THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

Ms T Ross
The Department of Justice and Constitutional Development
Private Bag X81
Pretoria
0001

Attention: Ms Ross
Per email: **hatecrimes@justice.gov.za**

31 January 2017

Dear Ms Ross

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

1. FW de Klerk Foundation (the Foundation) is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (the Constitution). To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.

2. Accordingly, the Foundation endeavours to contribute positively to the promotion and protection of our constitutional democracy. This includes the achievement of real and substantive equality and equitable access to land and other resources, but with due regard for those rights concerning property and administrative action that is lawful, reasonable and procedurally fair, as provided for in the Constitution.

3. As such, the Foundation welcomes the opportunity to make a concise submission to the Department of Justice and Constitutional Development (the Department) regarding the *Prevention and Combating of Hate Crimes and Hate Speech Bill* [Notice 698 of 2016] http://www.justice.gov.za.

4. In this regard, please find attached our submission for the Department's attention and consideration.

5. We trust that our submission will be of assistance in guiding the Department in its deliberations regarding the Bill.

Yours Sincerely,

Dr Eloff, Executive Director

Ms Dube, Director: Centre for Constitutional Rights

Ms Z Dawood, Director: Centre for Unity in Diversity

A. EXECUTIVE SUMMARY OF THE FOUNDATION'S CONCERNS IN RELATION TO THE BILL

1. INTRODUCTION TO APPROACH BY THE FOUNDATION

1.1. At the outset, the Foundation wishes to state that the hard work of a building a free, open and equal society is very much a work in progress. The Foundation has studiously condemned acts motivated by hate based on race, gender or any form of discrimination and will continue to do so.

1.2. We do, however, assert that the right to freedom of expression, which was valiantly fought for, should be strenuously defended in a robust democracy to shape the country we wish to leave for future generations.

1.3. Our approach was to draw a clear distinction between the offences of hate speech and hate crimes created in this Bill.

1.4. The focus of this submission is the constitutionality of the offence of hate speech created in clause 4(1)(a) of the Bill and we followed a two-stage approach in this regard. We first considered whether the expression of hate speech prohibited falls within the constitutional definition of hate speech in section 16(2) of the Constitution. Secondly, we considered whether, despite falling outside these constitutional parameters, the offence can still be justified as a reasonable limitation on the right to freedom of expression in terms of section 36 of the Constitution. We also point out that the creation of an offence of hate speech could be open to abuse and unintended consequences.

1.5. We only briefly considered the offence of hate crimes and sentencing thereof and the submission does not provide an in-depth analysis of this offence. For ease of reference, this Executive Summary succinctly sets out our findings below which is followed by a more comprehensive legal analysis and other considerations of the Bill. In conclusion, the Foundation proposes certain recommendations which we hope is of assistance to the Department.

2. SUMMARY OF FINDINGS

2.1. THE OFFENCE OF HATE SPEECH

2.1.1. The heading of clause 4 of the Bill which reads "Offence of hate speech" is fundamentally flawed as it presupposes that the criminal offence created in terms of clause 4(1)(a) relates to hate speech as captured in section 16(2) of the Constitution.

2.1.2. We found that that the various forms of hate speech created in the sub-clauses of clause 4(1)(a) are much wider than the scope of section 16(2) of the Constitution.

2.1.3. To qualify as hate speech under section 16(2)(c) of the Constitution, the expressions prohibited have to relate to the narrow category "advocacy of hatred" based on limited prohibited grounds of "race, ethnicity, gender or religion" which also "constitutes incitement to harm". Not only is there a list of 20 undefined prohibited grounds, but there is also a clear break from the need to show that there is a reasonable likelihood of harm occurring, be it either physical or emotional, which is a clear disregard of the interpretation of "constitutes incitement to harm" as required in section 16(2)(c) of the Constitution.

2.1.4. We furthermore submit it cannot be argued that the undefined words "threatening" to "stir up violence" will qualify under section 16(2)(b) of the Constitution, which relates to "incitement to imminent violence". Firstly, these aforementioned words are not in line with constitutionally accepted terminology and secondly, they do not necessarily confer a real risk of lawless action.

2.1.5. We therefore submit that the clause 4(1)(a) falls outside the scope of section 16(2) of the Constitution and does not deserve constitutional protection.

2.1.6. Therefore, we are in fact dealing with the criminalisation of various forms of expression in clause 4(1)(a), which can only be justified if it succeeds the limitation enquiry in terms of section 36 of the Constitution (the limitation enquiry).

2.1.7. The limitation enquiry weighed the rights to dignity and equality against the freedom of expression, and we analysed whether the nature and extent of the limitation can be justified considering lesser restrictive means to achieve the purpose. On analysis of this clause, we also considered foreign law approaches to the curbing of hate speech by means of criminal law and we generally found a very a cautious approach and that the criminal offences were narrowly tailored.

2.1.8. We found that clause 4(1)(a) loses sight that the focus of curbing hate speech is not on the mere expression, but on the potential of this extreme public manifestation of emotion to expose a vulnerable group of people to further discriminatory attacks.

2.1.9. We furthermore submit that the list of undefined forms of communication do not necessarily relate to public forms of expressions. Furthermore, if read with certain undefined words such as “abusive or insulting” which “bring into contempt or ridicule” to “a person or group of persons”- it provides too low a threshold. These aforementioned words cannot reasonably be associated with extreme contempt, which could objectively expose a vulnerable group of people to further attacks. We are also concerned that there might be conflict between terminology used in other proposed and existing legislation, which also prohibits hate speech.

2.1.10. We submit that it is concerning that no definitions are provided for the long list of characteristics on which the expression is based, besides for the definition of “intersex”. Furthermore, we submit that the listed grounds such as “occupation or trade” cannot be reasonably justified as inherent markers associated with the dignity of a person. This also links up to our concern that the definition of a “victim” in clause 1 should not refer to a juristic person as it should only be the inherent, unchangeable characteristics of a natural person.

