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Our Reference: Hate Crimes and Hate Speech Bill
Date: 15 February 2019

The Portfolio Committee on Justice and Correctional Services
National Assembly
Parliament of the Republic of South Africa
CAPE TOWN

For Attention: Hon. Ms MRM Mothapo, MP

By Email: vramaano@parliament.gov.za

Honourable Madam Chairperson,

RE: SUBMISSIONS ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9 – 2018]

1. We refer to the abovementioned matter, specifically to the notice issued by the Honourable Ms MRM Mothapo, MP on behalf of the Portfolio Committee on Justice and Correctional Services ("the Committee") on 26 November 2018, inviting the submission of public comments on the Prevention and Combatting of Hate Crimes and Hate Speech Bill ("the Bill").

2. Cause for Justice ("CFJ") hereby thanks the Committee for the opportunity to provide these written submissions and to participate in the law-making process. Thank you also for granting an extension of the deadline for comments to 15 February 2019.

BACKGROUND TO CAUSE FOR JUSTICE

3. CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.

4. Four of CFJ's five core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) the protection and promotion of human dignity/worth, (3) the protection of the vulnerable in society (social justice), and (4) ensuring accountable government action.

5. CFJ also delivered written submissions to the Department of Justice and Constitutional Development ("the DJCD") on the then Draft Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016 ("the 2016 Bill"), on 31 January 2017.[1] We understand that the DJCD process yielded and unprecedented number of public submissions – approximately 76,000 – and in consequence of which the DJCD substantially amended the Bill, with the result that the Bill now before the Committee is a vastly different text than the one we delivered submissions on in January 2017.

CONTENT OF SUBMISSIONS

6. Our submissions are structured under the following headings:

[1] "*CFJ Submissions on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B – 2016]*", Submissions by Cause for Justice, 31 January 2017.
Available at: <https://causeforjustice.org/wp-content/uploads/2018/05/Hate-Crime-and-Hate-Speech-Bill_Cause-for-Justice-submission_31.01.2017.pdf>.

CLAUSE 1: DEFINITIONS

MEANING OF "COMMUNICATION"

7. The definition of "communication" has been narrowed. Since the words "without limitation" (included in the 2016 Bill) have been removed, the Bill now provides a closed list of possible "communications" that fall within its ambit.

8. **We support the new narrowed definition:** The Bill places further limitations on the fundamental right to freedom of expression and such limitations should not be wider than is absolute necessary (reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom – section 36, Constitution).

MEANING OF "HARM"

Legislative text

"harm" means any emotional, psychological, physical, social or economic harm;

9. The definition of "harm" now omits "mental harm" but adds "emotional harm" (in contrast to the 2016 Bill). It has been expanded to include "social harm".

Proposals and comments

10. CFJ proposes that the definition of "harm" be amended as follows:

"harm" includes any physical or economic harm, and any emotional or psychological harm ***assessed in accordance with the standard of objective reasonableness****;*

11. By implication, we accordingly also propose the deletion of "***social***" harm, unless this term ("social harm") is clearly defined by way of a new definition in clause 1 of the Bill.

12. In addition to the abovementioned, we also propose that the following terms be clearly defined by way of new definitions in clause 1 of the Bill:

- "emotional harm"
- "psychological harm"
- "social harm" (except if this term is deleted from the definition of "harm")

Grounds for proposals (reasoning):

13. In terms of section 16(2)(c) of the Constitution, harm must be concrete.[2]

14. To the extent that the definition of "harm" is broad and vague, making it susceptible to both a subjective and an objective interpretation, it will invite litigation – being a choice target for constitutional challenge.

New definitions

15. The references to *emotional*, *psychological* and ***social*** harm are particularly concerning. Instances of these types of harm can be difficult to identify, verify and measure due to the subjective component present in each. ***There is a real risk that the subjective experiences (hurt feelings or offence) of over-sensitive individuals or groups may potentially be treated as harm.***

16. It is crucial to know what exactly each of these harms entail. As noted before, a lack of legislative certainty is a recipe/incentive for litigation. In addition, uncertainty and fear of contravening unclear provisions of the Bill, would have a chilling effect not only on freedom of expression, but other fundamental freedoms as well.

