing future policy responses on the implementation of hate crimes and hate speech legislation and trends in categories of offences prosecuted under the legislation.</p> <p>2. Submits that the principles of restorative and alternative justice form part of education and information campaigns.</p>	<p>1. Noted. Cl 7 to 9 deal with this aspect.</p> <p>2. Noted.</p>
<p><b>Dear SA submissions</b> (large number of submissions received)</p> <p>1. The majority of submissions were opposed to the Bill, mainly because of the view that the Bill seeks to suppress freedom of religion. Many persons also expressed the view that the word “hate” should be clearly defined. Many recommended that Cl 4 (the hate speech provision) should be deleted from the Bill.</p> <p>2. Persons who supported the Bill “partially”, also expressed concerns that Cl 4 of the Bill seeks to suppress freedom of expression.</p> <p>3. A small minority of commentators were in support of the Bill.</p>	<p>1 to 3. Noted.</p>

**Table 2:**

<b>NAME OF INSTITUTION/INDIVIDUAL COMMENTS/RECOMMENDATIONS</b>	<b>DoJ&amp;CD RESPONSE</b>
<b>Preamble</b>	
<p><b>Association of Christian Media, FOR-SA, Hate Crimes Working Group</b></p> <p>1. The preamble in the text approved by the National Assembly is unbalanced, referencing some rights but not others. 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.</p>	<p>1. The preamble aims to highlight three important aspects which are central to the ambit of the Bill, namely, the elimination of discrimination, protecting the dignity of persons and recognizing the importance of freedom of expression.</p>

<p>2. All international instruments should be included in preamble.</p>	<p>2. The Bill only refers to those international instruments that are directly relevant to hate crimes and hate speech.</p>
<p><b>Dr G du Plessis (ADF)</b>  Response to SC request:  Recommends an amendment to the pre-amble by inserting reference to “freedom of religious expression” and by replacing “advocacy of hatred that is based race, ethnicity, gender or religion, and that constitutes incitement to cause harm” with “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.</p>	<p>The Bill is in line with the Constitution and there is no need to amend the pre-amble as suggested.</p>
<p><b>Clause 1</b></p>	
<p><b>Western Cape Government</b>  1. The use of the words "substantial" and "severe" in the definition of "<b>harm</b>" will pose problems of interpretation.</p> <p>2. In subclause (e) the term "asylum seekers" is used to denote a ground, but the term is incorrectly used and should be "asylum seeker status", a ground on which the offence of hate speech is based.</p>	<p>1. It is trite that if the Legislature does not decide to define a term then that term or word should be understood according to its ordinary dictionary meaning. Definitions are generally used sparingly and strictly speaking only in those instances where the Legislature wants to add to or detract from the ordinary dictionary meaning of a term or word.</p> <p>2. Agreed, an amendment will be proposed to the SC.</p>
<p><b>Lombard Forensic Accountants</b>  1. Do not support the Bill.  “Hate” is not defined. In its current form it could be used for political reasons to silence outspoken persons. <b>(FOR-SA, International Religious Freedom Roundtable (Africa))</b></p>	<p>1. It is not clear how a statutory offence of hate speech may become “tool” to curtail free expression. The Films and Publications Act, 1996, contain similar provisions which were recently approved by Parliament. The common law offence of <i>crimen iniuria</i> could also be used as a political tool to stifle freedom of expression.</p> <p>The word “hate” must be considered in the context of what the Bill seeks to prohibit, namely hate crimes and hate speech, which has been the subject matter of numerous academic articles both internationally and in SA, in case law and in PEPUDA.</p>
<p><b>FOR-SA</b>  1. The definition of “harm” fails to meet the Rabat threshold test, which among others prefers a direct causal link between the speech and the harm suffered.</p>	<p>1. The definition of “harm” represents one component of the offence of hate speech and cannot be considered in isolation without any reference to the content of,</p>

<p>2. The Bill's types of harm include concepts such as "social detriment" and the definition of social harm, "detriment that undermines the social cohesion amongst the people of South Africa", does not provide much clarification. This is problematic because social harm is an element of a proposed criminal offence and people need to know when they are committing social harm.</p> <p>3. The Bill's definition of 'harm' contains elements open to subjective assessments. <b>(Heartlines, International Religious Freedom Roundtable (Africa), Democratic Alliance, Afriforum, CRL Commission, Centre for Social Justice, The Free Speech Union of SA, Islamic Forum Azaadville, Council of Charismatic Churches, Council of Charismatic Churches, Suni Ulama Council Gauteng, Ecumenical Leadership Council, ADF International, Google, Individuals and Faith Based organisations).</b></p> <p>4. Define harm as "<u>gross</u> psychological and physical detriment that objectively and severely undermines the human dignity of the targeted group caused by the expression".</p> <p>5. Define hatred as "strong and deeply-felt emotions of enmity, ill-will, detestation, malevolence and vilification against members of an identifiable group, that implies that members of that group are to be despised, scorned, denied respect and subjected to ill-treatment based on their group affiliation" in line with the Qwelane judgment. <b>(Association of Christian Media, ACDP, Islamic Forum Azaadville, Individuals and Faith Based organisations, Suni Ulama Council Gauteng, FW de Klerk Foundation, Democratic Alliance, United Ulama Council of South Africa)</b></p>	<p>and context within which the definition is used in, clause 4(1), for example. The Bill, when considered in context meets the Rabat threshold tests.</p> <p>2. It is submitted that the key words, namely, "undermines" and "cohesion" are sufficiently clear to provide the necessary guidance to persons to understand what "social detriment" entails.</p> <p>3. The definition of "harm" was amended in the PC on the basis of comments that the PC received calling for a stricter definition to be included in the Bill, among others, to clarify that "harm" must be objectively determined and not with reference to the subjective consideration.</p> <p>4. To limit the definition of "harm" to psychological or physical harm will not suffice for purposes of hate speech. Even the common law recognises that emotional distress (negatively affecting one's dignity) of a victim is sufficient to constitute an offence.</p> <p>5. The proposed definition is circular and employ synonyms of the word "hatred" in an attempt to define "hatred". It is not clear why "hatred" should be defined whereas the term carries its ordinary dictionary meaning in S 16 of the Constitution and S 10 of PEPUDA.</p>
<p><b>Dr G du Plessis (ADF)</b> Response to SC request: Delete definition of "harm". The term harm is a subjective concept and disproportionately broadens the allowed scope of the limitations to freedom of expression as reflected in international human rights law.</p>	<p>See Annexure C. There is no universal definition of the terms "hate", "hatred" and "harm". Different jurisdictions have enacted legislation within their own contexts.</p>
<p><b>SAHRC, Association of Christian Media</b> 1. Notes the potential limitation of right to freedom of expression through the introduction of additional grounds to those already contained in S 16(2) of the Constitution. Concerned that the Bill's clause on prohibited grounds may go beyond what is</p>	<p>1. It should be noted the ambit of S 16(2)(c) of the Constitution was extended by PEPUDA in 2000 to include more grounds as those listed in S 16(2)(c). S 16(2)(c) excludes those grounds from</p>

