**SUBMISSION ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL**

**INTRODUCTION**

1. Due to time constraints this submission deals only with the provisions in this Bill relevant to the proposed criminalisation of hate speech. The absence of submissions on the hate crime provisions must not be construed as unqualified support of these proposals.

**PROPOSED CRIMINALISATION OF HATE SPEECH**

2. ***Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC)** has been described as the “lodestar” in relation to how our country should approach the limitation of the right to freedom of speech. In this judgement the Constitutional Court importantly held as follows:

*“[S]ection 16(2) therefore defines the boundaries beyond which the right to freedom
of expression does not extend. . . . Implicit in its provisions is an acknowledgement
that certain expression does not deserve constitutional protection because, among
other things, it has the potential to impinge adversely on the dignity of others and
cause harm. Our Constitution is founded on the principles of dignity, equal worth
and freedom, and these objectives should be given effect to.****There is accordingly no bar to the enactment of legislation that prohibits such
expression. Any regulation of expression that falls within the categories enumerated in section 16(2) would not be a limitation of the right to section 16.****Where the State extends the scope of regulation beyond expression envisaged in
section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the
Constitution.”* (my emphasis)

3. In relation to this passage the Court further held in ***Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25** (hereinafter referred to as “***EFF***”) that *“What the Constitution gives an unrestrained leeway to proscribe, is expression or words meant to cause “war”, “imminent violence” and specified forms of “harm”.* ***Incitement to cause war or commit imminent violence would, if criminalised, thus not constitute a limitation of the right to freedom of expression.*** *The thrust of section 16(2)(c) is to disallow practices, tendencies and laws of our ugly and unjust past any space to find expression or application. When one incites others, under the guise of freedom of expression, to cause race- or gender-based harm, the inciter may not look to section 16(1) for exoneration.”* (our emphasis)

4. While must 3be remembered that the constitutionality of the Riotous Assemblies Act, 17 of 1956 was *inter alia* at issue in ***EFF*** it must follow that, in principle, the Court found that the criminalisation of the unprotected speech contemplated by section 16 of the Constitution would likely not to be seen as a limitation of the right to freedom of expression.

5. From this, it must follow that to determine whether the criminalisation of hate speech based on the prohibited grounds set out in section 16 of the Constitution (i.e. race, ethnicity, gender or religion) would pass constitutional muster would in all likelihood be a simpler exercise than a determination whether criminal hate speech on other grounds are constitutionally compliant. Given that hate speech was not at the heart of the matter in ***EFF***the guidance by the Court in ***Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22** (hereinafter referred to as ***Qwelane***), set out below, should, however, be considered along with this remark.

6. Paragraphs 90 and 91 of ***Qwelane*** made it clear that whether the proscription of speech takes the form of criminalisation or not would also be an important factor to determine whether it passes constitutional muster or not. The Court issued, in very clear terms, the following guidance on the circumstances in which criminalisation would be deemed as justified:

*“[90] …..Our approach accords with that of the United Nations Rabat Plan of Action where it is recommended that:*

*“Criminal sanctions related to unlawful forms of expression should be seen as* ***last resort measures to be applied only in strictly justifiable situations****. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply.”*

7. From these findings it must follow that the criminalisation of hate speech based on race, ethnicity, gender or religion (as set out in section 16 of the Constitution) could be more easily achieved, given that hate speech, in relation to these criteria, is not part of constitutionally protected speech. However, in light of the findings by the Court in paragraphs 90 and 91 of ***Qwelane,*** it might still be necessary, in order impose criminal liability for these forms of hate speech in a constitutionally compliant manner, that Parliament satisfy itself that that the measures contained in the current equality legislation have been insufficient in serving the purpose of rooting out and preventing discrimination on the basis of these criteria and that as a consequence hate speech on these grounds has increased, or at the very least have not decreased, since the introduction of the current legislation.

8. Parliament, in order to validly impose criminal liability is, in our view, therefore under an obligation to source and consider evidence in this regard and may proceed to impose criminal liability only if, amongst other things, it is convinced that the introduction of criminal provisions is the only available course of action.

