FREEDOM
OF RELIGION
SOUTH AFRICA

+27 021 556 5502

P.O. Box 50110
West Beach
Cape Town 7441

info@forsa.org.za
www.forsa.org.za

**To:** **The Department of Justice and Constitutional Development**
For attention: Ms T Ross
Per e-mail: hatecrimes@justice.gov.za

**Re:** **Comments on the Prevention and Combating of Hate Crimes and Hate Speech Bill (Deadline for Comments: Tuesday, 31 January 2017)**

**From:** **Advocate N L Badenhorst**
Legal Counsel, *Freedom of Religion South Africa (FOR SA)*
Tel: 021 – 556 5502 / 084 860 1943
E-mail: legal@forsa.org.za

**Date:** **30 January 2017**

**SUMMARY OF SUBMISSIONS:**

1. As an organisation working to protect and preserve religious freedom in South Africa, *Freedom of Religion South Africa* (*FOR SA*) is concerned that the "hate speech" component in the draft Prevention and Combating of Hate Crimes and Hate Speech Bill published in the *Government Gazette* on 24 October 2016 ("the Bill"):

   1.1. is over-broad and unconstitutional (see **paragraphs 22 - 31** below);

   1.2. could have a major chilling effect on other constitutional rights, including:

      1.2.1. Freedom of Expression (see **paragraphs 32 - 43** below); and

      1.2.2. Freedom of Religion, Belief and Opinion (see **paragraphs 44 - 52** below); and

   1.3. is unnecessary as existing law already prohibits "hate speech" (see **paragraphs 53 – 66** below).

2. FOR SA recommends that the presumably unintended, but nonetheless unconstitutional, consequences of the current definition of "hate speech" in the Bill, be avoided or eliminated by:

   2.1. Omitting the "hate speech" provisions from the Bill altogether and, only if necessary, amending and improving the "hate speech" provisions in the Equality Act, 2000; and

   2.2. In the event that the "hate speech" provisions remain in the Bill:

      2.2.1. limiting the definition and scope of "hate speech" in the Bill to bring it in line with s 16(2) of the Constitution; and

      2.2.2. Inserting a religious exemptions clause that adequately protects the constitutional right to Freedom of Religion, and religious expression (see **paragraphs 67 – 68** below).

3. Having an endorsement base of 5 million+ South Africans, including many of the major church, denomination and faith groups in South Africa, FOR SA would appreciate the opportunity to appear and make verbal submissions with regard to the Bill, at the appropriate time.

**ABOUT FOR SA:**

1. *Freedom of Religion SA* NPC (2014/099286/08) (FOR SA) is a non-profit organisation that serves to protect and preserve religious freedom (including freedom to express religious beliefs) in South Africa (www.forsa.org.za).

2. FOR SA represents the views of over 5 million South Africans from a cross-spectrum of (including many of the major) churches, denominations and faith groups, who have authorised FOR SA to speak as a united voice on behalf of religious groups in South Africa on issues affecting their religious rights and freedoms, including the Prevention and Combating of Hate Crimes and Hate Speech Bill ("the Bill").

3. So as not to unduly burden the current Submission, we do not herein include the names of all the churches, denominations, faith groups, organisations and individuals, represented by FOR SA herein. To the extent necessary however, this can be made available.

**FOR SA's INTEREST IN THE BILL:**

4. As a faith-based community, FOR SA believes that every human being is created in the image of God and as such, has intrinsic dignity and worth. Because God gives dignity and worth to all people, as human beings we ought to do the same. No person should suffer violence or hatred because of their race, nationality, sex, religion or any other characteristic.

5. FOR SA further esteems and affirms the constitutional promise that "*South Africa belongs to all who live in it, united in our diversity*"[1].

6. As such, we commend the Department of Justice for what we believe to be a *bona fide* effort to prevent and combat hate crimes and hate speech, and to create an environment where South Africans can peacefully co-exist despite our differences.

7. **We are concerned, however, that the Bill, particularly the "hate speech" component, is defined so broadly that it will violate other constitutional rights, including particularly Freedom of Expression (section 16 of the Constitution) and Freedom of Religion, Belief and Opinion (section 15 of the Constitution).** (While this Submission will primarily focus on the "hate speech component" of the Bill, it will also touch on the stated objects, as well as the "hate crimes component", of the Bill).

[1] Preamble to the Constitution

8. We hereby submit our concerns to you in writing, but would also appreciate the opportunity to appear and make verbal submissions, at the appropriate time.

**THE BILL's STATED OBJECTS:**

9. The Bill's stated objects include "*to give effect to the Republic's obligations regarding prejudice and intolerance in terms of international law*"[2].

10. When regard is had to the Preamble, it becomes clear that the particular international legal instruments contemplated by the Bill, are:

    10.1. The Declaration adopted at the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban; and

    10.2. The International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), to which South Africa is a signatory.

11. While these documents are undoubtedly pertinent to the issue, it is important to note that both instruments are concerned with, and confined to, issues of discrimination and intolerance based on "*race, colour, descent, or national or ethnic origin*"[3] and does not extend further to all the "characteristics" mentioned in s 3 of the Bill.