<p>constitutionally justifiable. Recommends that the prohibited grounds should mirror those of S 16(2)(c) of the Constitution.</p>	<p>protected freedom of expression i.e. S 36 of the Constitution does not apply in respect of the stipulated grounds. Any additional grounds will have to be tested against S 36.</p>
<p><b>Hate Crimes Working Group, FOR-SA</b></p> <p>1. Recommends that “associates” should be defined as family members, colleagues, friends and other possible connections to a victim. The provisions of the Bill will be easier to read, as a catch-all phrase, in place of listing all possible personal connections to victims in the relevant sections.</p> <p>2. The term “bona fide” should be replaced with the term “good faith”.</p>	<p>1. The definition of “victim” does not refer to a family member or associate. The only reference in the Bill to “associate” is in CI 3(1)(b) and is used in the context of “the victim’s association with or support of a group of persons”.</p> <p>2. In the context of the introductory words of CI 4(2) it will not add any value to the clause to replace “bona fide” with “in good faith”.</p>
<p><b>Pathsa</b></p> <p>1. Welcomes the inclusion of the grounds “gender identity or expression or sex characteristics” as a basis for a hate crime or hate speech.</p>	<p>1. Noted.</p>
<p><b>Association of Christian Media</b></p> <p>1. Expresses the concern about the conflation of unchanging physical with changing behavioral characteristics.</p> <p>2. ‘Intersex’ is a rare physical genetic abnormality. The inclusion of the term has not been adequately motivated (with the onus being on those who wish to include it).</p> <p>3. ‘Social origin’ is a vague term that is not unprotected by S 16(2) of the Constitution, does not have international precedent and has not been adequately motivated in terms of the limitations clause S 36.</p> <p>4. 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.</p> <p>5. It is problematic that the qualification ‘substantial’ used in the NA text is several steps lower than the Constitutional courts ‘deep’ used in the Qwelane judgment, while in fact the threshold for a criminal</p>	<p>1. The definition of “characteristics” is admittedly not an accurate word/term to use to define the list contained in the definition. However, that is one of the reasons why the reason why the term “characteristics” is defined in order to add to the ordinary dictionary meaning of the word characteristics.</p> <p>2. PEPUDA was amended to include a definition of “intersex” to ensure that it is clarified that “intersex” should be regarded as a ground for discrimination and applies equally to the hate speech provision of PEPUDA. It is submitted that the inclusion of the term under the ambit of PEPUDA justifies its inclusion in the Bill.</p> <p>3. See response in no. 1 above and the Annexures hereto.</p> <p>4. It is submitted that the Legislature is free to expand on detract from the ordinary dictionary meaning of words. It should also be kept mind that the definition of “harm” should not be read in isolation without any reference to the provisions of clause 4, which clause has</p>

<p>sanction should be higher (i.e. either remove psychological harm altogether or use 'gross').</p> <p>6. The PC considered the following compromise option. 'Social', which can be used to stifle public debate. Proposed amendment: <i>"harm" means deep emotional, psychological or physical detriment that objectively and severely undermines the human dignity of the targeted individual or groups;</i>" 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. Social detriment, expands on the meaning of 'social' within the definition of 'harm'.</p> <p>7. The Bill criminalises hate speech in Cl 4(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'. <b>(ADF International)</b></p> <p>8. 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'.</p> <p>Proposed definition: <i>'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.'</i></p>	<p>been amended in the PC to be in line with the judgment in the Qwelane judgment.</p> <p>5. It is submitted that the Constitutional Court in its judgment in the Qwelane case was not written as legislation. The use of the word "substantial" is more appropriate especially if one takes into consideration the use of the words "objectively" and "severely undermines the human dignity" in the definition of "harm".</p> <p>6. The matter was discussed at length in the PC and the PC finally elected to include "social detriment" in the definition of "harm".</p> <p>7. Subclause (1) describes (defines) when an offence of hate speech will be committed. A "victim" who feels offended is not sufficient to establish criminal liability. Liability will have to be determined according to objective criteria.</p> <p>8. The Department does not agree that the provisions of the Bill could be used to protect all persons with extreme forms of "sexual orientation", some of which, such as paedophilia, zoophilia and incest may qualify as criminal behavior in terms of the 2007-Sexual Offences Act.</p>
<p><b>Democratic Alliance, FW de Klerk Foundation, The Free Speech Union of SA (FSU), Association of Muslim Advocates and Lawyers, Islamic Forum Azaadville</b></p> <p>1. Expresses the view that the term "victim" also needs to be properly defined in order to address the broad and vague nature of the Bill. It will have to be carefully considered whether natural and juristic persons should be included in the definition of "victim". The term "victim" should be defined to include only natural persons in order to prevent the abuse of the legislation to clamp down on criticism aimed at companies, political parties, governments and groups of elected politicians.</p>	<p>1. It is a principle in law that fundamental rights, as far as is possible, also apply to juristic persons. There may be instances where juristic persons may be targeted as a result of their association with or support for persons who share one or more of the characteristics or grounds. There are very few political parties, if any, that qualify as juristic persons. Governments also do not qualify as juristic persons.</p>

<p><b>FW De Klerk Foundation</b></p> <p>1. Expresses concern over the lack of definitions for the key elements, such as “prejudice” and “intolerance”. Protected characteristics should relate to a natural person’s “unchangeable characteristics” and should not include characteristics such as “political affiliation or conviction” and “occupation or trade”.</p> <p>2. The provisions in the Bill relating to hate speech are unacceptable and are unconstitutional. They go far beyond the limitations on freedom of expression defined in S 16(2) of the Constitution and the definition of hate speech in PEPUDA, as confirmed by the Constitutional Court in the Qwelane case. <b>(FOR-SA, SAHRC, Association of Christian Media)</b></p> <p>3. Recommends that the current version of the offence of hate speech should be removed, so that hate crimes as a distinct crime can be addressed in terms of the criminal law without further delay. <b>(Individuals and Faith Based organisations)</b></p>	<p>1. Terms or words that are not defined should be interpreted according to the ordinary dictionary meaning of the words concerned. Insofar as “juristic persons” are concerned the definition of “victim” should be read with, for example, clause 3 where an offence as a hate crime is committed, among others, where the victim associates with or supports a group of persons who share on or more characteristics. A juristic person is included in the definition of victim.</p> <p>2. It should be noted the ambit of S 16(2)(c) of the Constitution was extended by PEPUDA in 2000 to include more grounds as those listed in S 16(2)(c). S 16(2)(c) excludes those grounds from protected freedom of expression i.e. S 36 of the Constitution does not apply in respect of the stipulated grounds. Any additional grounds will have to be tested against S 36.</p> <p>3. The inclusion of the offence of hate speech has been debated and accepted in the PC after lengthy deliberation, and prior to its introduction, through a consultation process by the Department.</p>
<p><b>African Christian Democratic Party (ACDP), Cause for Justice, Suni Ulama Council Gauteng</b></p> <p>1. Recommends that the definition of “grounds” should be limited to those mentioned under S 16(2) of the Constitution.</p>	<p>1. It has been recognised in the Qwelane judgment that analogous grounds may justifiably be included in a provision dealing with hate speech.</p>
<p><b>Media Monitoring Africa (MMA) (Google, The Catholic Parliamentary Liaison Office)</b></p> <p>1. The Bill does not include the following grounds: pregnancy, marital status, conscience, belief, and birth.</p> <p>2. The inclusion of “political affiliation or conviction” as a category could result in powerful political groupings or professional politicians seeking protection against fair criticism under this provision. Recommends that the “Political affiliation or conviction” category be removed.</p>	<p>1 As the “grounds” limit the right of freedom of speech, the National Assembly decided to reduce the number of grounds to those that were essential to be included in an offence of this nature.</p> <p>2. “Political affiliation or conviction” as a ground for hate speech was removed from the Bill and does not form part of Cl 4 of the Bill.</p>
<p><b>ADF International</b></p>	

<p>1. Hate speech is an elusive umbrella term usually referring to speech considered hateful by a group of persons. Similarly, hate speech laws intend to criminalise speech and expression based on subjective criteria such as 'insult' and 'offence'.</p>	<p>1. The Bill aims to criminalise only the most egregious forms of speech amounting to hate speech, and not simply offensive speech.</p>
<p><b>The Aurum Institute</b>  1. The Bill is not clear and does not mention or categorise corrective rape.  The question that needs to be raised at this point is whether the South African legal framework adequately addresses the scourge of corrective rape in the light of the aims of transformative constitutionalism.</p>	<p>1. The definition of “characteristics” covers persons who are regarded as vulnerable persons. The ambit of the definition is therefore wide enough to include instances of corrective rape.</p>
<p><b>Google</b>  1. Including a definition of “intersex” will restrict the definition to a meaning that may evolve over time as scientific and societal understanding of what it means to be “intersex” changes. The definition of “intersex” should be deleted from the Bill.</p>	<p>1. The definition was deleted by the PC.</p>
<p><b>Scalabrini Centre Cape Town</b>  1. It is recommended to expand the grounds and characteristic to include undocumented people.</p>	<p>1. Noted. It is not desirable to extend the grounds which will inevitably become a never-ending list.</p>
<p><b>Clause 2</b></p>	
<p><b>Dr G du Plessis</b>  Response to SC request: Recommends that clause 2(a) be amended by removing the words “regarding prejudice and intolerance” and inserting the words “while ensuring full respect to the right to freedom of expression” at the end of the paragraph.  Expresses the view that international human right treaties which SA ratified do not reflect the words “prejudice” or “intolerance”.</p>	<p>The Department does not agree. As previously stated domestic legislation is enacted within context and the Bill does not need to repeat international instruments verbatim.</p>
<p><b>Clause 3</b></p>	
<p><b>Western Cape Government</b>  1. A qualification in relation to the victim is necessary in this clause. It appears that the victim's association or support is limited to a "group of persons" rather than the broader category of association with <u>a person</u> or a group exhibiting the characteristics, which are the subject of the prejudice or intolerance.   Recommends that the wording must refer to the victim, <u>the victim's</u> family member or the victim's association with, or support for, <u>a person</u> or a group of persons who share the said characteristics.</p>	<p>1. Agreed. An amendment will be proposed to the Committee.</p>
<p><b>Suni Ulama Council Gauteng</b>  1. An important element of a hate crime is the</p>	<p>1. A word that is not defined bears its</p>