17. It is therefore problematic that the Bill does not define *emotional*, *psychological* or *social* harm. Admittedly, due to South African jurisprudence in relation to *emotional and psychological harm*,[3] it would be less problematic if definitions were not inserted for these two terms.[4]

Social harm

18. The inclusion of "***social harm***" however, is particularly alarming. It seems that even in academic circles, "social harm" is still an emerging and highly contentious issue. Without the provision of a separate and clear definition, "social harm" should be deleted. Its inclusion carries a real risk of

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[2] Milo et al in Woolman & Bishop 2008, *Constitutional Law of South Africa*, 2nd ed. Kenwyn, SA: Juta & Co.: 53, 42 – 83.

[3] In the hate speech case of *Freedom Front v South African Human Rights Commission*,[3] the words "kill the boer, kill the farmer", were declared to be hate speech. The Commission held that harm cannot only be limited to physical harm: It must include physical as well as emotional harm. (*Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC). Currie I & De Waal J 2013, *The Bill of Rights Handbook*, 6th ed. Cape Town, SA: Juta & Co.: 358.)

[4] The Bill may be improved by inserting definitions for "emotional harm" and "psychological harm", clarifying what these harms entail. If new definitions are proposed for insertion by the Committee, the public should be allowed an adequate opportunity to comment on any new definitions.

rendering a person criminally liable for ambiguous, unverifiable and/or unmeasurable alleged subjective experiences/consequences of supposed victims.

19. If a specific definition of "social harm" is proposed for insertion by the Committee, the public should be provided with an adequate opportunity to comment on the proposed definition. The content of any definition of "social harm" in the diverse and complex South African context, would probably be highly contested.

20. We accordingly submit that the first and best option would be to delete "social harm" from the definition of "harm" altogether.

Standard of Objective Reasonableness

21. In the prosecution of hate crimes and hate speech, it is crucial that any form of harm will be measured objectively. It would be unacceptable if any person were to be subjected to criminal prosecution for actions on his/her part that have no real direct and objectively measurable and verifiable impact on any identified individual or group. Without definitions that give content to the manner of assessment of harm, it accordingly becomes much more difficult to provide legislative certainty regarding the scope of harms, the causation of which will be visited with criminal liability.

22. Whether speech causes harm, must be decided based on an **objective standard**: "Whether a **reasonable person** assessing the advocacy of hatred on the 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."[5]

Existing and Accepted Approaches to Harm in South African Law

23. In the **common law of delict**, harm is a prerequisite for liability.[6] In terms of the **Aquilian action**, harm traditionally consisted in monetary loss sustained due to physical damage to a person or property. In recent times, it also includes monetary loss resulting from injury to the nervous system and pure economic loss.

24. Under the **action for pain and suffering (*actio iniuriarum*)**, the harm is intangible: Injury to the person, his dignity or reputation.[7] Psychological harm will justify an award of damages if the plaintiff can prove that the shock caused a physical reaction such as a stroke which lead to death, high-blood pressure, collapse, a detectable and recognised psychiatric injury that is not passing,

[5] *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC), 1290.
[6] Max Loubser (ed) *et al, The Law of Delict in South Africa* 2009: 299.
[7] Currie & De Waal 2013: 256.

anxiety, depression, impaired sleep or emotional trauma.[8] In order to be successful in a claim for damages for injury to dignity, the claimant must show that the conduct complained of, was subjectively, as well as objectively insulting.[9]

25. ***Crimen iniuria*** is committed by "the unlawful, intentional and serious violation of the dignity or privacy of another".[10] This offence can be related to the Roman law concept of "dignitas", which can be described as "that valued and serene condition in (a person's) social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt".[11] Infringement of another's *dignitas*, must be determined by means of an objective and subjective test.[12] With some exceptions, the addressee must be aware of the conduct, but also be humiliated by it. This means that objectively, the conduct must be of such a nature that a reasonable person's feelings will be offended by it.[13]

26. The test for determining the infringement of dignity in the common law,[14] is described as follows by Burchell, as laid down in *Delange v Costa*[15] in the Supreme Court of Appeal: "(a) The plaintiff's self-esteem must have been actually impaired and (b) a person of ordinary sensibilities would have regarded the conduct as offensive, tested by the general criterion of unlawfulness, namely, objective unreasonableness. This then means that the conduct complained of "must be tested against the prevailing norms of society".[16] These norms are represented by the values and principles contained in the Constitution.

