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31st January 2017

Submission in response to the Prevention and Combating of Hate Crimes and Hate Speech Bill (Notice 698 of 2016, Gazette No. 40367)

Please find attached the submission by the Helen Suzman Foundation for your consideration.



Francis Antonie
Director

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Trustees: Ken Andrew • Cecily Carmona • Jane Evans • Paul Galatis • Daniel Jowell • Temba Nolutshungu • Kalim Rajab • Gary Ralfe • Rosemary Smuts • Richard Steyn • David Unterhalter • Phila Zulu

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What ought to be the object of the legislator? He ought to assure himself of two things; First, that in every case, the incidents which he tries to prevent are really evils; and secondly, that if evils, they are greater than those which he employs to prevent them.

–Jeremy Bentham, 1830

1. Introduction

The Helen Suzman Foundation's ('HSF') mandate is to promote and defend South Africa's constitutional democracy. The HSF's interest in *The Prevention and Combatting of Hate Crimes and Hate Speech Bill* ('the Hate Speech Bill') centres on our commitment to our constitutional obligations of human dignity, the achievement of equality and the advancement of human rights and freedoms; ensuring that liberty is protected; that freedom of expression is not unconstitutionally curtailed; and that intentional and unintentional consequences of policies are considered. Central to our work is the defence of the rule of law.

The HSF welcomes the opportunity to make a submission on the Hate Speech Bill. The HSF sees this opportunity as a way of fostering critical, yet constructive, dialogue between civil society and government in terms of the legislative process.

1.1 The relationship between law, morality and virtue is complicated. Laws are often seen as the answer to a real or perceived breakdown in the ideal social order. However, when expediency trumps careful consideration of the impact of such laws, their very creation can become inimical to their purported remedy.¹ The criminalisation of speech to address the scourge of racism, bigotry and other forms of discrimination is one such example. The Helen Suzman Foundation recognises the need for interventions to curb the proliferation of racism, bigotry and other forms of prejudice and supports the use of the Equality Court as a means of adjudicating these infractions. Our concern over the Hate Speech Bill stems from the manner in which it seeks to define 'hate speech' as a criminal offence.

1.2 However well-intentioned the severity of such a sanction may be, the suppression of speech through

¹ See Hart, H.L.A, *Punishment and Responsibility*, 1968

² Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*.

the criminal law will not address the underlying causes of why such prejudices continue to stain the social fabric of our country. Remnants of South Africa's deeply painful past will not be undone through criminal sanction. The Truth and Reconciliation Commission spoke to our need as a nation to find a way to move forward as a collective, and recognised that retribution would not be a salve to the emotional, psychological and physical suffering of those who had lost the most. This submission does not in any way seek to diminish the harmful impact that words, ideas – and indeed hate – can have on this collective journey towards a socially cohesive nation. Instead, its purpose is to encourage another way forward.

2. Summary statement of issues

The Hate Speech Bill purports, in the main, to provide for the offence of hate crimes and hate speech through the prosecution and sentencing of persons who commit those offences, as well as for the prevention of such offences.

As noted in the preamble of the Prevention and Combating of Hate Crimes and Hate Speech Bill 'the Constitution of the Republic of South Africa, 1996, commits the Republic of South Africa and its peoples to establish a society that is based on democratic values of social justice, human dignity, equality and the advancement of human rights and freedoms, non-racialism and non-sexism'.

The Hate Speech Bill further relies on our international obligations in terms of the International Convention on the Elimination of All Forms of Racial Discrimination, to create these specific offences.

2.1 The HSF has the following concerns about the Hate Speech Bill:

1. It fails to differentiate between behaviour which is harmful and behaviour which is offensive.
2. It limits freedom of expression, beyond the limitations created by the Constitution, current legislation and the common law;
3. The phrasing and structure of the Hate Speech Bill allows for potential abuse in curbing

speech that is unpopular, critical or political in nature;

4. The use of vague and broad definitions which, if enacted, would encroach on the freedom of expression;
5. The generally unenforceable nature of the Hate Speech Bill, and the potential for specific victimisation;
6. It creates uncertainty about the application of existing legislation designed to regulate hate speech through the civil law.

2.2 Our view is that the Hate Speech Bill fails Bentham's test. In addition, both the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the well-recognised common law crime of *crimen injuria* already make provision for appropriate redress and punishment. Accordingly, we urge that the Bill be withdrawn entirely.

3. The Rule of Law

Section 1 of the Constitution provides that

'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.
- (d) Universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.