<p>understanding of what hatred is. The Bill fails in defining this crucial aspect leaving the ordinary citizen not knowing if he has transgressed a law or not. The misinterpretation of this Bill through its vagueness not only criminalises irrationally but also suppresses legitimate speech. <b>(FW de Klerk Foundation)</b></p>	<p>ordinary dictionary meaning. It should be kept in mind that the word is also not defined insofar as it applies to S 16(2)(c) of the Constitution. The word “hatred” in S 16(2)(c) is equally important for purposes of what types of speech do not qualify for protection under S 16(1).</p>
<p><b>Centre for Social Justice</b> 1. Considering that over the past years xenophobic violence has erupted in SA communities, it should be explicitly listed as an offence under hate crimes. The argument for not listing it could be that it is captured under “ethnic and social origin”. Due to its recurring nature and the prejudices within communities it warrants its explicit inclusion as characteristic of hate crimes.</p>	<p>1. Xenophobic violence is a generic term that is used to refer to acts of violence being committed against persons who, for example, have different nationalities from the perpetrators of the violence. The term “xenophobic” is not strictly speaking a characteristic, but nationality is regarded as a characteristic in terms of the Bill. It is submitted that the definition of “characteristics” is wide enough to encompass all forms of xenophobic violence.</p>
<p><b>The Catholic Parliamentary Liaison Office</b> 1. Draws attention to a number of words and phrases in Cl 3(1) that are difficult to define or which could result in uncertainty and vagueness:</p> <p>Does ‘family member’ refer to immediate family or extended family, and if the latter, to what degree? It is not clear why it is only ‘family members’ and not, for example, friends, associates, business or romantic partners, etc., whose characteristics come under consideration. What is meant by ‘association’ and ‘support’ in the phrase “the victim’s association with, or support for, a group of persons...”?</p>	<p>1. The proposal in connection with the inclusion of “person” before the expression “group of persons” will address the concerns that have been expressed.</p>
<p><b>The Catholic Parliamentary Liaison Office</b> 1. Supports that prosecutions must be authorised by the DPP.</p>	<p>1. Noted.</p>
<p><b>Hate Crimes Working Group,</b> 1. Proposes the following amendment: <u>“(4) Where the Director of Public Prosecutions, or a person delegated by them, declines to prosecute a charge of hate crime, written reasons for this decision must be provided to the complainant or their associate(s) within three working days.”.</u></p> <p>A definition of “working days” should be included in clause 1. “Working days” refers to “any other day than a Saturday, Sunday or public holiday”.</p>	<p>1. The Department is of the view that the Policy Directives of the NPA are sufficient in this regard.</p> <p>The Policy Directives, among others, deal with the provision of reasons. Prosecutors are often requested by complainants, family members of deceased persons, accused persons or legal representatives to furnish reasons for the exercise of their prosecutorial discretion (especially where the decision was not to institute criminal proceedings). Only requests emanating from persons with a legitimate interest in the matter should be entertained. In the</p>

	<p>interest of transparency and accountability, and in accordance with section 33(2) of the Constitution, reasons should as a rule be given upon request. The nature and detail of the reasons given will depend upon the circumstances of each case.</p>
<p><b>Same Love Toti</b>  SC questions:  What is the definition of “hate”?  Response: The Bill does not criminalise “hate” (hate is an emotion). A hate crime amounts to the commission of a recognised offence which is committed with a specific motive. Motive is a common denominator in every crime and forms part of investigations by the police.</p>	<p>Noted.</p>
<p><b>Clause 4(1): Hate Speech</b></p>	
<p><b>International Religious Freedom Roundtable (Africa) (FW de Klerk Foundation, Association of Muslim advocates and lawyers, FOR-SA, Ecumenical Leadership Council, South African Jewish Board of Directors, ACDP, SAHRC)</b>  1. The definition of ‘hate speech’ is wider than both the Constitution and PEPUDA’s definitions of hate speech because of the wide definition of harm and the failure to define hatred. The definition of hate speech must be improved.</p>	<p>1. It is submitted that Cl 4 is sufficiently clear to define precisely which actions will attract criminal liability.</p>
<p><b>Western Cape Government, Media Monitoring Africa (MMA)</b>  1. The offence of hate speech has been aligned with the Qwelane judgment.   2. Section 10 of PEPUDA unlike the Bill, is not concerned with criminal acts but creates remedies for a statutory delict in the form of the hate speech prohibition. In terms of section 10(2) of PEPUDA, however, a court has the discretionary power to refer any case dealing with the publication, advocacy, propagation or communication of hate speech to a DPP for the institution of criminal proceedings.   3. Recommends that the question of alignment between the Bill and the hate speech prohibition under PEPUDA must be considered, particularly in relation to the grounds forming the basis of hate speech.</p>	<p>1. Noted.   2. Noted.   3. The grounds that have been identified for purposes of the crime of hate speech have been carefully selected in order not to extend the ambit of the provision unacceptable wide.</p>
<p><b>Film and Publication Board</b>  1. Cl 4 is very similar to the FP Act, 1996. The Act defines hate speech as “...any speech, gesture, conduct, writing, display or publication, made using the internet, which is prohibited in terms of section</p>	<p>1. The ambit of Cl 4 of the Bill is much wider and extends beyond unprotected grounds stipulated in S 16(2) of the Constitution.</p>

<p>16(2) of the Constitution which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group”.</p>	
<p><b>Illita labantu</b></p> <p>1. Welcomes the definition of hate speech and the balance that is provided for under hate speech in terms of all bona fide speech and expression.</p> <p>2. It is challenging to draw a clear line between hateful speech and protected expression given the fact that it is a subjective and context dependent test. The country is very diverse in terms of culture, religion, politics, race which therefore needs a balance to safeguard the limitations placed under hate speech.</p>	<p>1. Noted.</p> <p>2. CI 4 was carefully redrafted with the judgment in Qwelane in mind and the need to strike a balance between competing rights such as the right to dignity and freedom of expression. The test to determine whether a person is guilty of hate speech is an objective and not a subjective test.</p>
<p><b>Islamic Forum Azaadville, Suni Ulama Council Gauteng, International Religious Freedom Roundtable (Africa), Heartlines</b></p> <p>1. CI 4(2)(d) aims to ensure that religious rights and freedom of speech is protected. The proviso attached to this right negates the exemption. In order for it to comply with the provisions of the Constitution the proviso to the exemption must be removed.</p>	<p>1. It is submitted that CI 4(2) is aligned to S 16(2) of the Constitution that constitutes a justifiable limitation of religious rights.</p>
<p><b>Democratic Alliance</b></p> <p>1. The creation of a new crime of Hate Speech, and the harsh prison penalties attached to it, may result in increased self-regulation of the journalistic profession and the public at large, even when the speech may not fall foul of the provisions of the Bill.</p> <p>2. The mere threat of imprisonment may result in self-censorship, thereby reducing freedom of expression across the country. This will result in a poorer marketplace of ideas, resulting in reduced debate and quality of idea exchanges between persons.</p>	<p>1 and 2. Insofar as the creation of a new crime of hate speech is concerned, it should be taken into consideration that hate speech, as a civil remedy, has been in existence for the past 23 years. It should also be noted that harsh penalties on its own will not necessarily increase self-regulation. Since the hate speech regime has been in existence for the past 23 years one would have expected that a statement of this nature (namely, “increased self-regulation”) would have been supported by proof in support thereof.</p>
<p><b>Heartlines</b></p> <p>1. Given that the Bill serves to criminalise hate speech, a higher standard of proof is required than there would be in a civil case. In some cases, such as xenophobic violence, for example, it is understandable that the need for proof of a causal link may result in an inability to act against behaviour that poses a real threat to societal stability. However, the absence of the need to prove a causal link, combined with the fact that much</p>	<p>1. Noted. It should be emphasised that all the elements of an offence must be proven beyond a reasonable doubt in order to secure a successful conviction.</p>