9. Under the heading **“*The nature and importance of free expression****”* the Court in ***EFF*** ultimately held that “potential harm” would not be sufficient to pass constitutional muster when even unprotected speech is criminalised. Furthermore, it emphasised that the purpose of the limitation must be “specific, pressing and substantial”:

***“[46] ….. It cannot therefore be correct to criminalise the incitement of any offence that does not even pose danger or serious harm to anything or anybody…. [49] What is however required is that the purpose of criminal legislation,…. be much more than the ordinary need to protect society from potential “harm”, to pass constitutional muster. Additional to being legitimate, the purpose must still be specific, pressing and substantial for that legislation to be regarded as reasonable and justifiable in its limitation of free expression.”*** (our emphasis)

10. In the same vein the Court at paragraph 42 held that the harm suffered through hate speech must be of a “serious” nature in order to justify criminalisation:

*“A reminder of where we were just over 26 years ago is necessary for context.
Then, expression was so extensively and severely circumscribed that a person could
be arrested, banned, banished or even killed by the apartheid regime for labelling as
unjust, what everyone now accepts is unjust. Inciting people to protest against
apartheid – a crime against humanity – or to break its unjust laws, was not only
criminalised but could also attract untold consequences. Thought control or enforced
conformity was virtually institutionalised.* ***Free expression is thus a right or freedom so dear to us and critical to our democracy and healing the divisions of our past, that it ought not to be interfered with lightly – especially where no risk of serious harm or danger exists.”*** (our emphasis)

11. From this judgement, in our view, it must follow that “serious risk or potential for harm” must be present in order to contemplate criminalisation – a risk that must be “specific, pressing and substantial”. Nonetheless, the criminal act can only be present once the serious harm has materialised in order for criminalisation to pass muster.

12. It therefore must follow that it should be carefully considered whether the current definition of hate speech, as contained in the Bill, stands any chance of passing constitutional muster in relation to criminal hate speech.

13. It is, in our view, also the duty of Parliament to satisfy itself, before expanding the list of criteria in respect of which hate speech may be criminalised, to satisfy itself that the hate speech experienced by the groups that meet these criteria is “specific, pressing and substantial”.

14. In relation to the possibility of expanding the criteria applicable to possible criminal hate speech it is important to also consider that In ***EFF*** the Courtdealt further with the issue of how a constitutionally valid limitation on protected speech is to be achieved, when it held that:

*“[33] Section 16(2) does not therefore constitute a limitation of free expression and it cannot have any role to play in determining what constitutes a reasonable and justifiable limitation of free expression.* ***That said, although legislation would clearly be on safer territory if it conforms to the dictates of section 16(2), it may also be permissible to venture across the boundary lines of protected expression. But, that would be conditional upon the existence of reasonable grounds to justify that encroachment.*** *Like all other open and democratic societies based on constitutional values of universal application, we ought to “permit reasonable proscription of activities and expressions”, if they “pose a real and substantial threat to such values and to the constitutional order itself”.* (our emphasis)

15. Under the heading **“*Justification analysis: The approach to limitation”*** the Courtmade the following remarks that, in our view, are all very important for the Committee in the processing of the Bill and the proposed additional criteria:

*[35] It is necessary to give proper context to a section 36 proportionality-based
justification analysis.* ***Whenever a fundamental right has been limited by a law of
general application, it is required of the State or any party seeking to uphold the
limitation to give good reason for a court to excuse that interference with a right*** *so important. It is indeed correct that “although section 36(1) does not expressly
mention the importance of the right, this is a factor which must of necessity be taken
into account in any proportionality evaluation”. For, the rights in the Bill of Rights
are an embodiment of the very character or cornerstone of our constitutional
democracy. Both the nature and importance of the right must necessarily be taken
into account. And* ***the State has no inherent “right” to limit these rights.*** *But it is
constitutionally obliged to respect, protect, promote and fulfil them. It may only be
permitted to limit them if the limitation is reasonable and justifiable in a value-based
constitutional democracy.*

*[36] The values and principles that are essential to a free and democratic society
must guide our courts. They are, after all, foundational to our democracy and the high
and ultimate standard by which a limitation of guaranteed rights may be reasonably justified****. Only where the exercise of these rights “would be inimical to the realisation of collective goals of fundamental importance” would their limitation be reasonable and justifiable in a free and democratic society****. The explicit but inexhaustive justificatory criteria set out in section 36(1) also have a crucial role to play in the weighing up of competing values “to reach an assessment founded on
proportionality.*

*[39] That exercise entails a reflection on the historical origins of the concept or right
entrenched and the cardinal values it embodies.* ***The analysis must thus be premised on the ever-abiding consciousness that the impugned limitation violates rights and freedoms which are guaranteed by the supreme law of the Republic****. And courts must approach this exercise alive to the constitutional obligation to uphold the rights in the Bill of Rights. The contextualisation of the interpretive exercise with reference to a free and democratic society as part of the standard for justifying the limitation of rights speaks to “the very purpose for which the [Bill of Rights] was originally entrenched in the Constitution.*

***[40] An approach to the justification analysis that seems to move from the premise that a legitimate governmental objective for the limitation automatically renders the limitation reasonable and justifiable or somehow shifts the burden to citizens to explain what is wrong with the limitation or why their constitutional rights deserve protection, would be misplaced. The purpose for the limitation, however legitimate and laudable, must still earn its juxtaposition to the right it inhibits. The burden to prove that it passes constitutional muster rests primarily on the State. And that is so because the obligation to give these rights the space to flourish rests on the same State that may limit them, in a constitutionally permissible manner.”***