27. **What the discussion above bears out is that <u>the law requires some objectively verifiable consequence/harm that is judged with reference to the sensibilities of the reasonable person</u>, not merely hurt feelings or highly subjective experiences of the victim.** This understanding of harm/consequence is also relevant to the assessment of the impact of the offenses of hate crime or hate speech. See discussion under paragraph 73 here below.

[8] Max Loubser (ed) *et al, The Law of Delict in South Africa* 2009: 299.
[9] Currie & De Waal 2013: 256.
[10] Snyman CR, 2008. *Criminal Law*. 5th ed. Durban, SA: LexisNexis Butterworths: 469.
[11] Neethling J, Potgieter JM & Visser PJ 1996. *Neethling's Laws of Personality*. Durban, SA: Butterworths: 48.
[12] "*The Constitutionality of Categorical and Conditional restrictions on harmful expression related to Group Identity*", Thesis by Dr Maria Elizabeth Marais, January 2014, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of Free State: 376.
[13] "*The Constitutionality of Categorical and Conditional restrictions on harmful expression related to Group Identity*", Thesis by Dr Maria Elizabeth Marais: 376.
[14] Burchell JM & Milton J, 2005. *Principles of Criminal Law*. Landsdowne, SA: Juta & Co.: 749.
[15] *Delange v Costa* (433/87) [1989] ZASCA 6; [1989] 2 All SA 267 (A): par 15-17; Burchell JM & Milton J, 2005: 749.
[16] Burchell JM & Milton J, 2005: 749.

28. South African law accordingly requires an objective standard to be used to assess harm. This is borne out in case law, the common law of delict and criminal law.

29. **In light hereof,** CFJ proposes that the definition of 'harm' be amended to clarify that it is to be assessed **objectively according to the standard of the reasonable person**.

CLAUSE 2: OBJECTS OF ACT

CLAUSE 2(a)

Legislative text

30. According to clause 2(a) of the Bill, one of the Bill's objects is to "give effect to the Republic's obligations regarding prejudice and intolerance as contemplated in international instruments."

31. The 2016 Bill did not refer to "international instruments", but to ***"international law"***.

Proposal

32. We propose that the reference to "international instruments" be removed and replaced with "international law".

Grounds for proposal (reasoning):

33. There is a monumental difference between international *law* and international *instruments* that do not have the status of law. While South Africa is **not bound by international instruments**, it is bound by international law, as provided in section 231(2) – (5) of the Constitution.

33.1 It is only once South Africa has signed and ratified an international agreement in accordance with section 231 of the Constitution, that such instrument attains the status of international law in relation to the Republic, and only then will South Africa become legally bound by it.

33.2 By conducting the necessary research, it is possible to determine from time to time which international laws apply to South Africa in relation to hate crimes and hate speech. However, since "international instrument" is a much wider term and refers to a wide range of documents, commentaries, discussion papers, position papers, motions, reports, declarations (even if unadopted) and the like, it is not possible to know which particular instruments the Bill is referring to.

33.3 More concerning, however, is the fact that the use of the term "international instruments" may cause South Africa to follow and implement proposals that do not have the status of law and are not binding on the Republic.

33.4 **The big risk is that South Africa will become vulnerable to every passing whim of ideological propaganda that happens to make it into the reports, meeting agendas and motion papers of the institutions of international and regional cooperation – even if these ideological winds never attain the status of binding international law.**

33.5 To address and remedy the above risks and irregularities, the term "international law" should be used. South Africa has an obligation to comply with and fulfil the obligations created by international law proper, and not international instruments that do not have the status of law in relation to the Republic.

CLAUSES 3 AND 4: NEW OFFENCES

Protected Grounds/Characteristics

Legislative text

34. Various characteristics which can form the basis for a ***hate crime***, are listed in clause 3(1). The list contains **23** characteristics.

35. Clause 4(1), on the other hand, lists **22** grounds which can form the basis of the offence of ***hate speech***. The only difference between the two lists is that *"political affiliation or conviction"* can form the basis of a hate crime, but would not constitute a ground for hate speech.