2.1.11. Lastly, in addition, we believe that clause 4(1)(a) in its entirety is open to unintended consequences and possible abuse. All of these relate to the legitimate freedom of expression, as protected by section 16(1) of the Constitution. It could even impact negatively on the protected freedom of religion, belief and opinion, protected in terms of section 15 of the Constitution.

2.1.12. There are in our opinion adequate legal remedies already available for those who may suffer the consequences of hate speech. The *Promotion of Equality and the Prevention of Unfair Discrimination Act* of 2000 (PEPUDA) provides unique civil remedies and with proper legislative reform it will be able to address hate speech in the modern day. Furthermore, there is the common-law remedy of *crimen injuria* which is often also applied in addition the civil remedies in PEPUDA.

2.1.13. We therefore found that clause 4(1)(a) of the Bill and the subsequent clauses in reference thereto cannot be justified as a reasonable imitation on the right to freedom of expression in terms of section 36 of the Constitution, and is unconstitutional.

2.2. **THE OFFENCE OF HATE CRIMES**

2.2.1. On analysis of the offence of hate crimes created in clause 3 of the Bill, the Foundation does not have many concerns besides the list of characteristics, which we discuss further below.

2.2.2. We in essence are in favour of the Bill's intention to distinguish hate crimes from ordinary crimes as it currently appears that there is a lack of statistics regarding the prevalence of these types of incidents in South Africa. By creating a proper distinction, data collection and reporting of these incidents will be made possible.

2.2.3. We do, however, have a few key concerns regarding clause 3 of the Bill. Firstly, we advise possible overlap of undefined wording used - such as "prejudice", "bias" or "intolerance" - should be avoided and we refer to our comment above regarding the definition of a "victim". We also refer to our comment on the offence of hate speech regarding the long list of undefined characteristics and the reference to "occupation or trade".

2.2.4. In our brief consideration of international approaches to hate crimes we have noted that it is crucial that hate crimes require two elements, namely a base offence - an act which would constitute a criminal offence such as murder or arson, in terms of criminal law, and then secondly, this criminal offence must have been driven by a "biased motive". We submit it should be clear in clause 6(1) and (2) in relation to the sentencing of hate crimes that the person was found guilty on the base offence and the "biased motive" must only be an aggravating circumstance to be considered at sentencing of the base offence. If there is no base offence committed in terms of our criminal law then no hate crime could exist.

3. RECOMMENDATIONS

3.1. The offence of hate crimes should indeed be created as the lack of distinction has obstructed proper recording and monitoring of these incidents.

3.2. On a practical ground, the reference to "hate speech" in this Bill should be excluded to ensure that the need to address hate crimes in our criminal law is not delayed.

3.3. Before the Department considers drafting proposed criminal measures to deal with hate speech, proper legislative reform of PEPUDA has to be undertaken and a proper census has to be taken to determine whether there is a pressing societal need to address hate speech within criminal law over and above PEPUDA.

3.4. If it is found by the Department that there is in fact a dire need to address hate speech by means of criminal law, as narrowly defined in terms of section 16(2) of the Constitution, then foreign law approaches in this regard should be considered in line with section 39 of the Constitution. In this regard, we submit that the Canadian approach to clear statutory defences regarding the narrowly defined criminal offence of hate speech should be considered and applied.

3.5. We recommend that the parameters of what racism is, should be added to the definition section, considering international and South African factors, but not limiting racism to any one race group.

B. LEGAL ANALYSIS OF THE BILL

1. CONSTITUTIONAL AND INTERNATIONAL LAW GUIDANCE ON THE INTERPRETATION OF THIS BILL

1.1 Constitutional and international law guidance on the analysis of Hate Speech

1.1.1 The right to freedom of expression as provided for in section 16(1) and (2) of the Constitution echoes South Africa's international obligation in terms of article 19 and 20 of the *International Convention on Civil and Political Rights* (ICCPR).[1] The ICCPR binds respective State parties to uphold civil and political rights and any measures proposed to curb civil and political rights must be in line with the ICCPR.

1.1.2 In line with article 19(2) of the ICCPR, section 16(1) of the Constitution, gives effect to the receipt and imparting of information in all forms and provides that -

> "(1) *Everyone has the right to freedom of expression, which includes* -
>
> *(a) freedom of the press and other media;*
> *(b) freedom to receive and impart information or ideas;*
> *(c) freedom of artistic creativity; and*
> *(d) academic freedom and freedom of scientific research".*

1.1.3 The United Nations' comment[2] (the Comment) on the rights to freedom of expression and opinion in the ICCPR, highlight that these rights are crucial to stimulate debate in a democratic society and to give effect to other civil and political rights, such as the right to vote.

1.1.4 In the matter of *Print Media South Africa v Minster of Home Affairs and Another* (Print Media)[3], Justice van der Westhuizen emphasised the importance of the right to freedom of expression in a democratic society and stated -

> "*Being able to speak out, to educate, to sing and to protest, be it through waving posters or dancing, is an important tool to challenge discrimination, poverty and oppression.*"[4] (own emphasis)

1.1.5 However, the right to freedom of expression is not an absolute right, which is also emphasised in article 19(3) of the ICCPR. The right can be legitimately restricted to protect the rights of others, such as the right to dignity and equality as claimed in the preamble of the Bill.[5]

1.1.6 In terms of section 36 of our Constitution a right in the Bill of Rights can be justifiably limited but must succeed the limitation threshold provided in this section. The limitation threshold specifically provides that it must be a law of general application and certain factors must be weighed to justify that the limitation would be reasonable in an open and democratic society.