These founding values are at the heart of the constitutional project for the new South Africa. Most

notable with regard to what it means to be a constitutional democracy, are the values outlined in Section 1(c) of the Constitution. The rule of law ensures 'equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.²

In other words, the rule of law implies

- the absence of arbitrary power,
- equality before the law, and
- the protection of basic human rights.

3.1 The Hate Speech Bill encounters problems when considered against these three criteria. This is because the Hate Speech Bill unreasonably limits freedom of expression as it fails to meet the requirements of Section 36 of the Constitution. The broadness and vagueness of the Hate Speech Bill could result in the potential for specific victimisation rather than general regulation. Vulnerable groups would include those that may have '*bona fide* engagement in artistic creativity', or those involved in 'fair and accurate reporting in the public interest', or holders of unpopular views.

4. The distinction between harmful and offensive behaviour

'Good grief, we're getting offended by everything these days! People can't say anything without offending somebody'
- Hillary Clinton

4.1 *Harm* is material damage, or actual or potential ill effect. *Offensive behaviour* is an act or instance of causing resentment or hurt, something that outrages the moral or physical senses.

4.2 It is generally recognised that people have a right to be protected by the law against harm. When it comes to speech, Judge Brandeis set out the 'clear and present danger' doctrine in 1927:

² Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies. 2004*. http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616

To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

4.3 Offensive behaviour characteristically evokes social disapprobation, ostracism even, but whether offensive behaviour should attract legal sanction is more controversial. Some argue that only harmful behaviour should be punished and others that both harmful and offensive behaviour should receive the attention of the law.

4.4 A third position is taken by Joel Feinberg³ who argues that certain types of offensive behaviour should attract legal sanction. In such cases, it should be recognised that offensive behaviour is less serious than harmful behaviour, and that offensive behaviour subject to sanction should be subject to four tests:

- For offensive behaviour to be sufficient to warrant coercion, it must result in a reaction that could reasonably be expected from almost any person chosen at random, taking the nation as a whole (the standard of universality);
- No one has a right to protection against offensive experiences if he can easily and effectively avoid those experiences with no unreasonable effort or inconvenience (the standard of reasonable avoidability);
- No respect should be shown for abnormal susceptibilities; and
- The person constrained by the law from being offensive to others must be granted an allowable alternative outlet or mode of expression.

It is therefore crucial to make careful distinctions. But the Hate Speech Bill does not make them.

³ Joel Feinberg, *Rights, justice and the bounds of liberty: essays in social philosophy*, Princeton University Press, 1980

5. Constitutional Implications

- 5.1 Parliament has a duty to ensure that freedom of expression is protected - and that any limitation on this right meets the requirements within Section 36 of the Constitution. Specifically, there is a clear distinction between offensive speech, which is protected under Section 16(1) of the Constitution, and hate speech - which is not, as outlined in Section 16(2) of the Constitution. Hate speech is a distinct offence which must be qualified by the element of incitement to cause harm. The conflation of hate speech with offensive speech will lead to an abuse of the prosecutorial process as well as our criminal justice system. In addition, it will create practical difficulties in the implementation and enforceability of the Hate Speech Bill. Moreover, it will fail in remedying the problems that the Hate Speech Bill purports to address.
- 5.2 Section 16(2) of the Constitution requires two elements to be present together in order for an expression to be considered hate speech: 'the expression must constitute advocacy of hatred on one of the listed grounds and the advocacy must constitute incitement to cause harm'.⁴ The Hate Speech Bill goes too far by not requiring these elements to be present which act as qualifiers on what should be considered hate speech.
- 5.3 Hatred is an extreme emotion. An expression should only be considered as advocating hatred when it proposes, calls for, or makes a case for it.⁵ In addition, such consideration should be restricted to statements which manifest 'detestation, enmity, ill-will and malevolence'.⁶ Even though the advocacy of hatred can be considered very offensive the expression still needs to satisfy the second element – incitement to cause harm – in order to be considered hate speech.⁷
- 5.4 Incitement means the expression must be directed at, or be intended to cause harm and whether any harm has been caused is determined by applying an objective test.⁸ The South African Human Rights Commission in **Freedom Front v South African Human Rights Commission** laid out the objective test as follows: '*whether a reasonable person assessing the advocacy of hatred on the*

⁴ I Currie & J De Waal *The Bill of Rights Handbook* 6th ed 357.

⁵ Currie & De Waal *ibid*.