16. In paragraph 41 the Court in a practical manner explained the task at hand in ***EFF*** as follows:

*“The question to be addressed is whether its limitation of free expression, admittedly meant to serve and advance a legitimate and important societal and governmental purpose, is proportionate to this obviously noble objective. In other words, does it restrict free expression as little as possible or minimally? Or did Parliament “overreach itself in responding to [this] matter of great social concern” – crime prevention.”*

17. Mindful that at issue in this case was the constitutionality of the Riotous Assemblies Act, we submit that the “social concern” in play when the proposed criminal hate speech is considered is not necessarily the prevention of crime, but rather the achievement of the aspiration expressed in the preamble to the Constitution, i.e. to “*Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”* and the realisation of constitutional founding values like*“Human dignity, the achievement of equality and the advancement of human rights and freedoms.”*

18. On the possibility of expanding the criteria applicable to hate speech the Court held as follows in ***Qwelane:***

*“[128] Through a recent amendment to section 1(a) of the Equality Act, discrimination on the ground of HIV/AIDS status was included as a prohibited ground. The remaining potentially vexed inclusions are those that are wide-ranging and that may elicit apprehension about interference by the draconian “thought police”, like the concepts “conscience” and “belief”. There are well-grounded fears that their inclusion may impermissibly encroach upon the right to freedom of expression. Some of the amici make insightful submissions in this regard. However, since this is not an issue that is before this Court for confirmation and, particularly in view of the absence of judgments on this point by the High Court and the Supreme Court of Appeal, it is not in the interests of justice to engage with this issue.* ***It is best left to Parliament to deal with****.”* (our emphasis).

19. While it is clear that, on the basis of this remark, concepts like “conscience” and “belief” were removed from the Hate Speech and Hate Crimes Bill, it is submitted that these two concepts were merely used by the court as examples of the “remaining potentially vexed interference” with the right to freedom of speech. To merely remove these two examples cannot be enough to properly discharge the constitutional obligations of Parliament.

20. In expanding the list of criteria, while simultaneously criminalising hate speech, it can never be as simple as extracting from current legislation and public submissions criteria that already apply to legislation aimed at preventing discrimination as part of the constitutional project and criteria that in the view of members of society warrants inclusion.

21. In substantiation of this view attention is firstly drawn to paragraph 130 in ***Qwelane*** where the Constitutional Court (in the context of hate speech ito existing equality legislation) held that:

*“It bears emphasis that the prohibition of hate speech seeks to protect against the dissemination of hatred that causes or incites harm, in that it undermines the dignity and humanity of the target group and undermines the constitutional project of substantive equality and acceptance in our society. Provisions prohibiting hate speech can be* ***contrasted*** *with our law around unfair discrimination. In that context,* ***listed grounds are grounds where the “dignity assessment” is presumed to have already been done – our jurisprudence tells us that discrimination on the basis of a listed ground is presumed to be unfair. This is based on past experiences, historic suffering or systemic disadvantage.*** *As a result, in the unfair discrimination scenario, the onus shifts onto the respondent to show that discrimination on a listed ground is not unfair. In this regard, listed grounds differ from analogous grounds, where unfairness must be shown.“* (our emphasis)

22. It is therefore clear that the list of vulnerable groups that are afforded protection through hate speech provisions and the list of vulnerable groups that are afforded protection through anti-discrimination provisions cannot simply be integrated as a policy choice. It clearly serves a different purpose in our constitutional project. Each such inclusion must be weighed and evaluated carefully, each according to its own merits.

23. The Court in ***Qwelane*** explained this further in paragraph 133 where it remarked that *“While it is essential that targeted groups are not overly broad, it is equally clear that, since section 10(1)(b) does* ***encapsulate and require certain elements that underscore the importance of membership, systemic discrimination and the undermining of dignity****, this does not leave the door open for the addition of analogous grounds that allow for an unjustifiable limitation of the right to freedom of expression.”* (our emphasis)

24. It is further submitted that the Court gave a good indication of how the list of criteria could be expanded in a constitutionally compliant manner. In paragraphs 179 – 180 of ***Qwelane*** the Court sets out the basis on which the expansion of the list to include sexual orientation is warranted and justified.

25. It is our view that for the Legislature to expand the list of criteria beyond the list of impermissible speech contained in section 16 of the Constitution in a constitutionally compliant manner, an approach will have to be followed where the Committee must satisfy itself that the suggested groups are objectively identifiable as a vulnerable group that has been the subject of systemic discrimination. Guidance should also be taken from ***Qwelane*** where the Court relied on expert evidence, as well as the testimony of victims, in order to include “sexual orientation” as a group.