(continued on next page)

36. Herewith a tabular depiction of the agreement and differences between the Bill and current law:

	Protected Grounds/Characteristics				Overlapping consensus (Strong agreement)	Overlapping consensus (Less strong agreement)	No consensus	Short-comings of the Bill
	The Bill	Constitution: Hatespeech (section 16(2))	Constitution: Non-discrimination (section 9(3)))	PEPUDA				
1	age		age	age		age		
2	albinism						albinism	
3	birth		birth	birth		birth		
4	colour		colour	colour		colour		
5	culture		culture	culture		culture		
6	disability		disability	disability		disability		
7	ethnic origin or	ethnicity	ethnic origin	ethnic origin	ethnic origin			
8	social origin		social origin	social origin		social origin		
9	gender or	gender	gender	gender	gender			
10	gender identity						gender identity	
11	HIV status						HIV status	
12	language		language	language		language		
13	nationality						nationality	
14	migrant status						migrant status	
15	refugee status						refugee status	
16	occupation or						occupation or	
17	trade						trade	
18	political affiliation or						political affiliation or	
19	political conviction						political conviction	
20	race	race	race	race	race			
21	religion	religion	religion	religion	religion			
22	sex, which includes intersex		sex	sex		sex		
23	sexual orientation		sexual orientation	sexual orientation		sexual orientation		
24			pregnancy	pregnancy				pregnancy
25			marital status	marital status				marital status
26			conscience	conscience				conscience
27			belief	belief				belief

Proposal and comments

37. CFJ proposes that the list of protected grounds/characteristics be brought in line with the Constitutional grounds for hate speech (section 16(2)), alternatively non-discrimination (section 9(3)) and the Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA").[17]

38. The Constitution, in ***section 16(2)***, lists **only four protected grounds**: race, ethnicity, gender and religion. Section 16(2), which places a limitation on freedom of expression, **does not include** age, albinism, birth, colour, culture, disability, social origin, gender identity, HIV status, language, nationality, migrant or refugee status, occupation or trade, political affiliation or conviction, sex, intersex or sexual orientation.

39. ***Section 9(3)*** of the Constitution – the non-discrimination clause – lists race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability religion, conscience, belief, culture, language and birth as grounds on which no person may be unfairly discriminated against, whether directly or indirectly. ***PEPUDA*** lists the exact same grounds as section 9(3) of the Constitution.

40. In contradiction to the non-discrimination clause and PEPUDA, **the Bill does not include** pregnancy, marital status, conscience, and belief.

41. Furthermore, **the Bill includes new grounds** that are not contained in the non-discrimination clause or PEPUDA, namely: albinism, gender identity, HIV status, nationality, migrant or refugee status, occupation or trade, political affiliation or conviction, and intersex.

42. During the DJCD process in respect of the 2016 Bill, we requested the DJCD to provide explanations/motivations for the discrepancies noted above, but our requests in this regard have to date not been answered.

43. **Our specific proposal is to:**

43.1 Remove the grounds that are not supported by section 16(2) or 9(3) of the Constitution or PEPUDA – i.e. the items listed in the **orange column** above; and

43.2 Include the grounds that appear in section 9(3) of the Constitution and PEPUDA, but which have been excluded from the Bill – i.e. the items listed in the **red column** above. There can be no rational justification for excluding these four grounds.

[17] Act 4 of 2000.

44. **We hereby implore the Committee to interrogate the DJCD in respect of these hitherto unexplained discrepancies, in order to establish whether there is any rational basis to these questionable and unsubstantiated departures from current law.**

Grounds for Proposals (Reasoning):

Rationality of chosen protected grounds/characteristics

45. Section 16(2) of the Constitution recognises only four grounds for hate speech: race, ethnicity, gender and religion. It does not recognise any other grounds on which protected free speech may be limited as "hate speech". As noted above, the Bill attempts to expand the four grounds to 23, whilst in certain respects attempting even to expand beyond the non-discrimination grounds in section 9(3) of the Constitution and PEPUDA and in certain other respects proposing to narrow down the non-discrimination list in section 9(3) and PEPUDA.

46. In order to test the constitutionality, legality and rationality of the state's proposed list of protected group characteristics, we formally requested (in our 31 January 2017 submissions) that the DJCD provide us with its reasons for such decision(s), as well as all working papers, minutes of meetings, reports, research findings, correspondence and all other material/information in document form (whether hard copy or electronic) that may be relevant or pertain to the state's decision on the chosen protected grounds/characteristics.[18]

47. We have as yet not been provided with any response.

48. The **Organisation for Security and Cooperation in Europe (OSCE)** provides guidance on selecting appropriate protected group characteristics for each state/country in its '*Hate Crime Laws" A Practical Guide*',[19] listing a number of factors to consider in the decision-making process. The main factors/indicators are:

48.1 Markers of group identity (fundamental characteristics);

48.2 Societal fissure lines – divisions that are embedded in the social and cultural history (social and historical context); and

48.3 Whether measures are implementable (implementation issues).

[18] In this regard, reliance was placed on the decision in ***Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)*** (818/11) [2012] ZASCA 115 (14 September 2012), para [42] – [46].
[19] Available on the internet at http://www.osce.org/odihr/36426.