**THE "HATE CRIMES" COMPONENT[4]:**

12. It is a sad reality that not everyone in South Africa appreciates the beauty of our pluralistic and diverse society, and that this very disdain of difference sometimes drives people to commit the most heinous of crimes against those who are different" to them.

13. This reality, however, does not necessarily require the creation of a substantive offence of "hate crime", as the Bill purports to do.

14. According to the Deputy Minister of Justice and Constitutional Development, the Hon. John Jeffery MP, certain advantages will flow from the developing of specific legislation on hate crimes: "*It will*

[2] S 2(a) of the Bill
[3] See ICERD
[4] S 3 of the Bill

*provide additional tools to investigators and prosecutors to hold the perpetrators of hate crimes accountable and provide a means to monitor efforts and trends in addressing hate crimes*".[5]

15. Firstly, all (violent) crimes need to be investigated and prosecuted, and all criminal offenders be held accountable, with the same vigour and tenacity, irrespective of the (perceived) motivation that fueled the crime. If the issue is a lack of law enforcement (for whatever reason e.g. lack of capacity or resource, lack of competence or training, bias on the part of responsible officials, etc) as the above statement seems to suggest, this is where government should be focusing its attention rather than creating a new law (which may suffer the same fate, for the same reasons).

16. Secondly, it is an established principle of South African criminal law that an offender's criminal liability is based not on his motive, but on his criminal conduct and his guilty state of mind (in the form of intention or negligence). In terms of the Bill however, motive is the essence of the crime, and the determining factor in whether a person is guilty of a "hate crime" or not. As such, the Bill goes against decades of established case law, and will cause great confusion and legal uncertainty (for the public, police, prosecuting authorities as well as magistrates / judges tasked with the hearing and deciding of "hate crime" cases coming before them).

17. Thirdly, this is not to say that motive is irrelevant. On the contrary! In South African criminal law, the offender's motivation is already a crucial element when considering the seriousness of a crime and consequently, the type and length of the sentence that the person already convicted of a crime, should receive. As such, it is arguable that, instead of creating a separate offence for "hate crimes", motivation (i.e. prejudice or bias based on any of the characteristics mentioned in the Bill) should be taken into account as an aggravating factor in crimes that are already recognised as such in our law.

18. Finally, rank ordering motives and charging certain crimes differently on the basis thereof, may well violate the right to equality, and to equal protection and benefit of the law, guaranteed by s 9(1) of the Constitution. If there is no alternate rationale for prosecuting certain people more harshly for the same crime, except for the characteristics of the victim, then different accused persons are not treated equally before the law.

19. Turning now to the specific wording of s 3 of the Bill, it is submitted that:

[5] Address by the Deputy Minister of Justice at the AGM of the Hate Crimes Working Group, Scalabrini Centre, Cape Town on 11 February 2015 (at www.gov.za/speeches/address-deputy-minister-justice-and-constitutional-development-hon-john-jeffery-mp-annual)

19.1. The inclusion of the words "*under any law*" in the definition of "hate crime"[6], is problematic. In terms of the current wording, "minor" civil offences (e.g. traffic violations, breach of contract) could potentially be turned into "hate crimes", with unintended and absurd results;

19.2. A number of critical words in the definition of "hate crime", including "*prejudice*", "*bias*", "*intolerance*" and "*family member*", are undefined and as such, vague and capable of multiple or misinterpretation and/or unfair application;

19.3. It is not clear why "*family member*" should be included in the scope of actual or perceived characteristics. The scope of the definition is far too broad, and could lead to unintended and absurd results; and

19.4. The selection of characteristics for inclusion in s 3 of the Bill, appears arbitrary and is confusing:

19.4.1. While some of the "prohibited grounds" cited in s 9 of the Constitution have been included (namely race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, belief, culture, language and birth), some of the "prohibited grounds" in s 9 have, without explanation and presumably inadvertently, been omitted from the Bill (namely pregnancy, marital status, age and conscience). These should be included in s 3(1) of the Bill;

19.4.2. Other characteristics, which do <u>not</u> form part of the "prohibited grounds" in s 9 of the Constitution, have however been included in the Bill (namely HIV status, gender identity [which is in any event unnecessary in the light of "*gende*r" already included in the list], albinism and occupation or trade). It is not explained on what basis these characteristics have been selected for inclusion in the "closed list" of s 3(1) of the Bill, but other characteristics such as for e.g. economic status, cognitive ability, have been omitted; and

19.4.3. It is not clear why "*sex*" should specifically be stated to include "*intersex*"[7], and we submit that this should not be so, as the Constitution does not specifically include such elaboration which is in any event capable of multiple interpretations or misinterpretation.