1.1.7 The factors listed in section 36(1) provides consideration of -

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[1] South Africa ratified the ICCPR in 1998.
[2] General Comment No. 34 by the United Nations' Human Rights Committee 102nd session, Geneva, 11 - 29 July 2011.
3 2012 (6) SA 443 (CC).
[4] At paragraph 92 of the Judgment.
[5] Article 19(3) of the ICCPR specifically states that -
"3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
For the respect of the rights or reputations of others;
For the protection of national security or of public order (ordre public) of public health or morals." (own emphasis)

(a) "the nature of the right;
(b) the importance and the purpose of the right;
(c) the nature and the extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve its purpose."

1.1.8 Furthermore, certain forms of expression are not protected in terms of international law and our Constitution. Article 20 of the ICCPR specifically provides that law must limit certain forms of expression, such as -

"1. *Any propaganda of war shall be prohibited by law.*
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." (own emphasis)

1.1.9 Section 16(2) of the Constitution mirrors article 20 of the ICCPR and explicitly provides that the right to freedom of expression does not extend to -

"(a) propaganda for war;
(b) incitement of imminent violence;
(c) advocacy of hatred, that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm." (own emphasis)

1.1.10 Any legislative prohibition of hate speech must ensure that the expression prohibited falls within the parameters of section 16(2)(c) of the Constitution. The distinct and internationally aligned terminology in section 16(2)(c) specifically provides that the expression must firstly constitute "advocacy of hatred based on race, ethnicity, gender or religion" and must "constitute incitement to cause harm".

1.1.11 It is crucial to take note that unless the expression prohibited falls within the narrow scope of section 16(2) of the Constitution, the limitation on the right to freedom of expression can only be justified if it succeeds the limitation threshold in section 36 of the Constitution.[6]

1.1.12 The key terminology in section 16(2)(c) of the Constitution has been interpreted as follows:

1.1.12.1.1 "Advocacy of hatred" based on certain inherent characteristics of a person must be statements which are reflective of extreme emotion. Extremely abusive language such as the "*Kill the farmer, Kill the Boer*" in the matter of the *Freedom Front v South African Human Rights Commission*[7] (Freedom Front) was found to be "advocacy of hatred".

1.1.12.1.2 Secondly, the requirement of "incitement to cause harm" must be present. The mere expression is not enough. In the *Freedom Front* matter, this was interpreted to mean a call to act in a certain manner, meaning an intention to incite, to produce harm, which could be physical or emotional.[8] Secondly the "harm" element does not necessarily mean the harm has to manifest but there has to be objective likelihood of it occurring.

1.1.12.1.3 The *Freedom Front* matter has emphasised that the question should be "*whether a reasonable person… within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm*"[9](own emphasis)

1.1.13 Accordingly, in line with the Constitution and the international interpretation of article 20 of the ICCPR, hate speech to be curbed by the Bill must relate to severe expression of

[6] This approach was confirmed in the Constitutional Court matter of *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294.
[7] 2003 (11) BCLR 1283 (SAHRC).
[8] Approach in above matter.
[9] This was emphasised in the *Freedom Front* matter at 1283.

contempt or scorn. Secondly, this extreme manifestation of emotion must have the ability to publicly incite others to act on the expression, which, if reasonably considered by an objective person, has a real likelihood to cause harm.

1.2 Constitutional and foreign law guidance on the offence of hate crimes

1.2.1 The distinction of hate crimes from ordinary crimes will not only give effect to article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD)[10], but also to section 12 of the Constitution, which relates to the right to freedom and security of the person.[11]

1.2.2 Before turning to a brief analysis of the offence of hate crime as described in this Bill it is advised that the definition of "hate crimes" and what it specifically entails in the international context should be used as guidance.

1.2.3 The Organisation for Security and Co-Operation in Europe (OSCE), which is the world's largest regional security agency [12] defines "hate crimes" as -

> "*crimes motivated by intolerance towards certain groups in society and …such crimes have the potential to divide societies and to create cycles of violence and retaliation*."[13]

1.2.4 The OSCE published a practical guide on hate crime laws (practical guide) wherein it is emphasised that hate crimes require two elements. Firstly, a "criminal offence" i.e. an act which would constitute a criminal offence in terms of criminal law, such as murder, and secondly, a "biased motive", which distinguishes this criminal conduct from other crimes.

1.2.5 It is important to take note that the OSCE emphasises that hate crimes always require the first element, which is already punishable in terms of ordinary criminal law. The fact that the criminal offence was driven by a "biased motive" is a consideration that will be considered on sentencing as an "aggravating circumstance". [14]

1.2.6 The OSCE's practical guide also state that a "protected characteristic" to include in hate crime law will be informed by a country's own history but it should be an "unchangeable marker" related to the self-worth of the person.[15]

2. AN ANALYSIS OF THE PROVISIONS IN THE BILL

2.1. Ad clause 1 of the Bill - the Definitions

2.1.1. Before turning to the constitutional analysis of the offences created in the Bill, certain key concerns in relation to the definitions as provided for in clause 1 are noted.

2.1.2. It is submitted that terminology used in legislation should logically have the same corresponding definition in all legislative instruments referring thereto. To this extent, it is noted that there appears to be a conflict between certain proposed terms in clause 1

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10 Article 4(a) if the ICERD specifically require Member States to: *"(a) …declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereto*."

11 Section 12 of the Constitution - "everyone has the right to freedom and security of the person which includes the right
(c) to be free from all forms of violence and from either public and private sources [and] …
(e) not to be treated or punished in a cruel, inhuman or degrading way."