⁶ Currie & De Waal *ibid*. See also *R v Andrews* 1988 65 OR (2d) 161 179 cited in *R v Keegstra* 1990 2 SCR 697 777.

⁷ *Van Loggerenburg v Highveld Stereo* 2004 (5) BCLR 561 (t) 6.

⁸ Currie & De Waal *ibid* 359.

stipulated grounds 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

5.5 The Hate Speech Bill, by the inclusion of 'is threatening, abusive or insulting'¹⁰ and 'bring into contempt or ridicule'¹¹, completely disregards the need for expressions to meet the above criteria and extends the reach of hate speech far too wide. The Hate Speech Bill discounts any objective test and introduces the possibility of criminal prosecution resulting in imprisonment and/or a fine based on the subjective feelings of a person or group of persons who feel hurt by a joke or mere remark that has been made in jest, thoughtlessly, or in the heat of the moment.

5.6 The Hate Speech Bill is mindful that Section 16(1) of the Constitution ensures that everyone has the right to freedom of expression, which includes:

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

5.7 However the Hate Speech Bill also notes that Section 16(2) of the Constitution states that the protection of expression in Section 16(1) does not extend to:

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

5.8 Therefore one must keep in mind that expressions that may be offensive, shocking or even disturbing can still fall under the protection of Section 16(1) of the Constitution, so long as they are

⁹ 2003 (11) BCLR 1283 (SAHRC).

¹⁰ Bill Section 4(1)(a)(ii) .

¹¹ Bill Section 4(1)(a)(bb).

not on a listed ground within Section 16(2). However, as noted by Kriegler J in **S v Mamabolo**¹² the freedom of expression *'is not a pre-eminent freedom ranking above all others... a law of general application may limit freedom of expression'*.

This was later reaffirmed by Moseneke J in **Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International**¹³, in stating that the right *'to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless'*.

6. Limitations of Rights Analysis

In order for a right to be limited by a law of general application it needs to meet the requirements of Section 36 of the Constitution which allows freedoms to be limited *'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'*. These factors include:

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

In **National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others** the limitation exercise was defined in these terms:

'The balancing of different interests must still take place. On the one hand there is the right infringed; its nature; its importance in an open and democratic society based on human dignity, equality and freedom; and the nature and extent of the limitation. On the other hand there is the importance of the purpose of the limitation. In the balancing process and

¹² (E TV and Others Intervening) 2001 (3) SA 409 (CC) at para 41

¹³ 2006 (1) SA 144 (CC) at para 47

*in the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose’.*¹⁴

6.1 Nature of the Right

In **South African National Defence Union v Minister of Defence and Others**¹⁵ O’Regan J recognised that *‘Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental functions as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally’*. It also constitutes a key aspect of what it is to be human, bestowing agency on us as we communicate, receive and impart with information with one another.

The right to freedom of expression is one of a *‘web of mutually supporting rights’* closely related to freedom of religion, dignity, association, the right to vote and the right to assembly. If we were to limit the freedom of expression we would subsequently encroach on aspects of these other constitutionally protected rights.

6.2 Importance of the purpose of the limitation

The state plays an important role in balancing freedom of expression and the regulation of speech. The Constitutional Court has noted that *‘implicit in [section 16] is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm’*.¹⁶ While recognising the importance in preventing and combating hate crimes and hate speech, any limitation imposed by

¹⁴ National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6; 1998 (12) BCLR 1517 at para 35

¹⁵ 1999 (4) SA 469 (CC) at para 7

¹⁶ Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294; 2002 (5) BCLR 433 at para 30.

the state, must meet the requirements of being both reasonable and consistent with the Constitution.

S v Makwanyane¹⁷ dealt extensively with the principle of deterrence. The case expounded on the causal nexus between the punishment of the death penalty and deterring violent crime – particularly murder. In its analysis, the Constitutional Court reasoned that the choice was not a simple dichotomy between instituting the death penalty or allowing crime to run rampant. The question of why people were motivated to commit crime was much more complex, and part of that nuance was tied to this country’s violent and difficult history. Indeed, our transition to democracy, though relatively peaceful, is still marred by structural economic inequalities and pervasive societal divisions. Importantly, the court acknowledged that there was no proof that the death penalty was a greater deterrent to violent crime than the sentence of life imprisonment.