[6] S 3(1) of the Bill
[7] S (c) of the Bill

20. In conclusion, while motive does matter and malicious intent is something that should (and must) be punished by the law, creating a new offence based entirely on the motive of the offender, is superfluous. It is also costly as it absorbs unnecessary judicial and police resources, and further strains a criminal system which is already at capacity.

21. The time, effort and cost involved in the creation and enforcement of a new offence should rather be spent on training and empowering the police, prosecutors and magistrates / judges to competently and efficiently exercise their responsibility to protect of our society against violence and other criminal acts.

**THE "HATE SPEECH" COMPONENT[8]:**

22. Our main concerns relating to the "hate speech" provisions in the Bill, are as follows:

22.1. The proposed definition, and scope, of "hate speech" in the Bill, is over-broad and unconstitutional;

22.2. The criminalisation of "hate speech" could have a major chilling effect on other constitutional rights, including:

22.2.1. Freedom of Expression (s 16); and

22.2.2. Freedom of Religion, Belief and Opinion (s 15); and

22.3. It is unnecessary as there are already existing laws in place that prohibit "hate speech".

**The definition, and scope, of "hate speech" is over-broad:**

23. Section 16 of the Constitution guarantees freedom of speech as a fundamental human right. In terms of s 16(2), the only speech that is not protected by this guarantee (i.e. that amounts to "hate speech"), is:

23.1. *"Propaganda for war;*
23.2. *Incitement of imminent violence; or*
23.3. *Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm*."

[8] S 4 of the Bill

24. Comparing the definition of "hate speech" in the Constitution and the Bill, it is clear that the definition in the Bill is much wider:

24.1. In terms of the Constitution, speech will only qualify as "hate speech" if it amounts, in the first instance, to "*advocacy of hatred*". This implies more than just a neutral or casual statement. It includes a coercive element, deliberate intent and effort to convince another to adopt a particular attitude or position. It requires "calling for" or "making a case for" hatred, and is therefore a much higher threshold than merely communicating to someone "*in a manner that … is threatening, abusive or insulting*", as contemplated by s 4(1)(a)(ii) of the Bill;

24.2. In terms of the Constitution further, in order to qualify as "hate speech", the speech, in the second instance, also has to "*constitute incitement to cause harm*", i.e. that there is a pressing, or stirring up, of someone to act in a violent or physically harmful manner. In this regard, it is important to note that South African courts have, perhaps as recognition of the importance of the right to freedom of expression, recognised that however offensive advocacy of hatred may be, it does not rise to the level of proscribed hate speech until it also tends to "*incitement to cause harm*"[9]. Our case law has already established that the question of whether speech has in fact risen to this level of "hate speech", is an objective enquiry, a question of fact. What the Bill requires, however, is something quite different and with respect, vague and confusing, and seems to be a (rather unhappy) marriage between a subjective enquiry (with a clear emphasis on the impressions, and feelings, of the "victim") and an objective enquiry (which also takes into account the "demonstrated intention" of the speaker). This is not in line with, and quite a stretch from, the current jurisprudence on "hate speech"; and

24.3. In terms of the Constitution finally, the "*advocacy of hatred*" must be based on one of the listed grounds, namely race, ethnicity, gender and religion. (This list is a closed list, and does not extend to other grounds). In terms of the Bill however, "hate speech" is not restricted to the listed grounds and appears, as already mentioned above, to be a rather random selection, including some of the prohibited grounds in s 9 of the Constitution while leaving out some others, and additionally including some other arbitrary characteristics. (In this regard, we refer to and repeat paragraph 19.4 and its subparagraphs above, which apply with equal force in the context of "hate speech").

[9] Department of Justice and Constitutional Development RSA, SA's Combined 2nd to 6th periodic report to the UN Committee on the Elimination of Racial Discrimination covering the period 2002 to 2011, at 45.

25. The inclusion of the words "*and which demonstrates a clear intention … to incite others to harm … or stir up violence against, or bring into contempt or ridicule …*"[10] in the Bill's definition of "hate speech", is problematic itself:

25.1. Firstly, from whose point of view would it be judged if there was "*a clear intention*" to for e.g. ridicule the "victim" - subjectively, from the speaker's point of view; objectively, from the hearer's point of view; or subjectively, from the hearer's / victim's point of view?;

25.2. Also, the use of the word "*intention*" is problematic, as "intention" in the broad sense of the word includes "legal intention" (*dolus eventualis*), i.e. objectively foreseeing the possibility that an act (or in this instance, the speaker's "*communication*"[11]) may have a certain consequence (in this instance, harm, violence, or causing someone to feel *"threatened", "abused", "insulted", "ridiculed*" or "*brought into contempt*") and persisting regardless with the act (in this instance, "*communication*");

25.3. <u>For example</u>: should a pastor from the pulpit say that prostitution, according to the Bible, is sinful, that may well qualify as "hate speech" in terms of the Bill. The argument would be that the pastor should have foreseen the possibility that on that particular Sunday, a sex-worker might have been in the church and further that saying prostitution is wrong might have offended her, and that he nonetheless went ahead and said that prostitution is wrong. He thus committed "hate speech" based on "*occupation or trade*"[12], and if found guilty, could be punished with a fine and/or up to three years' imprisonment (and if he were to do it again, up to ten years' imprisonment).