12 Which compromises of 57 participating states from Europe, Central Asia and North America.

13 See 'Hate Crime Laws - a practical guide' published by the Office for Democratic Institution and Human Rights of the OSCE in 2009. The guide can be accessed at http://www.osce.org/odihr/36426?download=true

14 This approach is also in line with the Framework decision of 2008 which requires Member States to take necessary measures to ensure that "racist and xenophobic motivation" is considered "an aggravating circumstance" or alternatively that the Courts take it into consideration in sentencing.[14]

15 See footnote 13.

of this Bill and the *Films and Publication Amendment Bill*[16] (the Films Bill), as well as the *Cybercrimes and Cybersecurity Bill* [17](Cybercrimes Bill).

2.1.3. The conflict arises in that the Films Bill also provides for criminal remedies to curb hate speech, which do not appear to be aligned with this Bill. Not only does the definition of hate speech differ between the two proposed Bills but also key elements of the offence appear to have different meanings assigned to them. The application thereof will only lead to arbitrary application and create confusion.

2.1.4. The same conflict also arose in relation to the Cybercrimes Bill, which initially provided for criminal remedies to curb hate speech. However, it has been noted that the latest version of the Cybercrimes Bill, published on 20 January 2017, specifically excludes the reference to hate speech and now specifically creates an offence for malicious communication punishable in terms of criminal law. [18]

2.1.5. It is concerning that no agreed definitions for any of the listed characteristics, besides for "intersex", are provided for in clause 1 of the Bill. It is important to ensure agreed definitions especially regarding characteristics such as "sexual orientation"; "gender identity"; "nationality" and "ethnic or social origin" are provided. Furthermore, agreed and clear definitions will ensure that law enforcement officials are able to practically apply these provisions.

2.2. Ad clause 3(1) and (2) of the Bill - offence of hate crime as read with definitions Clause 1 of the Bill

2.2.1. It is submitted that the wording "an offence under any law" in clause 3(1) should be replaced by "an offence recognised under common law, customary or any legislation".

2.2.2. It is further submitted that the wording used in clause 3(1) should be clear and there should be no overlapping of definitions, which could only open the floodgates for a range of skilfully crafted defences. Currently, clause 1 of the Bill provides no definition for "prejudice"; "bias" or "intolerance" and it is not clear whether these three relate to different concepts.

2.2.3. It is submitted that the reference to "victim", which is defined to include a "juristic person", loses sight of the core of hate crimes, which is understood in an international context to be a crime motivated by a characteristic or perceived characteristic inherent to the dignity of a person. It is an "unchangeable marker" related to the self-worth of the person, which the Bill aims to protect. It is not clear how a juristic person could ever qualify to be a carrier of such a marker. It is possible that the juristic person may represent a group of people who are defined by such a marker but then it acts in a representative capacity and it should be distinguished as such.

2.2.4. The list of "characteristics" or "perceived characteristics" in clause 3(1)(a) to (q) is wide-ranging and it is submitted that clear definitions should be provided, as stated earlier. Furthermore, "trade or occupation" in clause 3(1)(q) should be excluded on the basis that it does not qualify as an "unchangeable or a fundamental marker" to a person's self-worth as the OSCE's practical guide suggests.[19]

2.2.5. Lastly, in relation to clause 3(2)(c) of the Bill, it is advised that the causal connection should be narrowly defined to acts which clearly show that the person could be classified

[16] [B 37-2015} which amends the *Films and Publication Act* of 1996. To date of submission this appears to be the latest version of the Bill and comments made in relation thereto specifically relate to this version of the Bill.
[17][B -2017], as published on 21 January 2017.
[18] See clause 17 of the Cybercrimes Bill.
[19] See footnote 13.

as an accessory to the crime. It would also be important to provide definitions of the various terminology used such as "commands"; "direct"; "aids"; "promotes" and "encourages" specified in this context, in order to avoid overlapping of definitions which could lead to confusion on application thereof.

2.3. Ad clause 4(1)(a) of the Bill - the offence of hate speech

2.3.1. **A brief analysis of clause 4(1)(a) and the parameters of section 16(2) of the Constitution**

2.3.1.1.1. At the outset, we submit again that one needs to first determine if the clause falls within the limits of hate speech in terms of section 16(2) of the Constitution. If it does then there would not be the need to consider whether the limitation on the freedom of expression would be constitutionally justifiable as the expression can never be constitutionally protected.

2.3.1.1.2. We firstly reiterate that section 16(2)(c) of the Constitution only relates to "advocacy of hatred" that is based on "race, ethnicity, gender or religion" and that constitutes "incitement to cause harm."

2.3.1.1.3. Therefore, again "advocacy of hatred" and subsequently the requirement of "incitement to cause harm" must be present to qualify as hate speech in terms of the Constitution.

2.3.1.1.4. If we consider clause 4(1)(a) it is clear that several forms of expression are as a matter of fact prohibited. Firstly, if one reads clause 4(1)(a)(i) it does refer to "advocacy of hatred" but if one continues reading, it specifically states in sub-clause (aa) that it must be shown to have been intended to "incite others to harm any person… whether or not such person or group of persons is harmed".

2.3.1.1.5. We submit the reference to "whether or not such person or group of persons is harmed" loses sight that in terms of jurisprudence, the element of "harm" in section 16(2)(c) needs to be objectively determined and there has to be a "a real likelihood that within the context and having regard to the impact and consequences …that there is a real likelihood that the expression causes harm".[20] Secondly this sub-clause has to be read with the long list of undefined characteristics that are much broader than the narrow list stipulated in section 16(2)(c), which only relates to "race, ethnicity, gender or religion". Therefore we submit that clause 4(1)(a)(i)(aa) does not fall within the limits of section 16 (2)(c) of the Constitution.