49. The OSCE indicated that at the time of issuing the guidance (2009), 37 of its participating countries had hate crime legislation –

49.1 Almost all of which included 'religious' and 'racial' hatred;

49.2 11 included 'sexual orientation';

49.3 Seven included 'disability'; and

49.4 Six included 'gender'.

Protection of freedom of expression

50. Hate speech legislation which goes beyond the scope of the Constitution (such as the Bill) carries the grave risk of chilling all forms of speech in ways that are disproportionate to the risks of harm. It is accordingly necessary to limit the application of the Bill so as not to restrict freedom of speech more than is necessary to achieve the purpose of the intervention.

51. The proposal to include further characteristics in legislation that criminalises speech, will, if accepted, infringe constitutional rights and the inclusions would have to be defended as being reasonable and justifiable infringements of:

51.1 the right to **freedom of expression**, and

51.2 in the case of religious expression – the right to **freedom of conscience, religion, thought, belief and opinion**, and

51.3 in the case of political speech – the **right to make political choices**, and

51.4 in the case of citizens who has an occupation requiring him/her to impart very specific (even peculiar) information and ideas – the **right to freely choose a trade, occupation or profession**.

Hate crimes

52. The constitutional justifications required in the context of a widening of the grounds of unprotected hate speech would not be required in the context of 'hate crimes'. This is because hate crimes criminalise the motive/bias for committing some existing crime (the base crime).

53. The decision regarding which protected characteristics to include for purposes of the hate crime definition, however still has to comply with the basic test of legality, which requires adherence to

the rule of law, authority for all state action, **rationality** in state action in relation to legitimate government purposes, **prohibition of arbitrariness**, procedural fairness and laws that **are clear, accessible** and **not vague or overbroad**.

CLAUSE 3: OFFENCE OF HATE CRIME

Deletion of criminalising of incitement, attempts, conspiring

54. We note that the Bill does not include provisions similar to clauses 3(2)(b) and (c) of the 2016 Bill.

55. **We support this change for the following reasons:**

56. The basis for convicting a person of a hate crime, is that the person must already be guilty of some other crime. The hate crime conviction accordingly only amounts to criminalising hateful intent/motivation for criminal activity. In other words, the purpose of clause 3 is to provide further criminal liability for pre-existing "basis crimes" – because a hate motivation is present, not to create new crimes in relation to hateful motivations.

57. Clauses 3(2)(b) and (c) of the 2016 Bill therefore were superfluous and unnecessary, as all "basis crimes" will necessarily already be criminalised elsewhere and the presence of an "additional" hate motive will bring that "basis crime" within the ambit of clause 3.

CLAUSE 4: OFFENCE OF HATE SPEECH

Clause 4(1)(a)(i)

Legislative text

(i) be harmful or to incite harm; or

Proposals and comments

58. We propose that Clause 4(1)(a)(i) should be amended to read:

"to incite harm; **and**"

Grounds for Proposals (Reasoning):

59. The right to freedom of expression is foundational to any truly democratic society. Despotic regimes are known for controlling – and censoring – speech and other expressions. Therefore, hate speech legislation should not chill protected freedom of expression. Citizens' ability to express, without fear of reprisal or retaliation, a diverse range of robust opinions and beliefs, is crucial for the healthful flourishing of a constitutional democracy.

60. To the extent that the definition of hate speech in the Bill is wider than the Constitution's definition in subsection (c) of section 16(2), the hate speech definition in the Bill will be open to constitutional challenge.

61. In the context of hate speech, the Constitution does not prohibit *harmful* speech (i.e. where the *speech* itself causes actual harm to a victim). In such circumstances existing criminal law and civil law remedies and recourse exist and would apply to recompense or vindicate the victim and/or to hold the perpetrator accountable through criminal and/or delictual liability.