26. A further major problem is the fact that a number of essential words in the definition of "hate speech" (which are really essential components of the crime of "hate speech"), namely "*threatening"*, "*abusive*", "*insulting*", "*bring into contempt*" and "*ridicule*"[13], are vague and undefined, which will undoubtedly lead to multiple or misinterpretation of these words, legal uncertainty and potentially even abuse. In this regard, the following:

26.1. Terms like "*threatening*", "*abusive*" and "*insulting*" have synonyms like "hostile", "unmannerly" and "discourteous". "*Contempt*", amongst other things, means

[10] S 4(1)(a) of the Bill
[11] "*Communication*" itself has an excessively broad definition in terms of s 1 of the Bill and includes for e.g. "*gesture*". Because of the over-broad definition, even facial expressions that are considered "*threatening", "abusive", "insulting", "ridiculing"* or "*bringing into contempt*" could potentially be regarded as "hate speech"!
[12] S 4(1)(a) of the Bill
[13] S 4(1)(a) of the Bill

"disapproval" and "*ridicule*" has synonyms like "laughter" and "mimicry". As such, the definition, and scope, of "hate speech" has the potential to be incredibly far-reaching;

26.2. For example: In terms of the proposed definition of "hate speech", a woman who in a discourteous manner accuses her male colleagues of chauvinistic behavior, or threatens to expose their conduct, or a black man who says that Apartheid has taught him that white people cannot be trusted, may be charged with and found guilty of a criminal offence. A comedian who uses satirical comedy, humorous parody and witty mockery, to make fun of politicians, lawyers or even the Springbok rugby team, could end up in jail because of his/her "*ridicule*" based on "*occupation or trade*". The implications for journalists and the press, likewise, are dire;

26.3. In this regard also, it is important to mention that what people find *"threatening*", *"abusive*", *"insulting",* having a *"contemptuous*" or "*ridiculing*" effect, varies from person to person, and makes the enquiry into "hate speech" almost entirely subjective. Rather than merely assessing whether the speech was unlawful when comparing it to a well understood standard, it turns the attention to the perception of the listener (which becomes reality); and

26.4. Finally, it is problematic that the proposed definition of "hate speech" does not require falsehood in any way. While defences to the traditional understanding of defamation always include "fair and honest" comment, it is possible to be convicted of a "hate speech" offence without the truthfulness of their statement ever being in question.

27. Related definitions in the Bill that are too broad and lend themselves to abuse, are as follows:

27.1. "*Harm*" is defined as including "*any mental, psychological or economic harm"*[14], and elsewhere as including "*physical, psychological, social, financial or any other consequences of the offence for the victim and his/her family member*"[15]. This broad notion of "harm" is sufficient to turn almost any expression into a crime, and make almost any person a "*victim*" of "hate speech";

27.2. "*Victim*" "*means a person, including a juristic person, against whom an offence referred to in section 3 or 4 has been committed and, for purposes of section 4, means any*

[14] S 1 of the Bill
[15] S 5(1) of the Bill.

*member of a group or persons contemplated in that section*"[16]. In this regard the following:

27.2.1. As a result of the over-broad definitions in the Bill, an actual victim is not necessarily required before a person can be charged with and found guilty of "hate speech"[17]. This is in stark contrast with traditional defamation or slander cases, where a real person has to be slandered or defamed, and leaves the Bill wide open to abuse; and

27.2.2. In light of the definition of *"harm"*[18], it appears that "*victim*" also specifically includes a "*family member*" (which again is undefined, and capable of multiple interpretations) of a "victim".[19] This stretches the definition of "*victim*" far too wide, again making the Bill wide open to abuse!

28. Finally, we respectfully submit that the scope of application of the Bill is over-broad, and will lead to unintended and/or absurd consequences. In terms of the Bill, it is not only the "original" author or communicator who could be found guilty of, and punished for, the crime of "hate speech", but anyone who in any way encourages, or assists in, spreading the "hate speech" in such a way that it is accessible to the public or the "victim".[20] Notionally therefore:

28.1. A journalist who reports on an incident of "hate speech" (and repeating, in the interest of accurate and truthful reporting, what was actually said) in a news article or on television or radio, or the host of a television or radio talk show who invites an alleged "hate speech" offender to debate his/her viewpoints on the show[21], could potentially be sent to jail for three years if the article subsequently turns out to be "hate speech";

28.2. Likewise, an employee who, in the course and scope of his/her duties as such, is asked to publish or share a piece written by someone else, on the internet or on social media,