2.3.1.1.6. The second question which now arises is whether the wording in clause 4(1)(a)(ii), which relates to communication which is "threatening", read with the further wording in sub-clause (bb) to "stir up violence", could be argued to fall within the parameters of section 16(2)(b) of the Constitution.

2.3.1.1.7. Section 16(2)(b) of the Constitution relates to a prohibition of "incitement to imminent violence". We submit that considering that no definition is provided for "threatening" in the Bill it does not make sense why there is a break from constitutionally accepted terminology such as "incitement to imminent violence". The severity of the terms "threatening" and "stir up violence" are also questionable as "incitement imminent violence" confers a real risk and danger of lawless action.

2.3.1.1.8. In terms of academic research, the wording of "incitement to imminent violence" in section 16(2)(b) apparently has its origin from the United States *First*

[20] Refer to the Freedom Front matter at footnote 7.

Amendment jurisprudence and has been interpreted to mean "advocacy directed to incite or produce imminent lawless action and is likely to incite or produce such action"[21]. Furthermore, this clause 4(1)(a)(ii) also has to be read with the long list of undefined characteristics which led to this action and therefore it cannot be reasonably interpreted to fall within section 16(2)(b) of the Constitution.

2.3.1.1.9. We therefore submit that the criminal offence created in terms of clause 4(1)(a) can only withstand constitutional scrutiny if it succeeds the limitation enquiry in terms of section 36 of the Constitution. The submission will now briefly focus on the said limitation enquiry.

2.3.2. **Ad clause 4(1)(a) - An analysis of this clause in terms of the limitation enquiry**

2.3.2.1.1. One of the first aspects to consider is the nature of the rights clause 4(1)(a) sets out to protect and the importance of this limitation against the right to freedom of expression in a democratic society. [22]

2.3.2.1.2. The right to human dignity the Bill purports to protect is one of the cornerstones of our Constitution,[23] but it is a delicate concept which not only relates to an individual's sense of self-worth but also how the public perceives the individual's worth.[24]

2.3.2.1.3. The concept of the right to human dignity is even further complicated by the fact that no distinction exists in our Constitution that differentiates between a person's reputation and right to dignity.[25] The danger however is that the overbroad terminology used in the Bill may open the floodgates to common law defamatory claims under the guise of the offence of hate speech. An infringement of the right to dignity must be viewed in the context of the communication regarding the tone, the audience and how the reasonable person will perceive the communication regarding the said person.

2.3.2.1.4. For instance, our Courts have pointed out on various occasions that certain individuals by virtue of their profession - for example- politicians who take part in public life must withstand more criticism than your average individual.[26] If the threshold of the language is too low, politicians may abuse this provision to claim that their right to dignity has been infringed under the offence of hate speech.

2.3.2.1.5. Furthermore, the right to equality which the Bill aims to protect has to be considered in light of the fact that the Constitutional Court has held that "equality does not imply a levelling or homogenisation of behaviour".[27]It is vital in a democracy that the right to express diverse views - no matter how unpopular or offensive - be protected in order to facilitate "the search for truth by individuals and society generally".[28]

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[21] See the *Bill of Rights Handbook 5th Edition* by Ian Currie and Johan de Waal on page 373 at 16.4. Specific reference is made to the case of *Brandeburg v Ohio 395 US 44 (1969).*

[22] Section 36(1)(a) and (b) of the Constitution.

[23] The importance of the right to human dignity, which has to be considered in light of South Africa's history, was emphasised in the matter of *Dawood and Another v Minister of Home Affairs and others* 2000 (3) SA 936 (CC) wherein the Court found that "*The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings."*

[24] This was confirmed by Justice O'Regen in the matter of *Khumalo and others v Hollisima* 2002 (5) SA 401.

[25] In this instance see the above case at paragraph 27 of the judgment.

[26] See for instance the case of *Cele v Avusia Media Limited* [2013] 2 ALL SA 412 (GSJ); *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A).

[27] *Minister of Home Affairs and another v Fourie*2006 (1) SA 524 (CC) at paragraph 30.

[28] In *South African National Defence Force Union v the Minister of Defence* 1999 (4) SA 469 (CC), at para 9 of the judgment.

2.3.2.1.6. It is submitted that even though it is important to ensure the protection of the right to dignity and equality, the harsh consequences of clause 4(1)(a) do not justify the protection of these two rights, especially considering lesser restrictive means to achieve this - as will be discussed further below.

2.3.2.1.7. Furthermore, the nature, extent and the relation of the limitation and its purpose [29] need to be critically examined to determine if the justification is reasonable. To this extent, it is specifically submitted that clause 4(1)(a) read with the clause 1 provides for broad terminology which on application will unduly and unreasonably limit the right to freedom of expression.

2.3.2.1.8. For ease of reference a consideration of the extent and nature of the limitation will be considered in reference to each sub-clause of clause 4(1)(a), in order to show how broad, the limitation on the right to freedom of expression is:

2.3.3. **Ad clause 4(1)(a) - reference to "any communication":**

2.3.3.1.1. Firstly, the reference to *"*any communication whatsoever" read with the definition of "communication" in clause 1 relates to "gesture, display, expression, written, illustrated, visual or other descriptive matter, oral statement, representation or reference or electronic communication".

2.3.3.1.2. Except for the definition of "electronic communication", the Bill is silent on the meaning of the vast array of forms of "communication". Furthermore, the definition of "electronic communication" in reference to the definition of "data message" in the Bill has a different meaning assigned to it than in the Cybercrimes Bill.

2.3.3.1.3. The threat in not providing clear distinct definitions is that several forms of communication might have an overlapping meaning in terms of their ordinary dictionary meaning, which will make it unclear to the public of what is meant.

2.3.3.1.4. For instance, "illustrated" in terms of the English Oxford Dictionary, means an adjective "containing pictures or other graphical material" and therefore it can relate to an entire book or magazine. This might overlap with the meaning of "visual" which is defined in the English Oxford Dictionary as "a picture, piece of film, or display used to illustrate or accompany something".