Much of the justification for criminalising hate speech has been to create a deterrent to those likely to make racist or bigoted utterances. It is entirely unclear how or why the drafters of this Hate Speech Bill believe that criminal sanction will serve as an effective deterrent to the proliferation of racist or bigoted speech. The Constitutional Court in finding that the death penalty was unconstitutional, reasoned that prevention of crime could be achieved through less restrictive means; namely life imprisonment. The HSF would argue that the same principle applies here. The existing civil law remedies are sufficiently punitive. Any ‘deterrent’ as the Deputy Minister hopes for in a recently argued op-ed¹⁸, can only arise from continued public discourse, civic education and engagement on the best way to achieve social cohesion and our nation-building project as has been provided for in Section 9 of the Hate Speech Bill.

6.3 The nature and extent of the limitation

The more excessive the infringement the greater the onus is on the state to justify its limitation of the right.¹⁹ But the Hate Speech Bill casts the net of criminal liability so wide that, in effect,

¹⁷ 1995 (2) SACR 1 (CC) par 116-127.

¹⁸ Jeffrey, J ‘Preaching without incitement’, published in *Weekend Argus*, January 28, 2017.

¹⁹ S v Bhulwana; S v Gwadiso 1996 (1) SA 388; 1995 (12) BCLR 1579 at para 18.

criminalises both offensive speech and hateful speech.²⁰ We consider this to be an unjustifiable limitation on the right to freedom of expression and is inconsistent with the principles of the Constitution.

6.4 The relation between the limitation and its purpose

*‘Punishment should fit the criminal as well as the crime,
be fair to society, and be blended with a measure of mercy
according the circumstances.’ - S v Rabie²¹*

As required by the Constitution there needs to be a causal connection between the limitation and the purpose sought to be achieved. Any infringement on a constitutionally guaranteed right must be proportional to the harm sought to be mitigated against. The Hate Speech Bill imposes severe penalties against convicted offenders in the form of maximum sentences; the imposition of a fine and/or imprisonment not exceeding 3 years for a first conviction and the imposition of a fine and/or imprisonment not exceeding 10 years for any subsequent convictions. The HSF considers this to be a grossly disproportionate penalty given the nature of the offence. The offences in question are characterised by a high degree of subjectivity which creates uncertainty in the uniformity of their prosecution. The penalties created by the Hate Speech Bill are therefore inappropriate, unreasonable and disproportionate.

In **Case v Minister of Safety and Security**²² the Constitutional Court noted the approach to overbroad provisions:

‘Overbreadth analysis is properly conducted in the course of application of the limitations clause. To determine whether a law is overbroad, a court must consider the means used, (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate

²⁰ See Section 4.

²¹ 1975 (4) SA 855 (A) 862G.

²² Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 at para 49.

underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad'.

When one scrutinizes the Hate Speech Bill under the requirements established in Section 36 of the Constitution it is evident that the Hate Speech Bill does not meet constitutional muster as a justified limitation of a right. Its structure and use of language will result in legislation that encroaches on the freedom of expression to the point that is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

The use of the words 'bring into contempt or ridicule' in Section 4(1)(a)(bb) of the Hate Speech Bill severely limits the freedom of expression as these broadly defined words cast the net of hate speech too far. Incorporating such a phrase into the Hate Speech Bill causes aspects of expression such as satire and artistic creativity, which use ridicule in the broad sense, to fall within the scope of hate speech. This limitation on expression is not in accordance with the purpose sought to be achieved by the legislation, mainly the prevention and combating of hate speech.

It should also be observed that people may invite contempt or ridicule by their own freely chosen actions, and that they may reasonably be observed to be contemptible or ridiculous. In any functioning democracy such plurality of opinion, and diversity of views and ideas should be celebrated not condemned. Hate speech falls outside of the ambit of reasonable public discourse, debate, and indeed, disagreement.

The use of vague and broad language and provisions means that the extent of the limitation is severe and open to abuse in that it adversely affects the freedom of the press and other media, to receive or impart information or ideas and freedom of artistic creativity.

6.5 Less restrictive means to achieve the purpose.

The Prevention and Combating of Hate Crimes and Hate Speech Bill mainly purports to:

- 'to provide for the offence of hate crimes and the offence of hate speech and the prosecution of persons who commit those crimes;'

- 'to provide for the prevention of hate crimes and hate speech;'
- 'to amend certain Acts of Parliament consequentially;'

However, the purposes for which Bill has been drafted are effectively achieved by the existing limitations on freedom of expression found in Section 16(2) of the Constitution, as well as other forms of enacted or drafted legislation and the common law.