---

[16] S 1 of the Bill

[17] In this regard, see particularly s 4(1)(a)(ii)(aa) of the Bill – "*… whether or not such person or group of persons is harmed …*"

[18] S 5(1) of the Bill

[19] See for e.g. s 3(1) and s 5(1) of the Bill

[20] S 4(1)(b) – (c), and s 4(2) of the Bill

[21] As a case example, in June 2016 national news media ran a report on a man who claimed that the Bible taught that black people were inferior and must be servants. His statements were not only racially offensive, but factually misrepresenting the Bible. He then accepted a challenge to debate this on a Christian radio station, but was unable to substantiate his claims from Scripture. The audio recording was posted on the internet, shared and reported on by other news media. The public debate discredited his claims and resolved the matter. Had this Bill been law at the time, the radio station, the organisation posting the debate and the news media sharing and reporting on it all would have been at risk of criminal sanctions.

could potentially be charged with "hate speech" and if found guilty, suffer the same punishment; and

28.3. A person who, on a private whatsapp group (e.g. family group), shares a picture that could potentially be seen as "*threatening"*, "*abusive*", "*insulting*", "*bringing into contempt*" and/or "*ridiculing*"[22] another person (for e.g. a picture that makes fun of Afrikaans people, or Americans), the person who shared that picture on the private whatsapp group could, if someone outside the group were to somehow see the picture and think it is offensive or could be offensive, could potentially be found guilty of "hate speech".

29. In view of the aforegoing, it is clear that the definition of "hate speech" in the Bill places much greater limitations on freedom of speech than the Constitution itself (in s 16(2)(c)), as such is over-broad and for this reason, unconstitutional.

30. In this regard also, we mention that an application challenging the constitutionality of the "hate speech" section[23] of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ("the Equality Act") which, likewise, is broader than the Constitution, is currently pending before the Johannesburg High Court (***DJ Qwelane v Minister for Justice & Others***, Case number 36314/2013). The matter has been postponed for hearing in March 2017, and it is respectfully submitted that, in order to avoid unnecessary expenditure of money, time and effort, it is prudent that further consideration of the "hate speech" component of the Bill, stand over until such time as the Court has settled the constitutional limits of "hate speech" in that context and which will in turn inform this Bill (which goes much further even than the Equality Act!).

31. Should the current definition of "hate speech" in the Bill be allowed to remain, we respectfully submit that it is very possible that the provisions of the Bill, likewise, will be challenged for being over-broad and for that reason, also unconstitutional and invalid.

**Chilling effect on Freedom of Expression:**

32. The second problem with the current definition of "hate speech" in the Bill, is the major chilling effect that it could have on the fundamental right to Freedom of Expression.[24]

[22] S 4(1)(a) of the Bill
[23] S 10 of the Equality Act
[24] S 16 of the Constitution

33. Should the Bill be passed in its current form, the effect would be that virtually any speech that anyone could potentially find offensive, could qualify as "hate speech" punishable by a fine and/or up to 3 years' imprisonment for a first offence and up to 10 years' imprisonment for a repeated offence[25].

34. By contrast, section 16 of our Constitution guarantees the right to "freedom of speech" – not the right to "freedom from offence". This constitutional guarantee is a recognition that we live in a pluralistic society where people who hold diverse beliefs and views on matters, should be free to express their views openly and without fear of punishment. The "price tag" of this freedom is that we need to be willing to tolerate views that are different to our own – even views that we may find to be personally offensive, disturbing or shocking.

35. George Orwell once famously said: "*If liberty means anything at all, it means the right to tell people what they don't want to hear!*" This is what free speech in a truly free society really means. Without the freedom to offend, free speech and free thoughts cannot truly exist. Ideas are indeed sometimes dangerous things, especially ideas that seek to challenge the *status quo* or existing orthodoxy.

36. The question is not whether the views were perfectly correct, or were insulting and offensive, but whether the enforcers of the criminal law should be empowered to tell the difference. Where does the greater risk lie: Allowing citizens to speak controversially and offensively, or allowing the State to censor what it considers to be controversial and offensive?

37. In this regard, we would do well to reflect on our own history and the fact that "*the regime of racism in South Africa was maintained not only by brutality – guns, violence, restrictive laws. It was upheld by elaborately extensive silencing of freedom of expression*" (Nadine Gordimer).

38. Twenty years into constitutional democracy, we dare not go back to a time when the State told us what we may and may not speak, what we may and may not hear, and where censorship (rather than free speech) was at the order of the day.

39. If the State were to start dictating what is and is not acceptable speech based on content or opinion, that would amount to blatant viewpoint discrimination which is unacceptable within a democratic and pluralistic society such as ours.

40. Further, once the State is given the power to determine what speech is acceptable and what is not, it becomes a slippery slope and the question is, where will it stop? Having banned "offensive"

[25] S 4(3) of the Bill

words, is there any principled stopping point except one based on the discretion or whim of the State?