2.3.3.1.5. As stated previously, the Films Bill also provides for the offence of hate speech. Besides the obvious conflict in regard to definitions of similar terms, a situation also arises where the listed forms of communication in relation to hate speech differs between the two pieces of proposed legislation. It is illogical why the Films Bill only relates to "*speech, gesture, conduct, writing, display or publication*".

2.3.3.1.6. Lastly, in reference to "communication", it is noted that on analysis of foreign law approaches to the curbing of hate speech within criminal law, there is a clear focus on communications, which can be experienced by the public and cause the public to act in a certain manner. The focus of prohibition of hate speech in foreign law is not on private communications. [30]

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[29] Section 36(1)(c) of the Constitution.

[30] In this regard we refer to the European Union's Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expression of Racism and Xenophobia by means of criminal law, adopted on 28 November 1998 by the Council of the European Union. Article 1(a) to (d) of this decision describes specific offences and there is an emphasis on the public nature of the expressions. Furthermore, in the Canadian Criminal Code R.S.C. 1985 C-46, there is also an emphasis on "communicating statements" in the public in terms of section 319(1) of the Code and section 319(2) specifically states "other than in private conversation, wilfully promotes hatred".

2.3.4. **Ad clause 4(1)(a)(i) read with (aa) - "advocacy of hatred" to "incite others to harm" and "whether or not such person or group of persons is harmed"**

2.3.4.1.1. The reference to "whether or not such person or group of persons is harmed" in clause 4(1)(a)(i)(aa) is not a narrowly-tailored limitation on the right to freedom of expression.

2.3.4.1.2. In terms of the interpretation of article 19 and 20 of the ICCPR, it was found in a comparative study that despite the fact that "incitement" by definition is an "inchoate crime" there must "nevertheless be some degree of risk of resulting harm identified. [31]

2.3.4.1.3. The lack of any harm to be shown to result from the expression is too broad and not in line with the approach of the ICCPR. Furthermore, if one considers the approach of foreign jurisdictions such as Canada, which also provide for the prohibition of narrowly defined hate speech in their Criminal Code, there is a clear emphasis that the expression is prohibited in order to protect the public order.

2.3.4.1.4. We submit the disclaimer provided by "whether or not such person or group of persons is harmed" is not closely tailored to give effect to the right to dignity and equality and will unreasonably curtail the right to freedom of expression.

2.3.5. **Ad clause 4(1)(a)(ii) - reference to "threatening, abusive or insulting" read with sub-clauses (aa) and (bb)**

2.3.5.1.1. Clause 4(1)(a)(ii) creates an offence for communication which is "threatening, abusive, or insulting towards any other person or group of persons" which either "incites others to harm" or in terms of sub-clause (bb) "stirs up violence against or bring into contempt or ridicule any person or group of persons".

2.3.5.1.2. Firstly, there is again, a lack of guidance on the interpretation of the words "threatening"; "abusive" or "insulting" in clause 1 of the Bill. This creates possible abuse as this opens the door for subjective interpretation.

2.3.5.1.3. Secondly our great concern in this regard is that if one reads "abusive" or "insulting" with the words "bring into contempt" or "ridicule" in sub-clause (bb) it cannot be logically described as severe manifestation of emotion associated with the term "hatred", which has the objective potential to expose a vulnerable group to further attacks.

2.3.5.1.4. We have also considered international and foreign law approaches in this regard and, in specific Canadian jurisprudence emphasised in order to justify the right to freedom of expression, the legislative wording used must rise to a "level of ardent and extreme feeling".[32]

2.3.5.1.5. Furthermore, the threshold created by the words would create opportunities for absurd application. For instance, if read together with the provision that the communication is demonstrated to have been intended to be "insulting" and the

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[31] See the comparative study undertaken by ARTICLE 19, a global organisation for free expression, who conducted the study for a regional expert meeting on article 20 of the ICCPR in February 2010. The Organisation specifically considered the risk of harm occurring on interpretation of jurisprudence from the European Court of Human Rights at page 15 of the study. The study can be found at: http://www2.ohchr.org/english/issues/opinion/articles1920_iccpr/docs/CRP7Callamard.pdf.

[32] On foreign law approaches we specifically considered the approach by the Canadian Supreme Court in the matter of *Saskatchewan Human Rights Code v Whatcott* 2013 SCC 11, which considered the constitutionality of section 14 of the Province Saskatchewan's Human Rights code. We found there is great similarity between the wording "ridicules, belittles or otherwise affronts the dignity" which was declared unconstitutional and the reference to the "insulting" "bring into contempt or ridicule" in clause 4(1)(a)(ii) and (bb). We also considered the comparative study done by ARTICLE 19, referred to in footnote 28.

long list of grounds which includes "trade or occupation" it is plausible that a satiric cartoon directed at a Member of Parliament can be considered "hate speech".

2.3.6. **Ad clause 4(1)(a) - List of characteristics in terms of which expression is based**

2.3.6.1.1. Finally, as previously stated in regard to the long list of characteristics referred to in offence of hate crimes, we are concerned that very little guidance is given on the meaning of these extensive characteristics.

2.3.6.1.2. We reiterate that the focus should be on whether the characteristic is one which is inherent to the dignity of a person. It must be considered as an "identifiable and unchangeable marker", which is related to the "person's self-worth".[33] We therefore again submit that the reference to "occupation or trade" in this clause cannot rationally be construed to relate to an unchangeable marker related to the person's self-worth and hence cannot be construed as a reasonable limitation on the right to freedom of expression. It can also lead to absurd application as discussed above.