<p>discretion is afforded to the Director of Public Prosecution regarding prosecution, it is arguable that especially in cases involving so-called “unimportant offenders”, the legislation may give rise to erratic or arbitrary application.</p>	
<p><b>FOR-SA</b></p> <p>1. An attempt is made to provide protection for the freedoms expressly mentioned in S 16(1) of the Constitution. The Bill fails to provide protection for the freedom to receive or impart information or ideas.</p> <p>2. It is not only the original author or communicator who could be found guilty of the crime of hate speech, but anyone who distributes the hate speech in such a way that it is accessible to the public or the “victim”. An employee who, for example, in the course and scope of their duties is asked to publish or share a piece written by someone else, on the internet or on social media, could be charged with “hate speech”.</p> <p>3. A person who, on a private WhatsApp group, shares a picture that could potentially be seen as harmful towards another person could potentially be found guilty of “hate speech”.</p> <p>4. Recommends defining hate speech to expressly exclude private communications as follows: “Any person who intentionally, <u>publicly publishes</u>, propagates or advocates anything or communicates to one or more persons in a manner —(i) 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.” <b>(Google)</b></p> <p>5. Clarifying and strengthening the religious exemption clause (clause 4(2)(d)), to ensure adequate protection of the constitutional right to religious freedom, including religious expression, of all people – not only ministers of religion, namely, “(d) expression of any religious conviction, tenet, belief, teaching, doctrine or writings, by a religious organisation or an individual, <u>in public or in private</u>”. <b>(ACDP, Individuals and Faith Based organisations, Media Monitoring Africa)</b></p>	<p>1. It is submitted that the freedom to receive or impart information or ideas can be read into CI 4(2)(c) and it is therefore not necessary to expressly mention the freedom concerned.</p> <p>2. Do not agree. The example used will have to be judged on the basis whether or not the employee acted lawfully in following the instruction to publish before a prosecution could be instituted.</p> <p>3. Do not agree. The example used does not take into account that the act of sharing the information/picture must be coupled with the intent to be harmful and to promote or propagate hatred. Other factors will also have to be taken into consideration in order to determine whether the communication was unlawful, for example, whether the WhatsApp group consists of many participants, such as a “school parents group” or a private group of persons.</p> <p>4. It is not necessary to expressly exclude private conversations. The Constitutional Court expressly stated in the Qwelane judgment that a disjunctive reading of S 10(1)(a) to (c) of PEPUDA would, among others, include private conversations which should not be the case.</p> <p>5. It is not necessary to include the words “in public or private” because they are implied. See no. 4 above with reference to privacy.</p>
<p><b>Association of Christian Media</b></p> <p>1. In CI 4(1)(a)(i) the words ‘be harmful’ infer the direct harmful impact of the words themselves, as</p>	<p>1. It is doubted whether <i>crimen iniuria</i> could be regarded as a less restrictive</p>

<p>separate and different from ‘incite harm’ in the second part of the same sentence. This is broader than the unprotected speech in S 16(2) of the Constitution and would require motivation in terms of the limitations clause S 36. Less restrictive means include the common law crime of <i>crimen iniuria</i>.  <b>(Free Speech Union SA, Media Monitoring Africa, Campaign for Free Expression, ACDP)</b></p> <p>2. CI 4(1)(b) It is difficult, in view of the need for the person to know the words are ‘hate speech’, to establish how such a requirement will be proven and especially in view thereof that the definition of hate speech is already unclear and open to interpretation.</p> <p>3. CI 4(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.</p> <p>4. The term ‘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. <b>(Google)</b></p> <p>5. A person could be prosecuted for publishing something they 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”.</p> <p>6. Public hearings questions:  6.1 Whether the religious freedom exemption in clause 4(2)(d) of the Bill does not discriminate against non-religious people and is thus unconstitutional. It was argued that this allowed religious people to say what non-religious people could not.  Response:  Removing clause 4(2)(d) would make it much clearer that the Bill is unconstitutional, for limiting speech more than is reasonable and justifiable in order to achieve the stated purposes of the Bill.  Society historically and logically gains enormous benefits from the categories specifically protected in the exemption clause. For example, state attempts to limit scientific and academic debate have retarded technological progress. State attempts to muzzle</p>	<p>means to achieve the objects of creating the offence of hate speech. It should be kept in mind that the requirement to “be harmful” or to “incite harm” is reflected in S 10 of PEPUDA.</p> <p>2. In order for a decision to be taken whether a person should be prosecuted for contravening CI 4(1)(b) a number of factors will have to be taken into consideration, among others, by establishing whether the “hate speech” objectively determined constitute prima facie hate speech.</p> <p>3. Do not agree. Incitement to cause harm clearly requires an act in terms of which the intention of the alleged offender is aimed at inciting or “persuading” others to cause a victim or victims harm.</p> <p>4. It is admittedly a “double” requirement that is built into CI 4(1). However it is a necessary requirement to the extent that an alleged offender should not be able to avoid responsibility for their deeds by merely stating that the statement was of a bona fide nature.</p> <p>5. Whether a person will be prosecuted or not will be determined on the basis of establishing whether their actions were unlawful or not.</p> <p>The Department does not agree. The proposed exemption in clause 4(2)(d) does not extend to instances that constitute hate speech. A general exemption will render the Bill meaningless.</p>
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<p>the media have resulted in scandals of human rights and economics. The same applies to religious freedom.</p> <p>As the Bill is currently drafted, non-religious people have the benefit of three other exemption categories in the Hate Speech bill exemptions clause.</p> <p>* Or four categories if sub-clause (c) is counted as two categories as it in fact includes the two categories in S16(1)(a) and (b) of the Bill of Rights.</p> <p>* In particular, the “freedom to receive or impart information or ideas” goes beyond protection in professional journalism reporting.</p>	
<p><b>The Catholic Parliamentary Liaison Office</b></p> <p>1. Hate speech. The provision creates a chilling effect and it is submitted that CI 4 may be unconstitutional to the extent that it limits freedom of expression, without satisfying the conditions for such limitation set out in S 36 of the Constitution.</p> <p>2. CI 4(1)(a)(i) refers to communications that have a clear intention to be harmful or to incite harm. In turn, ‘harm’ is defined in CI 1 as “any emotional, psychological, physical, social or economic harm”. The word ‘any’ in this definition indicates that even very minor or trivial degrees of harm would qualify as hate speech.</p> <p>3. The characteristics of ‘occupation or trade’ and ‘political affiliation or conviction’, which may be grounds for the offence of hate crime, are not included in the list of characteristics that could be grounds for the offence of hate speech. Supports the idea that political debate should be as free as possible. However, questions why only these two categories have been excluded. The exclusion is arbitrary.</p> <p>4. Supports CI 4(3).</p>	<p>1. See the Annexures hereto.</p> <p>2. Do not agree. The test to determine whether harm as an element of the offence is present is an objective test and not a subjective test.</p> <p>3. This was also a matter that was debated at length in PC and the PC finally agreed that the two mentioned grounds cannot be justifiably included under the ambit of the hate speech provision.</p> <p>4. Noted.</p>
<p><b>Association of Muslim Advocates and Lawyers</b></p> <p>1. CI 4(1): The Islamic faith regards the LGBTQIA+ acts as prohibited in the Quran. It cannot be considered to constitute hate speech as Muslims are merely following the tenets of their religious practices. If Muslims are not allowed to express their views in writing and by speech this is viewed as limiting their right of religion and the Bill is therefore considered as infringing of freedom of expression.</p> <p>2. CI 4 implies that individuals who intentionally publish, propagate, or advocate ideas, or communicate in a manner that demonstrates a clear intention to harm or incite harm, or promote hatred based on the specified grounds, will not be charged with hate speech if their actions are done in good</p>	<p>1. It is submitted that CI 4(2) provides the necessary protection for religious expression.</p> <p>2. Noted.</p>