41. The right to free speech (including religious speech) is a vitally important right in our constitutional democracy, and as such it should be jealously guarded. Freedom of expression ensures a society with a culture of critical conversation, encouraging everyone to tolerate the views of others and protecting the right of dissenters.[26]

42. If certain speech were to be criminalised, the effect would be that freedom of speech would be suppressed due to the fear of someone taking offence at something said and then filing a criminal complaint with the authorities. As a result, debate on issues such as what is true and untrue, right and wrong, just and unjust, would effectively be shut down and the constitutional promise of free speech for all would be reduced to an empty promise on a piece of paper.

43. As such, hate speech laws are actually very illiberal, but potentially also very dangerous. In the words of former US Federal Judge Michael McConnell. "*Speech is constitutionally protected – not because we doubt the speech [may] inflict harm, but because we fear censorship more.*" Thus, while it is true that people may 'misuse' their right to free speech and even use it to offend, this is a risk that open and democratic societies must take.

**Chilling effect on religious freedom:**

44. The third problem with the current definition of "hate speech" in the Bill, is the major chilling effect that it could have on the fundamental right to Freedom of Religion, Belief and Opinion.[27]

45. According to our Constitutional Court, this right includes *"the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination*"[28].

46. The over-broad definition of "hate speech" in the Bill poses a severe threat to religious freedom, because it could be employed to muzzle (and/or have the unintended effect of muzzling) believers across different faith groups from expressing (whether from the pulpit, to a public or private

[26] Freedom of Expression Institute Module Series: Hate Speech and Freedom of Expression in South Africa, p 10
[27] S 15 of the Constitution
[28] ***S v Lawrence; S v Segal; S v Solberg*** (CCT 38/96; CCT 39/96; CCT 40/96) [1997] ZACC 11; 1997 (10) BCLR 1348; 1997 (4) SA 1176, at para [92]

audience) their sincerely held religious convictions and beliefs. It is very possible, as experience has already shown, that the expression of these beliefs may be (mis)interpreted by those who hold to different convictions and beliefs, as *"threatening, abusive or insulting*" and intending to "*bring [them] into contempt or ridicule*".

47. By way of example, in terms of the proposed definition of "hate speech":

    47.1. If a pastor were to say from the pulpit that according to the Bible, prostitution (or abortion, or euthanasia) is wrong, it is entirely possible that he/she could be charged with "hate speech" based on his/her perceived intolerance towards a particular "*occupation or trade*" and, if found guilty, be sentenced to 3 years in jail. (The same argument could apply in respect of certain Scriptures from the Koran, or any other holy text);

    47.2. If a believer were to have a conversation with a person of a different faith or someone who does not share or accept his/her religious beliefs and convictions (on, for example, the way to salvation, creationism, gender issues, marriage, procreation, discipline of children, etc), and that person were to take offence in any way, the believer could potentially face a charge of "hate speech" based upon a perceived prejudice towards the other person's "*religion*" or "*belief*"; and

    47.3. If someone were to share a post on social media that says that while God loves all people, He does not approve of sex outside of marriage (whether heterosexual or homosexual), that person could potentially be charged with "hate speech" based on his/her perceived intolerance of another person's "*sexual orientation"*, <u>even where there is no actual victim</u>!

48. Experience in the USA, UK and other Western democracies has shown that liberal activists, driving anti-religion and anti-natural family agendas, frequently employ "hate speech" laws to hinder or stop the teaching, preaching and publishing of religious content which they regard as unfavourable, offensive or "harmful" to their cause. In fact, in Europe this has become so problematic that even <u>mainstream</u> Christian beliefs and values expressed publically and privately have led to Christians being arrested and prosecuted (and in many instances, only later to be acquitted. This illustrates that the prosecuting authorities often misapply the law).

49. The same anti-religion agenda is at work in South Africa, where pastors and individual Christians are already unfairly being charged with "hate speech" for believing, preaching and teaching, the Bible. <u>For example</u>:

49.1. In the case of Creare Training Centre (a school that trains and equips students for Christian ministry), the then Deputy Minister of Justice, Andries Nel, laid a complaint against Creare with the South African Human Rights Commission (SAHRC), accusing Creare of "promoting violence against homosexual people" because of its Biblical belief and teaching that while God loves all people, He does not approve of homosexuality (or indeed, any sex outside of marriage). In this case, the SAHRC found that while Creare's view was a Biblical one, it was unacceptable and a violation of human rights;

49.2. In the case of Zizipho Pae two years ago, LGBT activists filed "hate speech" complaints against Pae (a member of the Student Representative Body of the University of Cape Town) following a post on her personal Facebook page to the effect that "*We are institutionalising and normalizing sin. May God have mercy on us!*" At their insistence, Pae was summarily suspended and ultimately expelled from the SRC (in addition to having her office trashed, and suffering severe intimidation and harassment by the LGBT community). With the assistance of FOR SA, Pae appealed to the Vice-Chancellor of UCT, who found her expulsion to be "invalid" and ordered her reinstatement to the SRC; and

49.3. In another more recent instance, atheist activists laid a complaint with one of the Chapter 9 institutions against a well-known and reputable evangelical church in Cape Town, complaining that their Biblical belief and teaching that people are not born gay, is "hate speech" and promotes violence against gay and lesbian people (which, we pertinently point out, is <u>not</u> what the Bible advocates or promotes and goes against the heart of the Christian message).