2.3.7. **Last consideration regarding the limitation enquiry of clause 4(1)(a) - lesser restrictive means to achieve the purpose**

2.3.7.1.1. Lastly, a key aspect to consider is the possibility of lesser restrictive means to curb hate speech to protect the right to equality and dignity.[34]

2.3.7.1.2. In this regard, we also note that no statutory defences or exceptions are provided to the offence of hate speech, which also questions whether certain religious teaching for instance can now be considered hate speech. In the Canadian Criminal Code clear statutory exceptions are provided to the offence of hate speech and we suggest this approach should be considered.[35]

2.3.7.1.3. Our law already provides for unique civil remedies for hate speech in terms of section 10 of PEPUDA and there is also the possibility of the Equality Court to refer a matter to the Director of Public Prosecutions.[36] Not only does PEPUDA create a unique forum to address these types of incidents but the advantage of utilising the PEPUDA remedies are that the measures proposed do not only focus on deterrence but also attempt to provide corrective and restorative steps to eradicate systemic deeply rooted discrimination. For instance, in the matter of *ANC v Penny Sparrow*[37] the payment of damages ordered by the Equality Court was paid to a civil society organisation that aims to eradicate racism and can now be effectively be used to empower vulnerable marginalised groups in society.[38]

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[33] Consider the approach by the OSCE.

[34] In terms of section 36(1)(e) of the Constitution.

[35] Section 319(3)(a) to (d) of the Canadian Criminal Code provide statutory defences to the offence of hate speech in section 319(2) and reference is made to "statements communicated to be true"; "in good faith on a religious subject"; "subject of public interest" and in "good faith… to pint out for purpose of removal …feelings of hatred."

[36] Section 10 of PEPUDA already goes much further than section 16(2) of the Constitution and it is quite plausible that section 10 of PEPUDA itself will not muster a constitutional scrutiny. This section has however not been constitutionally analysed by the Courts to date.

[37] [2016] ZAEQ1 (10 June 2016). The amount of R150 000 was awarded to the Oliver and Adelaide Tambo Fund. The matter was also referred to Director of Public Prosecutions and Ms Sparrow was charged with *crimen injuria* and apparently entered into a plea bargain which involved a fine of R5000 and a two-year suspended sentence.

[38] PEPUDA also provides for exceptions to the offence of hate speech in section 12 of the Act.

2.3.7.1.4. It is however submitted that there are challenges regarding the effectiveness of some of the remedies proposed by PEPUDA and legislative reform is needed in order to bring PEPUDA in line with social media trends.[39]

2.3.8. **Conclusion of the limitation enquiry of clause 4(1)(a)**

2.3.8.1. In conclusion, it is submitted that clause 4(1)(a) of the Bill unreasonably limits the right to freedom of expression in section 16(1) of the Constitution and is unconstitutional. We propose clear consideration of the recommendations made in clause 4 at the end of this submission in this regard.

2.3.8.2. We now turn to a brief consideration of the clauses dealing with the offence of hate speech with reference to the offence created in clause 4(1)(a).

2.4. Ad Clause 4(1)(b) - the offences of distribution of electronic communication constituting hate speech in terms of clause 4(1)(a)

2.4.1. It is submitted that since the core of this offence relates to hate speech as contemplated in clause 4(1)(a), the offences created in this sub-clause will become inoperable. In the alternative certain additional concerns regarding clause 4(1)(b) are noted below.

2.4.2. First, we reiterate that clear definitions should be provided for crucial elements of this offence such as "distribute" via an "electronic communication system". The terminology should also correspond with the definitions used in the Cybercrimes Bill.

2.4.3. Furthermore, it is submitted that the reference to "accessible by or directed at a specific person who can be considered to be a victim of hate speech" in clause 4(1)(b)(ii) can be easily abused and should be excluded. It may lead to an absurd situation where for instance a private text message which could objectively have no means to disrupt the public order or provoke later discriminatory attacks could be considered an offence of hate speech.

2.4.4. It is also submitted that the same note in relation to the offence of hate crimes is made regarding the reference to a "victim.

2.4.5. Finally, it is submitted that the offence created in this clause should be limited to electronic communication which can be accessed by many people - the broader public and should not include private texts. This approach would also be in line with international and foreign law approaches to the criminalisation of hate speech.[40]

2.5. Ad Clause 4(1)(c) - the offences of displaying or making material available constituting hate speech in terms of clause 4(1)(a)

2.5.1. It is again submitted that this clause will become inoperable as it directly relates to clause 4(1)(a), which we have held to be unconstitutional. Furthermore, it is submitted that the following additional concerns in relation to the clause are raised:

2.5.2. There is again the element of vagueness as no definition is provided for "material" in clause 1 of the Bill and "material" is not referred to anywhere else in the Bill.

2.5.3. It is also possible for instance that on the interpretation of this clause that not only the artist but also the owner of a gallery could be held liable if an incident such as *The Spear* painting of President Zuma occurred again.[41]

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[39] For instance, the order directing an unconditional apology in terms of section 21 of PEPUDA is questionable as it truly begs the questions whether the person is sorry for his actions. Furthermore, PEPUDA only refers to "words" in relation to the prohibition of hate speech and needs to be brought in line with the proposed Films Bill and Cybercrimes Bill.

[40] Refer to page 14 of the comparative study done by ARTICLE 19, the full reference of which can be found at footnote 29.

[41] The reference to "The Spear" painting of President Zuma relates to the painting done by Brett Murray which exposed President Zuma's genitals and was on display at the Goodman Gallery in Rosebank, Johannesburg in May 2012.

2.5.4. There is also no requirement in this section that the "display" of such material constituting hate speech must be accessible by the broader public, which could lead to absurd application.