62. The harmfulness or not of speech is irrelevant for purposes of hate speech. What is required is the incitement of others to cause harm. Therefore, clause 4(1)(a)(i) should only refer to a clear intention to "incite harm", but not to "be harmful". It is important to note that the definition of hate speech in the Constitution contains **two *cumulative requirements***, namely "***advocacy*** of hatred" (based on one of four grounds), which must necessarily constitute "***incitement*** to cause harm". "Advocacy of hatred" and "incitement to cause harm" accordingly are not and cannot be two independent alternative requirements: Both need to be present in respect of the expression in question.

63. The word "or" at the end of clause 4(1)(a)(i) is accordingly either a legal or drafting error and should be deleted and replaced with "and". It should be amended to read:

    "to incite harm; **and**".

Clauses 4(1)(b) and (c)

Proposals and comments

64. Furthermore, in relation to hate speech, the Constitution (section 16(2)(c)) requires that the particular hateful expression incites "harm". This means that, when objectively observed from the outside, the expression will motivate others to perpetrate "harm" on the intended victim(s).

65. We accordingly support the amendments to clauses 4(1)(b) and 4(1)(c) – that the Bill now (in contrast to the 2016 Bill) requires an informed intention to communicate "hate speech" on the part

of distributors of hate speech, through the qualifying wording "intentionally" and "which that person knows".

Clause 4(2)

Proposals and comments

66. Clause 4(2) contains four exemptions from criminal liability for hate speech.

67. We generally support the introduction of these exemptions (which was not included in the 2016 Bill and which we called for in our January 2017 submissions on the 2016 Bill).

68. However, the new clauses 4(2)(a) to (d), need to be amended in order to be effectual in its purpose and application.

69. **We accordingly propose that the respective sub-clauses be amended to read as follows:**

69.1 Clause 4(2)(a): "any *bona fide* artistic **or literary work**, performance or other form of expression, **that can reasonably be construed as having artistic or literary merit or worth**;"

69.2 Clause 4(2)(b): "any ***bona fide*** academic or scientific inquiry;"

69.3 Clause 4(2)(c): "fair and accurate reporting or commentary in the public interest or in the publication **and distribution** of any information, **ideas**, commentary, advertisement or notice **on matters of public interest**, in accordance with section 16(1) of the Constitution of the Republic of South Africa, 1996; or"

69.4 Clause 4(2)(d): "the *bona fide* interpretation and proselytising or espousing of, **or training or instruction in accordance with,** any religious tenet, belief, teaching, doctrine or writings."

70. **We further propose that the following definition for "matters of public interest" be inserted in clause 1 (the definitions clause) of the Bill:**

70.1 "**"matters of public interest"** means discussions, debates or opinions on matters pertaining to the common well-being or general welfare of the public or serving the interests of the public and includes discussions, debates and opinions on matters pertaining to religion, belief or conscience;"[20]

[20] This is the definition of "matters of public interest" provided under section 1 of the Films and Publications Act, 65 of 1996.

Grounds for Proposals (Reasoning):

71. The clear purpose of clauses 4(2)(a) to (d) is to provide protection from criminal prosecution for *bona fide* expressions that have artistic, literary, academic or scientific merit, is on a matter of public interest, is part of reporting or providing commentary, or is part of religious or conscientious engagement.

Clause 4(2)(a)

72. Section 16(1)(c) of the Constitution specifically recognises that the right to freedom of expression includes freedom of artistic creativity.

73. According to Currie and De Waal, the need to protect artistic creativity is rather obvious: Since artistic (and literary) works sometimes radically criticise, and comment on, society, government and other powerful persons may desire to control and even silence any uncomfortable and dissenting voices.[21]

Insertion of "literary"

74. Literary works form an important and extensive body of artistic expression and should be specifically included under clause 4(2)(a) to avoid fear of or actual thought censorship.

Insertion of "merit or worth" to combat abuse

75. ***In order to limit and combat any potential abuses*** of the exemption under clause 4(2)(a), only works, performances or expressions that can reasonably be construed (i.e. in accordance with an objective standard) as having artistic or literary ***merit or worth***, should be protected.

Deletion of self-defeating proviso

76. The proviso at the end of clause 4(2)(a), which reads *"to the extent that such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)*", renders the envisaged protection of *bona fide* artistic and literary works, performances and similar expressions, worthless and of no effect. We propose that it be deleted.

77. The purpose of clause 4(2)(a) is to exempt and protect *bona fide* artistic and literary works, performances and similar expressions from potential criminal liability based on the protective

[21] Currie & De Waal 2013: 351.

grounds. The proviso effectively cancels and defeats the protective exemption, exposing again *bona fide* expressions to prosecution.