26. From this part of the ***Qwelane*** judgement it stands to be argued that not only will Parliament need to be satisfied that the vulnerable groups are the target of systemic discrimination in order to contemplate criminalising hate speech aimed at members of such groups, but we will also have to be satisfied that the discrimination is **specific, pressing and substantial.** Furthermore, it is clear that Parliament must be satisfied that the time has indeed arrived to criminalise speech aimed at the groups that satisfy these criteria as a measure of last resort.

27. In this regard it is submitted that evidence must be presented that the measures contained in the current equality legislation have been insufficient in serving the purpose of protecting the rights of members of vulnerable groups and that as a consequence hate speech as part of systemic discrimination against these groups has increased since the introduction of the current legislation, or, at the very least, has not decreased. Once again Parliament is, in our view, under an obligation to source and consider evidence in this regard in order to be convinced that the introduction of criminal provisions is required or justified.

28. Given that this is a Bill introduced by the Executive it must firstly follow that the Executive is under an obligation to supply the information that would enable Parliament to form the view that criminalisation, and the expansion of criteria, is justified in terms of the Constitution.

29. However, Parliament must also consider whether it could, in any way or form, be contemplated, as part of criminalisation, to extend the list beyond the list to which current hate speech provisions apply. If it is accepted that criminalisation can only be a measure of “last resort” it must surely follow that any additional criteria must first be added to the equality legislation that contains measures other than criminalisation. Only if and when it becomes clear that these measures are not effective in assisting members of the vulnerable groups to which these additional criteria apply, could consideration be given to impose criminal liability in respect of these criteria.

30. In addition, we are of the view, that Parliament should be guided by the following passage in ***Qwelane***, where the Court accepted the following definition of hatred, and include this definition in the Bill:

*[103] ….As mentioned above, the Supreme Court of Canada persuasively defined, in the context of hate speech, the legislative term “hatred” as****—“being restricted to manifestations of emotion described by the words ‘detestation’ and ‘vilification’.*** *This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimisation and rejection that risks causing discrimination or other harmful effects.”*

31. In respect of the meaning of the terms harmful the Court in Qwelane held as follows:

*[154] … On a plain reading, “harmful” can be understood as deep emotional and psychological harm that severely undermines the dignity of the targeted group. In Keegstra, the Supreme Court of Canada eloquently summed up two types of interconnected harms that resonate with the ethos of our diverse constitutional democracy, namely “harm done to the members of the target group” and harm done to “society at large”. Similarly, in SAHRC v Khumalo, three types of harm were illustrated. First, “the reaction of persons who read the utterances and who are inclined to share those views and be encouraged by them to also shun, denigrate and abuse the target group”. Second, the type of harm experienced by the target group which includes “demoralisation and physiological hurt” and “the harm caused from responding in kind thereby creating a spiral of invective back and forth”. And third, “harm to the social cohesion in South African society” which can undermine our nation building project.”*

32. In respect of “harm” the Court in Qwelane referenced “physical harm” and “physiological harm” (see paragraph 26), as well as “societal harm” (see paragraph 109 and 121) and “emotional harm” (see paragraph 154) approvingly.

33. Apart from the findings by the Constitutional Court around the need for “serious” harm to be caused in order for criminalisation to possibly pass constitutional muster, we respectfully point out that it would be difficult to justify the inclusion of a definition of “harmful” and “harm” that goes beyond the manner in which the Court has defined the concept (in relation to equality legislation), while criminalising speech that caused harm. In this regard we specifically point out that none of the applicable *dicta* or equality legislation has, up to now, included “cultural harm”. Therefore, in the absence of a proper definition and justification for the inclusion of “cultural harm” we submit that it will not be able to pass muster.

34. In light of the above, the wording of the “exceptions” should also, in our opinion, be revisited. Apart from the fact that harm, rather than potential harm, must be used as a yardstick in crafting the exceptions, it should also be considered whether the manner in which the exceptions are crafted strikes the correct balance in relation to manner in which the academic community and the different religious communities enjoy the protections afforded to it in the Constitution.

35. Lastly, we are of the view that, in order for criminalisation of hate speech to pass constitutional muster, a clear distinction between speech that must be dealt with by way of equality legislation and speech that may be dealt with by way of criminal prosecution must be carefully considered. Simultaneously, for criminal provisions to pass muster, some emphasis needs to be placed on the need to facilitate rehabilitation.

36. Therefore, in summation, we submit that there is still much work to be done on the crafting of this Bill, with particular reference to the definition of criminal hate speech, the definition of harm for the purposes of criminalising hate speech, the definition of hatred, the expansion of the list or categories currently included and the wording of the exceptions, before we, as legislators, can be satisfied that we have given proper and substantive consideration to the criminalisation of each specific category, and that we have done that which the Constitution enjoins us to do.