50. This Bill, which seeks to broaden the definition of "hate speech" and thereby limit the right to freedom of speech, is deeply problematic in a constitutional democracy such as ours. True democratic freedom demands individual freedom. Citizens cannot be truly free unless they are able to say what they believe and to live according to their beliefs, freely and without fear of harassment or punishment by the State.

51. In a proper democracy, religious convictions and beliefs should be respected and accommodated, not suppressed or punished. No one should be forced to choose between obeying their conscience or obeying the law, especially where they face the penalty of harsh consequences if they choose to obey their conscience or religious convictions. Should it be passed in its current form, this is exactly the negative consequence that this Bill will achieve.

52. In light of the above, we submit that, should the "hate speech" provisions in the Bill remain, it will be both appropriate and necessary to insert a "religious exemptions clause" in order to accommodate, protect adequately and give effect to the constitutional right to Freedom of Religion, Belief and Opinion. In this regard, the following:

52.1. Section 12 of the Equality Act, 2000 already incorporates legislative exemptions on the "hate speech" (in s 10) and unfair discrimination (in s 12) prohibitions in the same Act;

52.2. In the Constitutional Court case of ***National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others***[29], the Honourable Judge Sachs held as follows:

*"The fact that the State may not impose orthodoxies of belief systems on the whole of society has two consequences. The first is that gays and lesbians cannot be forced to conform to heterosexual norms; they can now break out of their invisibility and live as full and free citizens of South Africa. The second is that those persons who for reasons of religious or other belief disagree with or condemn homosexual conduct are free to hold and articulate such beliefs. Yet, while the Constitution protects the right of people to continue with such beliefs, it does not allow the State to turn these beliefs - even in moderate or gentle versions - into dogma imposed on the whole of society.";* and

52.3. Such clause is not uncommon in other democracies that have adopted "hate speech" laws. For example:

52.3.1. In Canada, an accused will be acquitted "*if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text.*" In addition, the Canadian Code, in framing its prohibition of hate speech, also states that "*nothing in this section shall be deemed to interfere with the free expression of opinion upon any subject in speech or writing*"; and

52.3.2. In the United Kingdom, in terms of the Waddington Amendment (to clause 29 of the Public Order Act, 1986), "*the discussion or criticism of sexual conduct or practices, or the urging of persons to refrain from or modify such conduct or practices, shall not be taken of itself to be threatening or intended to stir up hatred*".

[29] (CCT11/98) [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 at para [137]

53. Our democracy, and indeed the constitutional rights to Freedom of Religion, Belief and Opinion (s 15) and Freedom of Expression (s 16), demand a society in which people can freely express their deepest convictions and beliefs, without fear of being criminally charged with advocating violence or "hatred" against others.

**Need for, and potential effectiveness, of the legislation:**

54. Finally, it is submitted that "hate speech" is already prohibited in South African law, and that it is unnecessary to create an additional law that will have the effect of placing further strain (in terms of time, effort and money) on our already burdened courts and on the police, who will be tasked with the investigation of "hate speech" charges and obliged to make arrests, etc in terms of the Bill.

55. The Preamble to the Bill itself acknowledges that "hate speech" is already prohibited in South African law, through:

55.1. The **internal limitation in s 16 of the Constitution**, which explicitly excludes the following types of speech from the constitutional guarantee to free speech:

55.1.1. *"Propaganda for war;*
55.1.2. *Incitement of imminent violence; or*
55.1.3. *Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm*."; and

55.2. **Section 10 of the Equality Act, 2000**. (It is in terms of this very Act that the Umzinto Equality Court recently ordered *Penny Sparrow* to pay a fine of R150,000 to the Oliver and Adelaide Tambo Trust, for calling black people "monkeys" on social media).

56. In addition, ***crimen iniuria*** (i.e. the willful injury to someone's dignity) is already a common law crime in South Africa. (Again, in the *Penny Sparrow* case, she was charged with this very offence and having pleaded guilty, given the choice between 12 months in prison or a R5,000 fine. It is hard to conceive how the provisions in the Bill could have assisted the prosecution, judgment and ultimate punishment in any way.)