2.6. Ad Clause 4(2)(a) &(b) - the offences of assisting in the commission of hate speech as defined in clause 4(1)(a)

2.6.1. It is submitted that besides the reference to hate speech as created in clause 4(1), we make the same submission regarding the words "commands"; "directs"; "aids" or "promotes" as used in relation to the offence of hate crimes.

2.6.2. Furthermore, it is concerning that clause 4(2)(a) and (b) do not require the person to have the "intention" to either "participate" in the crime or for instance to "promote" any other person to commit the crime of hate speech.

2.6.3. The South African Courts require that an accomplice to a crime must "*consciously associate himself with the commission of the crime by aiding or assisting the perpetrator, which generally involves affording him or her opportunity, means or information in respect of the commission of the crime*."[42]

2.6.4. The lack of intention of a person in regard to the commission of the offence created in this clause ignores the crucial aspect that the accessory to this crime must have "consciously associated" himself with the crime.

2.7. Ad clause 6(1) and (2) - in relation to sentencing of hate crimes

2.7.1. It is submitted that it is appropriate and in line with international approaches [43]to consider the fact that a crime was driven or motivated by a characteristic of the victim or perceived characteristic as an "aggravating circumstance" at sentencing of the base offence.

2.7.2. It is not clear why clause 6(2)(b) needs to stipulate consideration of the result of the crime, as this would automatically be a distinctive element of the specific crime in terms of common law or legislation. For instance, the elements that need to be proved for the commission of the common law crime of arson are "the unlawful setting an immoveable property on fire with the intent to injure another"[44] and therefore if arson was committed with a biased motive then the offender would be guilty of a hate crime in terms of the Bill. The fact that it will classify as a hate crime will be an aggravating factor that the Court must take into account on sentencing.

3. OTHER GENERAL CONSIDERATIONS ON THE BILL

3.1. **Concern on the lack of a definition of racism**

3.1.1. We have noted that there is no definition of racism in the Bill. Although not exclusively so, hate crimes are often motivated by racism, as is hate speech. It is in our view important to have a definition of racism included in the Act.

3.1.2. We are, however, aware that the public and academic debates about racism have often produced concepts of racism that reduces its perpetrators to only those with power, or to only white people. In terms of these definitions, black people are incapable of racism and white people are incapable of not being racist. This, we submit, is in itself a racist argument.

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[42] *S v Kimberley and Another* 2004 (2)SACR 38 at para 10.

[43] In terms of the OSCE's practical guide "The majority of hate crime laws in the OSCE region fall within this description" of "penalty enhancers".

[44] See "South African Criminal Law and Procedure Volume II Common Law Crimes" by P.M.A. Hunt published by Juta and Co, Ltd in 1982.

3.1.3. We believe that we need to seek international guidance here, as our history and present circumstances may cloud or judgement and make us forget that racism is a universal phenomenon that cannot and should not be so contextualised that it is reduced to 9% of South Africa's (white) population.

3.1.4. According to the ICERD "racial discrimination" is defined as follows in article 1: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

3.1.5. Extrapolated to a definition of racism, it would follow that it should be defined along the lines of "any attitude, communication or action that distinguishes, excludes, restricts or has preferences based on race, colour, descent, or national or ethnic origin, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

3.1.6. In the South African context, we believe that three concepts could enrich the above definition, namely stereotyping of other races, hierarchical relations between races and a sense of superiority about their own race.

C. CONCLUSION

4. RECOMMENDATIONS

4.1. In conclusion, we recommend that the offence of hate crimes should be created, as the lack of distinction has obstructed proper recording and monitoring of these incidents and therefore a proper means to address the prevalence of such incidents.

4.2. We found that clause 4(1) of the Bill is broader than the parameters of hate speech as carefully tailored in section 16(2) of the Constitution and therefore it does not deserve constitutional protection. The offence created in clause 4(1)(a) could only muster constitutional scrutiny if it could be shown that the limitation on freedom of expression is a reasonable limitation on the right to freedom of expression in terms of the limitation enquiry set out in section 36 of the Constitution, which inquiry it fails.

4.3. It is our submission that on our analysis the far-reaching terminology used in clause 4(1)(a) and the subsequent clauses in relation thereto could not muster the limitation enquiry. It is therefore our recommendation that on practical grounds the reference to "hate speech" in this Bill should be excluded in order to ensure that the need to address hate crimes in our criminal law is not delayed.

4.4. This recommendation is further enhanced by the fact that there are adequate remedies available for victims of hate speech. These include the civil remedies in terms of PEPUDA and the common law remedy of *crimen injuria*. We are also of the opinion that should hate speech be criminalised, it would lead to unintended consequences and possible abuse. This applies specifically to the freedoms of expression, religion, belief, and opinion, protected in terms of section 15 and 16 of the Constitution.

4.5. We submit that before the Department considers drafting proposed criminal measures to deal with hate speech, proper legislative reform of PEPUDA must be undertaken. Furthermore, a proper census should be taken to determine whether there is a pressing societal need to address hate speech within criminal law over and above PEPUDA.

4.6. If it is found by the Department that there is in fact a dire need to address hate speech by means of criminal law as narrowly defined in terms of section 16(2) of the Constitution, then foreign law approaches in this regard should be considered in line with section 39 of the Constitution. In this regard we submit that the Canadian approach to clear statutory defences in regard to the narrowly defined criminal offence of hate speech should be considered.

4.7. We believe that the Bill should contain a definition of or at least the parameters for what racism is, taking into account both international definitions and South African circumstances. This should not narrow the perpetrators of racism to only one group.

4.8. We hope this submission was of assistance to the Department and we wish to emphasise that the Bill as it stands is in danger of eroding the hard-won right to freedom of expression, which is the foundation of our constitutional democracy. We are available to make oral submissions regarding the above, should the Department so desire.

End