6.5.1 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) is a comprehensive piece of legislation already in place in South Africa. It ensures the 'prevention, prohibition and elimination of unfair discrimination, hate speech and harassment'²³ in Chapter 2. Section 10 and Section 12 of PEPUDA are concerned with the prohibition of Hate Speech and the prohibition of dissemination and publication of information that unfairly discriminates. Section 10 of PEPUDA states that

1. 'Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to —
 - (a) be hurtful;
 - (b) be harmful or to incite harm;
 - (c) promote or propagate hatred.
2. Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation'.

²³ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Chapter 2.

By reading this with Section 12 it is clear that PEPUDA sufficiently prohibits hate speech in that nobody may 'disseminate or broadcast any information' or 'publish or display any advertisement or notice' that may be reasonably understood a clear intention to unfairly discriminate.²⁴ Note that the broadness and vagueness of 'hurtful' in Section 10 of PEPUDA may be subject to constitutional review, but no test case has yet emerged.

Section 12 of PEPUDA creates exceptions in the form of '*bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution.'²⁵ These exceptions safeguard aspects of expression which are intrinsically linked to democracy in a way that the Hate Speech Bill fails to.

We already have PEPUDA which established the Equality Courts. These courts are granted a number of powers and functions regarding the orders they may make, as outlined in Section 21(2). These include payments of damages to individuals or appropriate organisations, or at the discretion of the Courts, to refer any case dealing with hate speech to the Director of Public Prosecutions for institution of criminal proceedings for *crimen injuria*.

The provisions under Section 21(2) of PEPUDA not only meet the punitive purposes sought to be achieved by the Hate Speech Bill, but they go beyond it to use forms of restorative and rehabilitative justice that are more appropriate than the retributive justice which is dominant within the Hate Speech Bill.

The preventative measures outlined in Section 9 of the Hate Speech Bill which impose a duty on the state to 'promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences', are not found in existing legislation. However Section 6 of PEPUDA, which deals with 'prevention and general prohibition of unfair discrimination', can be amended to include the preventative measures discussed in Section 9 of the Hate Speech Bill. If the educational aspects of Section 9 were included in PEPUDA and utilised by the Equality Courts, rehabilitative forms of justice could be implemented better to eradicate racism rather than suppress it through retributive measures.

²⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 Section 12.

²⁵ Ibid.

6.5.2 *Crimen injuria*

Crimen injuria is sufficient to provide for instances of hate speech which are serious enough to attract criminal prosecution. It is the 'unlawful, intentional and serious violation of the dignity or privacy of another'.²⁶ The interests protected under this crime have been described as *dignitas* which does not just equate to dignity but instead is a 'formal, collective description of all the rights or interests' which covers 'all objects protected by the rights of personality'.²⁷

Crimen injuria 'can be committed either by word or by deed'.²⁸ In order to establish whether there has been a violation both a subjective and objective test is applied. In order to satisfy the subjective test 'Y must (a) be aware of X's offending behaviour and (b) feel degraded or humiliated by it'.²⁹ The dignity, self-respect and mental tranquillity of a person are 'subjective elements of a person's personality'.³⁰ The objective test will be satisfied where X's conduct is of 'such a nature that it would offend at least the feelings of a reasonable person'.³¹ Therefore if Y is timid or hypersensitive and easily takes offence to conduct which would not offend a reasonable person the test will not be satisfied.

In order for a conviction of *crimen injuria* to be sustained the violation must be of 'a sufficiently serious or reprehensible character to merit punishment in the interests of society'.³² Case law has indicated that '*the test of gravity is whether the conduct is likely to have results that may detrimentally affect the interests of the state or the community*'.³³ The court in **R v Walton** aptly provided '*in the ordinary hurly-burly of everyday life a man must be expected to endure minor or trivial insults to his dignity*'.³⁴ The requirement of seriousness may be considered vague but it is a necessary requirement in order to avoid trivial prosecutions. An objective test must be used to

²⁶ CR Snyman *Criminal Law* 5th ed 469.

²⁷ Snyman *ibid* 470. See also R v Umfaan 1908 TS 62 66-67 and R v Holliday 1927 CPD 395 402.

²⁸ Snyman *ibid* 470.

²⁹ Snyman *ibid* 471. See also R v Van Tonder 1932 TPD 90 94; S v S 1964 3 SA 319 (T) 321B; and S v A 1993 1 SACR 600 (A) 610E-F.

³⁰ Snyman *ibid* 471.