<p>faith while engaging in the sincere interpretation, promotion, or endorsement of religious principles, beliefs, teachings, doctrines, or writings.</p> <p>3. Cl 1 and 4 lack clarity in defining specific types of conduct that would be considered as "good faith." Since this statute pertains to criminal law, it is crucial to have precise and well-defined crisp concepts within the law.</p> <p>4. Despite the limited exemptions granted in Cl 4(2), freedom of expression remains at risk. Religious practitioners will be confined to practice their religion without being able to proselytise and therefore undue limitations are placed on their right to freedom of religion.</p>	<p>3. It is not necessary to specify types of conduct that will qualify as "good faith" conduct. To do so may lead to unintended consequences that instances of "good faith" conduct may not be mentioned that may lead to liability in circumstances where it is not justified. Whether a person has acted in "good faith" or not is a factual question that must be evaluated on a case by case basis.</p> <p>4. Do not agree. Cl 4(2)(d) is clear and it includes religious practitioners i.e. the exemption applies equally to them.</p>
<p><b>Google</b></p> <p>1. Cl 4(1)(a) does not include definitions of "publish", "propagate" and "advocate". Definitions of these terms should be included for certainty and clarity.</p> <p>2. Cl 4(2)(d) which exempts good faith interpretations of religious texts from being considered as hate speech is overly broad. Recommends the deletion of Cl 4(2)(d). The broad drafting could potentially enable religious scholars and leaders to advocate for hate speech under the umbrella of such speech made in good faith interpretations.</p> <p>3. S 16(1) of the Constitution provides that everyone has the right to freedom of expression which includes, among others, academic freedom and freedom of scientific research. The inclusion of "bona fide" in Cl 4(2)(a) is more restrictive than the requirement of S 16(1).</p>	<p>1. If a term is not defined then it bears its ordinary dictionary meaning.</p> <p>2. Do not agree. Cl 4(2)(d) is subject to the qualifier that the speech may not advocate hatred that constitutes incitement to cause harm.</p> <p>3. S 16 of the Constitution does not prevent or prohibit the Legislature from adding qualifying criteria in Cl 4(2).</p>
<p><b>Ecumenical Leadership Council</b></p> <p>1. The issue of "hate speech" is more contentious due to the potential effects that the proposed legislation may have on the fundamental right to free expression. Religious leaders "will have to cross a potentially combustible minefield in order to preach the Gospel". How do religious leaders preach a biblical scripture that says homosexuality is an abomination without being labeled as hate speech and maybe facing criminal charges?</p>	<p>1. Cl 4(1)(a)(i) and (ii) must be read conjunctively and not disjunctively. The example that has been used is an over simplification of the provisions of Cl 4(1)(a), because the second and very important requirement for criminal liability is that the speech must be uttered with the intention to "promote or propagate hatred".</p>
<p><b>FW De Klerk Foundation</b></p> <p>1. The heading of Cl 4 the "Offence of hate speech" is flawed, as it presupposes that the criminal offence created in terms of Cl 4(1)(a) relates to hate speech,</p>	<p>1. S 16(2) of the Constitution is an internal restriction of freedom of expression. In other words those grounds</p>

<p>as understood in terms of S 16(2)(c) of the Constitution.</p> <p>The provision falls outside the parameters of S 16(2)(c). To qualify as hate speech in terms of S 16(2)(c) the expression prohibited must amount to “advocacy of hatred”, which is based on the prohibited grounds of “race, ethnicity, gender or religion” and that “constitutes incitement to harm”. Legislation regulating hate speech must ensure the prohibition contains all these elements.</p> <p>2. The offence created deals with the criminalisation of expression, which is constitutionally protected.</p> <p>3. Recommends that the hate speech provision should be removed from the Bill, in order to ensure that the criminalisation of hate crimes as a distinct crime is not further delayed.</p>	<p>that are listed need not to be tested against S 36 of the Constitution. The S 16(2)(c) list of grounds may be expanded, as long as the inclusion of analogous grounds comply with S 36 of the Constitution (Qwelane judgment).</p> <p>2. The offence was created, among others, with due consideration to competing rights such as freedom of expression and the right to dignity.</p> <p>3. The Department disagrees.</p>
<p><b>We are tomorrow Global Partnership</b></p> <p>1. The Bill should explicitly include provisions for the regulation of hate speech on social media and other online platforms. This can be done by expanding the definition of “public space” to include online spaces, and by requiring online platforms to take action against hate speech that is posted on their platforms.</p> <p>2. The Bill should recognise the intersectionality of different forms of discrimination. The Bill should explicitly provide protection against hate crimes and hate speech that are motivated by a combination of factors such as race, gender, and sexuality.</p>	<p>1. The provisions of clause 4(1), read with the definition of “communicates”, are wide enough to include online platforms and there is no need to provide expressly for online platforms.</p> <p>2. It is not necessary to make mention of intersectionality. Apart from the fact that it is implied it should be kept in mind that liability in terms of Cl 4 only requires a minimum of one ground to be present. However, the expression “one or more of the grounds” cater for “intersectionality”.</p>
<p><b>Afriforum</b></p> <p>1. The following definition must replace the current definition in Cl 4(1):</p> <p>4. (1) (a) Any person who unlawfully and intentionally, publicly advocates for –</p> <p>(i) the incitement of imminent violence against any person or group of persons for any reason, including reasons based on:</p> <p>(aa) age;</p> <p>(nn) ... ..; or</p> <p>(ii) hatred towards any other person or group of persons based on race, ethnicity, gender, or religion, or sexual orientation, and that constitutes incitement to harm,</p> <p>is guilty of the offence of hate speech.</p>	<p>1. The proposal is not supported, among others, on the basis that it is not clear whether there should be a causal link between “advocating” and the “incitement of imminent violence”. In other words the proposal is drafted in such a manner that the alleged offender must publicly advocate for the incitement of imminent violence (presumably to be committed by a second party). The use of the words “for any reason, including reasons based on:” creates an open ended list which will not necessarily comply with the principle of legality.</p>
<p><b>ACDP</b></p> <p>1. The Bill’s definition of hate speech is far wider than set out in the Qwelane judgement. It seeks to criminalise speech which is protected under S 16(1) and which the State is obligated to protect. To limit</p>	<p>1. See the Annexures hereto.</p>



<p>speech protected under S 16(1), the State has to prove the limitation passes the S 36 test. The State has failed to do. <b>(The Free Speech Union of South Africa)</b></p> <p>2. It is easier to be convicted of hate speech than the civil offence of hate speech. The Constitutional Court's definition in the Qwelane judgment deals with PEPUDA, in a civil law context. The Bill is a criminal law which needs to have a far narrower definition of hate speech as well as a higher threshold to meet the requirements of hate speech as an offence as opposed to PEPUDA's civil offence of hate speech. The Bill creates the situation where it is easier to go to jail for 8 years for hate speech than to be ordered to apologise under PEPUDA.</p> <p>3. Recommends that the words "be harmful" be deleted to bring it in line with S 16(2).</p>	<p>2. The Bill is in line with the Qwelane judgment most notably the conjunctive reading of Cl 4(1)(a)(i) and (ii). It should be kept in mind that the burden of proof in criminal matters is much higher than compared to the burden in civil matters. The burden of proof should be regarded as the distinguishing factor when the two provisions are compared with each other.</p> <p>3. This matter was debated at length in the PC and it was finally decided to retain "harmful", among others, because it stands to reason that certain forms of speech are inevitably harmful to certain persons and they therefore deserve protection.</p>
<p><b>The Free Speech Union of South Africa (FSU)</b></p> <p>1. An intention must be aimed at being harmful or inciting others to harm, and promoting or propagating hatred. 'Harm' is defined as "substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups". Both 'harm' and 'hatred' must occur; it is not sufficient to have one or the other.</p> <p>2. If the harm is not related to hatred, or if there is propagation of hatred without any harm or incitement to harm, it would not qualify.</p>	<p>1. Noted. Cl 4(1) does comply with both conditions.</p> <p>2. Noted.</p>
<p><b>FSU</b></p> <p>1. The Bill has effectively codified three of the four items listed in S 16(1)(a)-(d) of the Constitution. It has also codified the S 15 freedom of religion. The error is that S 16(1) refers to a general right to freedom of expression which "includes" freedom of the press and other media, freedom of artistic creativity, and academic freedom and freedom of scientific research. The Bill's codification of the aforementioned is misguided to the extent that the S 16(1) list were not intended to be an exhaustive list.</p> <p>2. An additional exemption, for political expression, should be included in the Bill.</p>	<p>1. The Department disagrees. The Bill does not codify what is already in the Constitution. The word "includes" in section 16(1) indicates that the list is not exhaustive which means that other analogous grounds may be added in future as and when the need arises. The right to receive and impart information or ideas is very wide or broad and was therefore not included in the subclause.</p> <p>2. It is not necessary to include a reference to "political" speech because political affiliation or conviction does not formed part of the defined "grounds".</p>