57. “Hate speech” laws in SA are already enforced through the:

    57.1. The South African Human Rights Commission (SAHRC), who can investigate a “hate speech” incident of their own accord, or following a complaint laid with the Commission. Matters adjudicated on by the SAHRC may result in further court action, should the Commission decide that this is warranted;

    57.2. The Commission for Gender Equality (CGE), who has similar powers to the SAHRC in relation specifically to gender related matters;

    57.3. The Equality Courts (created in terms of the Equality Act, 2000) enforces the prohibitions against unfair discrimination and “hate speech” in terms of the Act, and can apply a considerable range of sanctions, including corrective community service and fines; and

    57.4. The divisions of the High Court of South Africa.

58. The question arises: if, by the Bill’s own admission, “hate speech” is already prohibited in South African law, why the need for an additional law on “hate speech”?

59. Statistics show that in 2016, the Equality Courts received 588 complaints regarding racism and discrimination (compared to 844 complaints in 2015, and 612 complaints in 2012). “Hate speech” complaints to the SAHRC, have not seen a marked increase in the last few years.[30] In the circumstances, it is hard to believe the claim that “*government is being overwhelmed with hate speech complaints*” and that for that reason, an additional law is required.

60. It is no secret that the South African Police (who, in terms of the Bill, would be the body responsible for collecting data on these offences, in addition to enforcement of the law) is understaffed and under-resourced, and hardly coping with their current investigation load.

61. The same can be said of our criminal courts, who are already strained under the flood of criminal charges coming before them on a daily basis, and have massive backlogs. The Bill will place additional burdens on our courts, who will be tasked with the interpretation and application of legislation that effectively duplicates what is already in place.

62. Finally, this Bill calls for a criminal justice-centric response to what is, essentially, a socio-cultural issue. Criminalising “offensive” behaviour will not in itself bring change. What is required, is a

[30] Page 8 of *Rapport*, 8 January 2017.

multi-sectoral approach, including specifically raising public awareness and education on these sensitive issues.

63. It has been said that the South African society's overwhelming repudiation of recent regrettable incidences of hate speech, particularly on social media, is indicative of the growing maturity of the South-African democracy in general and specifically in exercising the right to freedom of expression. The best remedy for "hate speech" may well not be criminalisation, but more rigorous protection and promotion of the right to free speech, including the right (and duty!) to reprimand offenders and facilitate societal penalties.

64. In line with this approach, the African Commission on Human and Peoples' Rights (ACHPR) adopted a resolution on repealing criminal defamation laws in Africa. It provides as follows: "*Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners [from] practising their profession without fear and in good faith.*" This is particularly so when less restrictive remedies are available in the form of civil defamation, and the right of reply.[31]

65. The Equality Act, 2000 likewise addresses "hate speech" and unfair discrimination through corrective measures ultimately aimed at transformation, rather than criminalising persons who have committed "hate speech".

66. It is submitted that this approach is preferable to a "criminal justice-centric" approach, which involves the arrest and (often, costly, time-consuming and arbitrary) prosecution of an individual who may at the end of the day not even be found guilty of "hate speech". Experience in the United Kingdom has shown that there are numerous Christian street preachers who have been arrested and prosecuted for alleged "hate speech", only to be acquitted later on. This illustrates that prosecuting authorities often misapply the law, and that we should therefore be slow to "criminalise" speech which ultimately may turn out to be legal, and to make "criminals" out of innocent people too quickly.

67. In conclusion, it is submitted that adequate laws against "hate speech" are already in place, and that an additional law is thus unnecessary. If there is a genuine need for additional measures to deal with "hate speech", it can be achieved by amending the Equality Act, 2000 and/or training and empowering the bodies or forums responsible for enforcing the "hate speech" laws already in place.

---

[31] Bhardwaj & Winks 2013; ACHPR/Res169(XLVIII)2010: Resolution on Repealing Criminal Defamation Laws in Africa http://old.achpr.org/english/resolutions/Resolution169_en.htm (accessed on 19 November 2016).

**FOR SA's PROPOSED RECOMMENDATIONS:**

68. FOR SA submits that the Bill should be carefully redrafted, if not discarded completely, taking into account specifically the comments received from the public and private sector, the legal profession and religious organisations.

69. In particular (and without derogating from the other issues highlighted herein), the Bill should be amended as follows:

69.1. Include, in the Preamble of the Bill, specific reference to s 15 and 31 of the Constitution;

69.2. That the "hate speech" component of the Bill[32] be omitted from the Bill altogether, *alternatively* stand over until such time as the ***Qwelane*** case has been decided, *alternatively* and only if necessary, amend and improve the "hate speech" provisions in the Equality Act, 2000;

69.3. In the event of the "hate speech" provisions remaining in the Bill:

69.3.1. Limit the definition and scope of "hate speech" in the Bill to bring it in line with s 16(2) of the Constitution; and

69.3.2. Insert a "religious exemptions clause" along the following lines in the "hate speech" component of the Bill, so as to adequately accommodate, protect and give effect to the constitutional right to Freedom of Religion (including religious expression):

"*Notwithstanding the provisions of … above, the bona fide expression of a person's religious convictions, beliefs, thoughts and/or opinions in accordance with section 15 of the Constitution, shall not be considered as "hate speech"*.

END.

[32] S 4 of the Bill