³¹ Snyman *ibid* 472.

³² Snyman *ibid* 474. See also R v S 1955 3 SA 313 (SWA) 316; and S v Jana 1981 1 SA 671 (T) 676A.

³³ R v Walton 1958 3 SA (R) 695; Jana *ibid*.

³⁴ Walton *ibid*.

determine the degree of seriousness of any violation and will depend on a multitude of factors such as 'the relationship between the parties, such factors as the age and sex of X and Y, the persistence of the conduct complained of, the degree of publicity attached to the conduct, the relative social positions of the two parties, the fact that the insult is addressed to a public official such as a traffic officer or a policeman who is acting in his official capacity, or the fact that the insult has a racial connotation'.³⁵

There are numerous grounds of justification: for example, 'consent, necessity and self-defence' which may negate the unlawful character of the act.³⁶ *Crimen injuria* requires that the crime be committed with intention meaning 'X must know that he is violating Y's dignity' and as such negligence will not suffice.³⁷

Section 21 (2)(n) of PEPUDA gives the Equality Court the power to make 'an order directing the clerk of the equality court to submit the matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of the common law or relevant legislation'. *Crimen injuria* provides the appropriate grounds for the institution of criminal proceedings as it allows for the prosecution of hate speech which has been committed intentionally and which is of a serious enough nature to warrant criminal prosecution. There is no need for a further basis of prosecution such as in terms of the Hate Speech Bill as these incidences are already covered.

Crimen injuria is also an appropriate option, unlike the Hate Speech Bill, as its application is limited to events of a serious nature. *Crimen injuria* provides limitations on the institution of criminal proceedings and provides for some grounds of justification which means freedom of expression will not be unjustifiably limited. Criminal proceedings will only be instituted in cases where the expression can objectively be considered to be detrimental to the interests of society rather than on a mere insult. *Crimen injuria* allows courts to determine the matter based not only on the subjective feelings of a person or group of persons, but rather it provides the court with an objective test of the reasonable person which will allow for fair, consistent and uniform application of the law.

³⁵ Snyman ibid 474-5.

³⁶ Snyman ibid 475.

³⁷ Ibid.

Crimen injuria has been and is being utilised to prosecute such instances, for example, the cases of Penny Sparrow, Vicki Momberg³⁸, Johannes David Kriel³⁹ and Andries Jacobus Vermaak.⁴⁰ The need for this Bill becomes redundant in the face of both PEPUDA and *crimen injuria*.

7. International law implications

The right to freedom of expression is not only recognised in our Constitution but by the international community as a whole as well. **The Universal Declaration of Human Rights (1948)** recognises this right in Article 19, which provides specifically for the right to freedom of opinion and expression and ‘includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers’.

7.1 **The International Covenant on Civil and Political Rights (1966) (‘ICCPR’)** recognises the same rights above however it goes into more detail. Article 19 provides –

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
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:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of

³⁸ <http://ewn.co.za/2016/06/25/Vicki-Momberg-to-appear-in-court-for-crimen-injuria>.

³⁹ <http://www.iol.co.za/news/crime-courts/you-cannot-make-these-comments-and-say-sorry-afterwards-7442557>.

⁴⁰ <http://www.iol.co.za/news/crime-courts/magistrate-in-race-attack-case-objects-to-proceedings-2022630>.

public health or morals.

And Article 20 of ICCPR provides –

1. Any propaganda for 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.

7.2 **The African Charter on Human and People's Rights (1981)** Article 9 provides –

1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

7.3 Article 4 of **The International Convention on the Elimination of All Forms of Racial Discrimination (1956) ('CERD')** which goes substantially further than Article 20(2) of the ICCPR, requires state parties, among other things, to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination. In contrast to the ICCPR, CERD requires the prohibition of racist speech even if it does not constitute incitement to discrimination, hostility or violence.

According to the CERD, Article 4(a) requires state parties to *penalize* four categories of misconduct:

1. dissemination of ideas based upon racial superiority or hatred;
2. incitement to racial hatred;
3. acts of violence against any race or group of persons of another colour or ethnic group; and
4. incitement to such acts.

In a 2001 Joint Statement, the UN, OSCE and OAS Special Mandates on the right to freedom of expression set out a number of conditions which hate speech laws should respect:

- No one should be penalised for statements which are true

- No one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence
- The right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance
- No one should be subject to prior censorship
- Any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.