<p><b>ACDP</b></p> <p>1. Concerned that the proviso to Cl 4(2) which states “does not advocate hatred that constitutes incitement to cause harm based on one or more of the grounds”, is self-defeating and recommends that the proviso be deleted, or that the word “physical” be inserted before the word “harm” in the proviso. <b>(Individuals and Faith Based organisations)</b></p> <p>2. Hate speech laws have been used internationally against Christians. There are numerous cases in which Christian street preachers have been persecuted in the United Kingdom and elsewhere for alleged “hate crimes” and later acquitted. This illustrates not only the need for the current “religious exemption clause”, but also the need for it to be strengthened. This is when the State seeks to dictate what religious leaders may preach, and would be a breach of religious freedom and freedom of expression.</p>	<p>1. It is submitted that the proviso is, among others, aimed at protecting the dignity of persons who share certain characteristics.</p> <p>2. Street preachers qualify for protection in terms of Cl 4(2)(d) if they comply with the requirements of the Cl. To assume that a certain religious group will be persecuted is very similar to an assumption that persons will be prosecuted for saying something offensive in private.</p>
<p><b>Media Monitoring Africa (MMA)</b></p> <p>1. The Bill should strike an appropriate balance between freedom of expression and the protection of human dignity and equality. The Bill should prevent hate speech that subverts the “dignity and self-worth of human beings”.</p>	<p>1. Noted.</p>
<p><b>ADF International</b></p> <p>1. Cl 4(1) is circular and is therefore not a definition of ‘hate speech’. The definition provides that ‘hate is hate’. Hate speech as defined in the Bill does not provide any clarity as to what type of speech is limited and what is acceptable.</p> <p>2. Law enforcement agencies will face difficulties in identifying whether there is sufficient evidence to prosecute. Hate speech which aggravates many base crimes such as assault and harassment is often verbally communicated, and therefore the evidence relies on the hearer or receiver being able to accurately recollect the event. The evidence base can therefore be very thin and anecdotal.</p>	<p>1. Clause 4(1) should be read with the definition of “grounds”. The two provisions cannot be read in isolation from each other. The provisions, read together, limit the offence of hate speech to the most egregious forms of speech which impact negatively on the dignity of certain persons.</p> <p>2. The presence or absence of evidence is one of the many factors to be taken into account by the Prosecuting Authority before a decision is made whether or not to institute a prosecution. It is not a factor that should be addressed by way of legislation.</p>
<p><b>Campaign for Free Expression (CFE)</b></p> <p>1. The criminal prohibitions of hate speech should mirror the higher thresholds set out in S 16(2) of the Constitution. The Bill imposes liability for hate speech without specifying explicitly that the requirement of “could reasonably be construed to demonstrate a clear intention” must be applied objectively.</p> <p>2. The current wording of the Bill criminalises conduct far beyond what is suggested in these international documents. Accordingly, there is no</p>	<p>1. It was made clear in the Qwelane judgment that an objective test must be applied.</p> <p>2. The test to determine a “clear intention” is in the end after the consideration of all relevant factors an objective test. The Constitutional Court in the recent Centre</p>

<p>rational relationship between the stated purpose of limiting freedom of speech (to comply with South Africa's obligations and undertakings) and the means used to achieve that purpose.</p> <p>3. The language of the Bill should make it clear that only intention in the form of <i>dolus directus</i> (direct intention) rather than <i>dolus indirectus</i> or <i>dolus eventualis</i> will suffice.</p> <p>4. The exceptions in CI 4(2) do not make provision for satire and parody and therefore recommends that "comedic expression", alternatively "satire and parody", ought to be included expressly in the language of CI 4(2). The inclusion will be consistent with CI 12A(a)(v) of the Copyright Amendment Bill, which insulates "parody, satire, caricature" and "cartoon" from attracting liability for copyright infringement.</p>	<p>for Child Law v the NDP case confirmed that the supreme law in the country is the Constitution and not international documents. The courts are bound by the Constitution first and foremost.</p> <p>3. The Legislature should be cautious when legislating on common law principles of criminal liability which have been formulated over a very long time. This could result in unintended consequences. <i>Dolus</i> remains what it is irrespective of the form it takes on.</p> <p>4. CI 4(2)(a) refers to "artistic creativity, performance or expression". It is submitted that the ambit of CI 4(2)(a) is wide enough to include or cover "comedic expression including satire and parody". The risk of expanding the list is that some groups of persons may be left out, for example, what will be the position if musicians, singers and poets are not listed.</p>
<p><b>SAHRC</b></p> <p>1. Recommends that the Bill stipulates that the criminal route would be reserved for egregious or serious cases which ought to be proven beyond reasonable doubt. Less serious cases must be addressed through PEPUDA.</p> <p>2. Welcomes CI 4(3), but recommends that the DPP should be guided in the decision with reference to the seriousness of the hate speech offence in question. The following is recommended: "Any prosecution in terms of this section must be authorised by the Director of Public Prosecution having jurisdiction or a person delegated thereto by the DPP concerned, <u>which authorisation should only be granted inter alia in the event that the alleged offense is of a serious nature and has caused material harm.</u>"</p>	<p>1. A provision of that nature is inappropriate. An aggrieved person should be afforded the opportunity to decide whether they want to follow the civil PEPUDA or the criminal hate speech route or both.</p> <p>2. The proposed draft does not add value to the provision concerned. There are various factors that a DPP will take into consideration in order to decide whether a prosecution should be instituted or not.</p>
<p><b>Judge Broekhoven</b></p> <p>The wide definition of hate speech is wider than what is required by the Constitution and violates the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief.</p> <p>Expressed the view that it is troubling that criminal sanctions are provided for "hurt" feelings or emotional harm.</p> <p>Expressed the view that the Bill could "rob" persons who belongs to certain faiths of their dignity and should therefore be protected from criminal sanction.</p>	<p>The Department does not agree. The Bill does not criminalise "hurt" feelings. The definition of "harm" must not be read in isolation, but must be read with clauses 3 and 4 and interpreted in context. See, among others, the Annexures dealing with responses on constitutionality</p>

<p><b>Same Love Toti</b>  SC Questions:  1. Should the Bill reflect the findings in the Qwelane judgment?  Response: Yes, subparagraphs 1 and 2 of subclause (1), should, in line with the Qwelane judgment, be read conjunctively as currently reflected in the Bill. It narrows the scope of the definition of hate speech.</p>	<p>Noted.</p>
<p><b>Dr G du Plessis (ADF)</b>  Response to SC request: Recommends the deletion of the clause because it disproportionately limits the right to freedom of expression opening the door to selective enforcement.  The alternative is to amend clause 4 as recommended on pages 4 to 6 of the document as submitted by Dr Du Plessis.</p>	<p>See responses on constitutionality.</p>
<p><b>Clause 5(1)</b></p>	
<p><b>Centre for Social Justice</b>  1. Organisations that work in communities on issues related to violence and its prevention should be recognised as having the ability to assist victims in preparation of statements on crimes of hate including hate speech. A failure to recognise this gap, has the potential of victims slipping in the cracks of non-redress for offences committed against them.</p>	<p>1. It is submitted that discretion to address the court on sentencing should remain with the prosecution. Nothing prevents a prosecutor from consulting with organisations that will be able to assist in addressing the court in sentencing.</p>
<p><b>Western Cape Government, Illita Labantu, Hate Crimes Working Group</b>  1. A victim impact statement is a sworn statement made by a "victim or someone authorised by the victim to make such a statement on behalf of the victim". This does not take into account victims who are unable to authorise the making of a victim statement on their behalf.   Recommends that CI 5 be broadened, and that consideration be given to a set of possible circumstances where the victim is unable to authorise the making of a victim impact statement.   2. CI 5 does not make provision for a viva voce victim impact statement to be adduced in court. In criminal matters, it is common practice, where a victim impact statement (sworn statement) is not available for some reason, to allow the actual victim to testify under oath and provide the court with viva voce evidence. Clause 5 does not seem to recognise this practice. The rationale for a (written) victim impact statement needs to be clarified in clause 5.</p>	<p>1 and 2. CI 5(2)(b) requires that where it is impossible to obtain a VIS that the prosecutor address the court on the reasons for the absence of such a statement. Insofar as viva voce evidence is concerned it is not necessary to expressly provide for it in the Bill.</p>