These provide a good basis for assessing the legitimacy of any particular hate speech law. The Hate Speech Bill does not respect the above conditions, and there is no indication any such considerations were taken into account when the Hate Speech Bill was drafted.

7.4 The United Nations Human Rights Office of the High Commissioner recommended there should be a distinction between three types of expression that may be considered hate speech. These are: 'expression that constitutes a criminal offence; expression that is not criminally punishable but may justify a civil suit or administrative sanctions; expression that does not give rise to criminal, civil or administrative sanctions but still raises a concern in terms of tolerance, civility and respect for the rights of others'.⁴¹ The Hate Speech Bill as it currently stands does not recognise any such distinction but rather criminalises all forms and attracts a penal sanction. The OHCHR has further recommended a six part threshold test to determine which, if any, expressions should be criminalised, which requires a determination of the context; speaker; intent; content or form; extent of the expression; and likelihood, including imminence, of incitement.⁴²

7.5 The European Court of Human Rights in **Handyside v United Kingdom**⁴³ recognised that freedom of expression forms the foundation of a democratic society and is required for the development and progress of every person. Freedom of expression does not just protect ideas which are received favourably but can extend to *'those that offend, shock or disturb the State or any sector of the*

⁴¹ OHCHR *Rabat Plan of action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (5 October 2012).

⁴² *Ibid* par 20.

⁴³ *Handyside v United Kingdom* Application No 5493/72 (1976) ECtHR, para 49.

population'. In order to ensure the right to freedom of expression is not unduly limited 'every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued'. Once again, the Hate Speech Bill as it stands is disproportionate to the aim it seeks to achieve as it provides for a blanket criminalisation even over expressions which may be offensive and insulting but not necessarily harmful or inciting.

7.6 The Hate Speech Bill goes beyond the requirements of international law by criminalising not only speech which falls within the four categories required to be penalised under Article 4(a) of CERD but also criminalising speech which can and should only be considered as offensive or insulting. Current debates within the international community indicate a general lack of consensus over the compatibility between Article 20 of the ICCPR and Article 4(a) of CERD. As a State Party to both, South Africa ought to tread carefully in the domestication of these obligations into our laws. There is no uniform interpretation of what it means to create offences punishable by law. Parliament must be cognisant of the difficulties inherent in the implementation of Article 4(a) of CERD when legislating to regulate freedom of expression. International jurisprudence indicates that although the right to freedom of expression is not absolute and can be limited, such limitations should be proportional. By criminalising what is essentially offensive speech the Hate Speech Bill creates constitutionally unjustifiable limitations on this right.

8. Observations of the Hate Speech Bill

In this section, we point out a number of instances where careless drafting of the Hate Speech Bill leads to serious difficulties.

8.1 Definitions

1. '**communication**', the inclusion of the wording 'without any limitation', negates discretion in the consideration of the types of communication included in the stated definition. Further, the use of such wording is ambiguous in that it potentially excludes application of Section 36 of the Constitution.
2. '**gesture**' and '**expression**' as listed under '**communication**', are vague, ambiguous and

overly broad in their potential interpretation. Both types of communication should include their own definition under Section 1 of the Hate Speech Bill.

3. '**court**' as defined in Section 1 of the Hate Speech Bill does not refer to the Equality Court, which was specifically created to preside over cases involving discrimination on the basis of prohibited grounds.
4. '**harm**' as described makes reference to types of "harms" without defining the meaning of harm envisaged in application of the Hate Speech Bill, the definition as it stands is vague and overly broad. The types of harm listed should include their own definition under this Section 1 of the Hate Speech Bill.
5. '**person**' should be included within Section 1 of the Hate Speech Bill, the definition should be inclusive of any individual, juristic persons, as well as the State. The omission of this defined term leaves room for ambiguity as to who can be held liable under Section 3 and Section 4 of the Hate Speech Bill.
6. '**victim**' as defined in the Hate Speech Bill is inclusive of juristic persons. The inclusion of juristic persons as victims, given the broad and vague phrasing used within the Hate Speech Bill, may be abused in such a way that critical or disapproving speech regarding the state, political parties and other such institutions may be hampered. Such speech is vital in a democracy and therefore the potential of such abuses needs to be adequately addressed.
7. '**social origin**' is undefined and is indistinguishable from the other listed prohibited grounds. This term must be defined if it is to remain as a prohibited ground.
8. '**belief**' is undefined and is a broad and vague concept with many possible interpretations. As religion is already listed, one would presume that these differ and therefore without defining the word, the potential interpretation of this ground is so wide so as to create room not only for abuse in its application but also to provide grounds for objection on account of vagueness.