<p>Recommends that clause 5 should make provision for the prosecutor to call a victim as a witness to adduce viva voce evidence on the impact of the offence.</p>	
<p><b>Scalibrini Centre Cape Town</b></p> <p>1. Encouraged by the provision for Victim Impact Statements (VIS) and the requirement for the victim's authorisation when a person other than the victim is making a VIS. As the section currently provides, a deceased migrant would neither be able to give a VIS nor authorise another person to do so on their behalf.</p> <p>2. The prosecutor should be required to obtain expert input either from the group to which the victim belonged or from organisations which work directly with the group to which the victim belonged. The prosecutor should be required to explain the absence of such a statement in the case of the death of the victim. <b>(Hate Crimes Working Group)</b></p>	<p>1 and 2. It is submitted that discretion to address the court on sentencing should remain with the prosecution. Nothing prevents a prosecutor to consult with organisations that will be able to assist in addressing the court in sentencing.</p>
<p><b>South African Jewish Board of Directors</b></p> <p>1. The SAJBD agrees with the inclusion of a Victim Impact, but recommends the inclusion of a 'Community Impact Statement'. In the UK it is described as a short document illustrating the concerns and priorities of a specific community over a set time period.</p>	<p>1. Proposal not supported. It is trite that a presiding officer should take the interests of the victim, the convicted person and the community at large into consideration when deciding on an appropriate sentence.</p>
<p><b>Hate Crimes Working Group</b></p> <p>1. Supports CI 5(2) but recommends that the subclause should be amended to include the following:</p> <p>(a) someone authorised by the victim to make such a statement on behalf of the victim.</p> <p>(b) in the event of the victim's death, the victim's associate(s).</p> <p>(c) an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.</p>	<p>1. The proposal is supported. CI 5(2)(b) requires that a prosecutor must address the court on the reasons for the absence of a VIS. However, the Department will submit a proposed amendment to the SC for consideration.</p>
<p><b>Clause 6(1)</b></p>	
<p><b>Illita Labantu, COSATU</b></p> <p>1. Welcomes the penalties and orders that courts may impose on offenders of hate crime and hate speech.</p>	<p>1. Noted.</p>
<p><b>South African Jewish Board of Deputies</b></p> <p>1. Supports the provision for perpetrators to be sentenced in accordance with the jurisdiction of the court and that hate crimes have been included in the minimum sentencing regime.</p>	<p>1. Noted.</p>

<p><b>Ecumenical Leadership Council</b></p> <p>1. The Bill establishes offences for hate crimes and hate speech. By requiring that hatred of people due to shared characteristics should be regarded as an aggravating factor in sentencing and by prescribing minimum sentences for such crimes, despite hatred already being considered an aggravating factor for statutory or common law offences, introduces harsher punishment for crimes motivated by hatred.</p>	<p>1. The introduction of a statutory offence (motivated by prejudice, intolerance or hate) is generally accompanied by the introduction of a penalty. Many offences that are motivated by prejudice or intolerance, for example murder, are under certain circumstances already subject to a minimum sentencing regime. However, this does not prevent the Legislature from emphasising that other forms of hate crimes should be viewed in a serious light.</p> <p>The facts of the case will, among others, guide a presiding officer to decide on an appropriate sentence within the parameter determined by the Legislature. The Legislature, by introducing a statutory offence, is sending a very strong signal that these types of crimes, namely hate crimes and hate speech will not be tolerated. It should also be briefly mentioned that the penalty for hate speech is a maximum penalty which leaves it open to the discretion of the court to decide what an appropriate penalty in each case is.</p>
<p><b>Film and Publication Board</b></p> <p>1. The Films and Publications Act, 1996, imposes criminal sentences for offences and highlights the maximum term of imprisonment. There appears to be a duplication of offences in instances where the prohibitions are similar. The offences and penalties listed in the FP Act appears to be more detailed noting the lack of a provision of the maximum fine that may be imposed under the Bill.</p>	<p>1. The ambit of CI 4 of the Bill is wider than the hate speech provision that is reflected in the FP Act. In any event it is a prosecutor's prerogative to decide in which court to institute proceedings and which statutory provisions to use to prosecute an offence.</p>
<p><b>SAHRC</b></p> <p>1. Expresses the concern that the eight year sentence for hate speech may exceed those of other State parties to the ICERD. Comparative research has revealed that hate speech laws vary among different countries as well as its related penalties. Expresses the view that hate speech should not be treated as a more serious offence than hate crimes. Concerned that the Bill may give the impression that a court may issue a reprimand to a person who commits a hate crime, but this option is unavailable in the case of a person who is convicted of hate speech.</p>	<p>1. The sentence proposed in the Bill considers the South African context, as do other jurisdictions take into account their context, which evidences the varying penalties in other countries. 8 years is the maximum sentence, depending on the circumstance of each case.</p>
<p><b>FOR-SA, Heartlines, Suni Ulama Council Gauteng, Democratic Alliance, Association of Muslim Advocates and Lawyers, Council of</b></p>	

<p><b>Charismatic Churches, ACDP</b></p> <p>1. The Bill proposes a maximum jail sentence of eight (8) years (and/or a limitless fine) for a first (and all subsequent) offences of hate speech. The increase in the penalty was introduced in opposition to the many submissions that were made to the PC. The sentence is very harsh for a first offence of hate speech. The maximum sentence for hate speech (at least a first offence) should be dramatically reduced and brought in line with sentences already handed out under the common law crime of <i>crimen iniuria</i>.  Recommends the following:  “(6)(3)(b) The following factors need to be considered when determining sentencing –  (i) The context prevalent at the time the within which the expression was made and the likelihood it would have incited harm against the target group in that context.  (ii) The speaker’s standing in the context of the audience to whom the speech was directed.  (iii) The degree to which the expression was provocative and direct.  (iv) The expression’s reach: the size of its audience, whether the audience had the means to act on the incitement, whether the statement (or work) was circulated in a restricted environment, or widely accessible to the general public.”</p>	<p>1. Presiding officers should be able to exercise their discretion within the bounds of an upper level penalty and that the Legislature should be cautious not to be too prescriptive as this may have unintended consequences.</p>
<p><b>Google, ACDP</b></p> <p>1. The proposed penalties under the Bill are unlikely to address the vulnerability of groups. Recommends that clause 6 should include references to restorative and rehabilitative justice in the form of financial, emotional and community reparations.</p> <p>2. Subclause (3) should be amended as follows:  “(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.</p>	<p>1. It should be kept in mind that the PEPUDA remedies, which remedies are more rehabilitative and restorative in nature, remain available to vulnerable persons.</p> <p>Presiding officers may, in terms of existing legislation, among others, section 297 of the Criminal Procedure Act, 1977, impose sentences which keep convicted persons out of prison, for instance suspended sentences and the postponement of sentences, with appropriate conditions.</p> <p>2. Presiding officers should be able to exercise their discretion within the bounds of an upper level penalty and that the Legislature should be careful not to be too prescriptive.</p>
<p><b>Association of Christian Media</b></p> <p>1. Actual and threatened civil ‘Hate speech’ litigation under PEPUDA has already severely inhibited public debate on controversial issues. 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</p>	<p>1. Hate speech should nonetheless be considered in a serious light. What the Bill requires is responsible and open debates in the public interest and not speech that is aimed solely at damaging the dignity of others.</p>

<p>offence and seven for a second offence).</p> <p>2. The maximum penalty does not differentiate between a person inciting violence and a person expressing an opinion someone else disagrees with. Recommends that the version of the clause, as approved by Cabinet, should be reconsidered:</p>	<p>2. It has been submitted that this is a matter best left to the discretion of presiding officers in deciding what an appropriate penalty in a specific case should be.</p>
<p><b>Centre for Social Justice</b></p> <p>1. Great emphasis is placed on adversarial justice without due regard to non-adversarial processes promoted in African law under Ubuntu. Retributive justice and restorative justice through integration within the justice system could provide plausible avenues of redressing hate crimes and hate speech.</p>	<p>1. It should be kept in mind that the PEPUDA remedies, which remedies are more rehabilitative and restorative in nature, remain available to vulnerable persons.</p>
<p><b>We are tomorrow Global Partnership</b></p> <p>1. Penalties for hate crimes and hate speech should be increased in order to serve as a stronger deterrent. Recommends increasing the maximum sentence for hate crimes and hate speech, and the introduction of fines and community service orders as additional penalties.</p>	<p>1. Many forms of hate crimes are already subject to the minimum sentencing regime and it is therefore not possible to increase penalties for these types of offences. Insofar as hate speech is concerned it may be appropriate to retain the maximum of eight years or a fine at this stage.</p>
<p><b>Afriforum, Democratic Alliance, Association of Muslim Advocates and Lawyers</b></p> <p>1. Highlights the importance of the right to freedom of expression by referring to its role in a functioning democracy, the search for truth and the personal development of citizens. It is submitted that the prohibition in the Bill is a severe infringement on the right because of the penalty that it imposes and the perturbing effect it has on freedom of expression.</p> <p>Recommends the following wording:</p> <p>6. (3) When determining the sentence for any person convicted of an offence referred to in section 4, a court may impose one or more of the following penalties by requiring the offender to:</p> <p>(a) be imprisoned for a period not exceeding three years, only in cases where the offender incited harm against a person or group of persons and the person or group of persons suffered actual harm;</p> <p>(b) make an unconditional apology;</p> <p>(c) perform acts of community service;</p> <p>(d) pay to the victim or an organisation that represents the victimised group–</p> <p>(i) an amount not exceeding R100 000 in the case of a first conviction; or</p> <p>(ii) an amount not exceeding R500 000 in the case of any subsequent conviction.</p>	<p>1. It has been mentioned earlier in the document that the provisions of CI 4 have been carefully drafted to ensure the necessary balance between freedom of expression and the right to dignity. It is further submitted that the imposition of a penalty is a matter for judicial discretion, among others, based on the fact that a presiding officer is in the best position to take all relevant factors into consideration to decide on a penalty to be imposed.</p>
<p><b>Judge Broekhoven</b></p> <p>The proposed jail sentence of 8 years, even for a first offence, poses a threat to freedom of religious</p>	<p>The 8 year period is a maximum period of imprisonment. Sentencing is left to the</p>



expression. No-one will be protected from such a jail sentence.	discretion of the courts to determine an appropriate sentence having regard to all relevant factors of every case. See also Annexure "C".
<p><b>Same Love Toti</b>  SC question:  1. Please express an opinion on the maximum sentence of 8 years?  Response:  Expresses no objection to maximum sentence of 8 years. Less serious offences will be punished accordingly.</p>	Noted.
<p><b>Dr G du Plessis (ADF)</b>  Response to SC request: Clause 6(3) should be amended to only make reference to fine and not imprisonment.</p>	The Department does not agree. See the above response regarding the discretion of courts in sentencing. See also Annexure "C".
<b>Clause 7</b>	
<p><b>Google, South African Jewish Board of Deputies</b>  1. Cl 7 should be amended to include a time period (90 days) in which the NDP should issue directives in terms of the Bill.</p>	1. Proposal is not supported. Directives should ideally only be available when the regulations have been developed which will pave the way for the commencement of the Bill.
<p><b>Illita Labantu</b>  1. Welcomes the coordination and collaboration between SAPS, DoJCD and NPA to align efforts and work together on issuing instructions and directives.</p>	1. Noted.
<p><b>Centre for Social Justice</b>  1. Directives are provided for to allow for approaches to be followed in prosecuting hate crimes and speech. Special education similar to Equality Court prescriptions is not included.</p>	1. Cl 9(3) provides for training courses to be developed by SAJEI.
<b>Clause 8</b>	
<p><b>Hate Crimes Working Group</b>  1. Supports the provisions of clause 8 (<b>Centre for Social Justice</b>).</p> <p>2. Submits that due to the public interest nature of hate crimes and hate speech Cl 8(2) must be extended to the public. The information contemplated in clause 8(1) must be available to the public.</p>	<p>1. Noted.</p> <p>2. The mere fact that the information must be submitted to the institutions that are listed in Cl 8(2) will render such information as automatically available to the public.</p>
<p><b>Centre for Social Justice</b>  1. Mandatory reporting is supported. It will give an indication of the extent to which the problem is</p>	1. Noted.

declining or escalating.	
<b>Clause 9</b>	
<p><b>South African Jewish Board of Deputies, Illita Labantu</b></p> <p>1. Welcomes introduction of a duty on the state to prevent and combat hate crimes. Key departments have not been listed. The duty to “cause programmes to be developed” is too vague.</p>	<p>1. Noted. Other key departments will as a matter of fact in any event be consulted.</p>
<p><b>Hate Crimes Working Group</b></p> <p>1. Supports provisions of Cl 9, but suggests that adequate funding should be allocated to strengthen the work of the awareness campaigns and trainings of officials. Experts in sexual orientation, gender identity and sex characteristics should be consulted along with civil society organisations.</p>	<p>1. Consultation with experts and civil society organization will in any event take place.</p>
<p><b>Cause for Justice</b></p> <p>1. Cl 9(2)(c) and 9(3) creates a risk insofar as “social context training” is concerned for individuals, groups or officials to do propaganda for their own agendas/ideological commitments with the force of the state behind them. Recommends that all references to “social context training” should be deleted.</p>	<p>1. All the programmes referred to in Cl 9(2) will have to be objective and presented accordingly.</p>
<p><b>Centre for Social Justice</b></p> <p>1. Cl 9 does not make it mandatory that only appropriately trained officers and officials should handle matters.</p>	<p>1. It should be kept in mind that officers and officials work on a daily basis with underlying offences and on fairly regular basis with offences such as <i>crimen iniuria</i>. It might be more appropriate not to introduce a requirement in respect of appropriately trained officers and officials, but rather leave training to be conducted as and when necessary.</p>
<b>Clause 10</b>	
<p><b>FOR-SA, Association of Christian Media</b></p> <p>1. The Bill makes provisions for regulations (drafted by the Executive) to be deemed approved within 60 days after having been referred to Parliament. This will grant the Executive the power to make regulations without Parliament having the opportunity to consider and approve them. This oversight should be remedied to allow Parliament an adequate opportunity to provide the necessary oversight over regulations.</p>	<p>1. The provision provides sufficient assurance for Parliamentary oversight.</p>
<p><b>Association of Christian Media</b></p> <p>1. The Act will result in substantial additional costs to SAPS and the NPA. Recommends that prior to</p>	<p>1. Provision is made for the Minister of Justice and Correctional Services to</p>

<p>approving the Bill, the Cabinet member responsible for finance should be requested to approve a budget for the implementation of the Bill after consulting with SAPS and the NPA.</p>	<p>consult with the Minister of Finance where any draft regulations may have financial consequences.</p>
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**The Democratic Alliance submitted additional matters for discussion with the Department.**

The Democratic Alliance discussed broadening artistic creativity, in Section 4(2)(a) under matters done in good faith, to include “literary, comedic or satirical”. The Department explained that the words artistic creativity in the Bill encapsulates literary, comedic or satirical expression as part of that creativity and for this reason including it is not necessary. Furthermore, the inclusion of the words “literary, comedic or satirical” excludes other areas of artistic creativity whereas artistic creativity encapsulates a wider range of artistic expression.

The Democratic Alliance discussed including in Section 4(2)(d) “as protected in section 15 of the Constitution” to emphasize the protection afforded by the Constitution but the Department indicated that the wording was stating the obvious in terms of the principle of Constitutional supremacy.

The Democratic Alliance discussed including a protection for “Political debate”, however the Department indicated that political debate is protected in terms of parliamentary Rules.

The Democratic Alliance discussed including the wording “the sharing of anything done in good faith contemplated in (a) to (e) above” with the Department responding that the sharing of anything done in good faith, is purely a subjective test created because the person who shares the information could subjectively believe that whatever had been said was done in good faith.