8.2 Offence of hate crime

Section 3 (1) of the Hate Speech Bill should clarify the offence stipulated with the qualifier of **'criminal offence'**, the clause as currently worded creates ambiguity between civil and criminal offences.

Section 3 (1)(d) of the Hate Speech Bill lists **'social origin'** as a prohibited ground. It is undefined and indistinguishable from the other listed prohibited grounds. Moreover, the potential interpretation of this ground is so wide so as to create room for abuse in its application.

Section 3 (1)(h) of the Hate Speech Bill lists **'belief'** as a prohibited ground. It is a broad and vague concept with many possible interpretations. The potential interpretation of this ground is so wide so as to create room not only for abuse in its application but also to provide grounds for objection on account of vagueness.

Section 3 (1)(q) of the Hate Speech Bill lists **'occupation or trade'** should not be included as a prohibited ground. Such inclusion is open to abuse and unlike the listed prohibited grounds is not an immutable part of the humanity of envisaged victims.

Section 3 (2)(c)(i) of the Hate Speech Bill as currently worded meets the standard of hate speech as provided for in Section 4 of the Hate Speech Bill. The clause does not include a link between any of the listed acts and the commission or attempted commission of a hate crime. This can be remedied by the inclusion of the words 'and which results in the commission or attempted commission of a hate crime'. In the absence of the suggested caveat, the subsection should be deleted.

8.3 Offence of hate speech

Section 4 (1)(a) of the Hate Speech Bill states 'by means of any communication whatsoever'; the inclusion of the word 'whatsoever', is overly broad and potentially widens the ambit of interpretation beyond the provided definition of 'communication' in Section 1 of the Hate Speech Bill.

Section 4 (1)(a)(bb) of the Hate Speech Bill states 'stir up violence' as an element required to prove

the offence of hate speech. This element is unnecessary, as it is already provided for in Section 4 (1)(a)(aa) of the Hate Speech Bill in the requirement of 'incite others to harm'. The elements of 'bring into contempt or ridicule' fall outside the scope of any anticipated harm as envisaged in this Bill as they are manifestly distinguishable both in terms of severity and degree of harm caused. This element should be deleted. This submission elaborates on the substantive justification for this deletion under Section A 4.4 of this submission.

Section 4(1)(a) of the Hate Speech Bill lists 'social origin', 'belief', and 'occupation or trade' as a listed prohibited ground, please refer to our arguments on this point in Section 3 of this submission.

Section 4 (1) (b) and Section 4 (1) (c) of the Hate Speech Bill are both unclear as regards the meaning of intention, specifically whether the required intention is to commit hate speech in the manner described in both Sections, or if the required intention must merely be to distribute, display or make available material considered to constitute hate speech.

Furthermore, both Sections unjustifiably limit and infringe constitutional rights contained in Section 16 (1) of the Constitution, and it is unlikely that either of Sections will pass constitutional muster if challenged in a court of law.

9. Conclusion

We sum up our objections to this Bill as follows:

1. The Hate Speech Bill is unconstitutional in that it seeks to restrict freedom of expression to a greater extent than the Constitution does. If passed, it would certainly be vulnerable to legal challenge on this ground.
2. The Hate Speech Bill is so vaguely and broadly worded that any court would face considerable difficulties in applying it.
3. The Hate Speech Bill is so vaguely and broadly worded that it is incapable of general application, and it creates the potential for specific victimisation.

4. The Hate Speech Bill is completely insensitive to the distinction between harmful behaviour and offensive behaviour and it does not incorporate reasonable views on what should or should not be subject to legal sanction in either case.
5. The Hate Speech Bill is draconian in that it criminalizes much behaviour which should not be criminalized.
6. The Hate Speech Bill cuts across existing legislation and institutions (the Promotion of Equality and Prevention of Unfair Discrimination Act, and the Equality Courts) and the common law (*crimen injuria*), and it fails to consider the relationships of its provisions to existing legislation and the common law.
7. The Hate Speech Bill is not required by our obligations under international law.
8. The Hate Speech Bill fails to serve the purposes set out in its preamble.

We believe that South Africa already has the appropriate legal framework for dealing with harmful and offensive behaviour. This Bill, if enacted, would damage this framework rather than improve it. We therefore recommend that the Hate Speech Bill be withdrawn.

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31st January 2017

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