78. We also note that clauses 4(2)(b) and (c) do not contain any provisos. It is unclear why the Bill would seek to treat artistic speech differently (affording it less protection) than other speech.

Clause 4(2)(b)

79. We propose that "*bona fide*" be inserted in this sub-clause to guard against the abuse of the exemption by perpetrators who allege to be engaged in academic or scientific inquiry, but who in truth are engaged in so-called *faux* / *pseudo*-science.

Clause 4(2)(c)

80. Sections 16(1)(a) and (b) of the Constitution, explicitly recognise that the right to freedom of expression includes freedom of the press and other media, and freedom to receive or impart information or ideas.

81. Currie and De Waal notes that the *rationale* behind the constitutional protection of press freedom is to essential to establish and maintain an open and democratic society.[22] In the *Khumalo*-matter, the Constitutional Court emphasised that the manner in which the media carries out its constitutional mandate enables each citizen to be a responsible and effective member of society.[23]

82. The freedom to impart and receive information and ideas is equally indispensable to the establishment and maintenance of democracy: No free and democratic society can exist under a fearful system of imagined or real thought censorship. According to Currie and De Waal, the focus of the right is the exchange of ideas between a speaker and a listener.[24]

Insertion of "ideas"

83. Since section 16(1)(b) of the Constitution specifically refers to *ideas*, the word "idea" should be inserted into clause 4(2)(c) in order to bring the clause in line with the Constitution.

[22] Currie & De Waal 2013: 343.
[23] *Khumalo v Holomisa* 2002 (5) SA 401 (CC) [22].
[24] Currie & De Waal 2013: 350.

Insertion of "matters of public interest"

84. The purpose behind freedom of the press and media, and the freedom to impart and receive information and ideas, is to promote and protect the public interest. Living in an open and democratic society is in the public interest. Therefore, in order to limit any potential abuses of the exemption under clause 4(2)(c), we propose that a reference to "matters of public interest" be inserted in this clause.

85. For the sake of clarity and certainty, a definition of "matters of public interest" should be inserted in the "definitions clause" (Clause 1) of the Bill. Please note specifically that the definition we propose has been approved by Parliament in the past – it is found in the Films and Publications Act (Act 65 of 1996) and was added to that act in 2009.

Clause 4(2)(d)

86. According to section 15(1) of the Constitution, everyone has the right to freedom of conscience, religion, thought, belief and opinion. The Constitution even provides for the conducting of religious observances at state or state-aided institutions:[25] This constitutes an explicit recognition, acceptance and commitment to the protection of the overt practice of religion in the public sphere.

87. The Constitution also prohibits advocacy of hatred based on *religion* which constitutes incitement to cause harm. Clearly, the Constitution places a high value on freedom of religion and deplores hatred against religious people.

88. For many religious persons, their beliefs are absolutely *foundational to their identity* and life orientation (view of the world), and intricately and necessarily connected with their *human dignity*. It is difficult to understand how anyone would be able to fully enjoy this fundamental right (and the right to human dignity), if they are unable to live – without fear of reprisal and both privately and publicly – in accordance with their sincerely held religious beliefs.[26] It is crucial that everyone should be able to fully enjoy this right without fear of criminal prosecution.

Protection of "training" and "instruction"

89. Therefore, in recognition of the importance of the right to freedom of conscience, religion, thought, belief and opinion, and its centrality to the enjoyment of the right to human dignity, the Bill, in addition to not infringing upon any *bona fide* interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, **should not infringe upon any bona fide**

[25] Section 15(2) of the Constitution.
[26] Bona fide adherence to a religion should not be confused or equated with *mala fide* bigotry.

training or instruction in accordance with such religious tenet, belief, teaching, doctrine or writings.

90. Training and instruction in accordance with the religious tenets, beliefs, teachings, doctrines and writings of a particular religion, is integral to fully engaging in and enjoying that religion.

Deletion of self-defeating proviso

91. The proviso at the end of clause 4(2)(d), which reads *"to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)*", renders the envisaged protection of *bona fide* religious or conscientious engagement worthless and of no effect. We propose that it be deleted.

92. The purpose of clause 4(2)(d) is to exempt and protect *bona fide* religious or conscientious engagement from potential criminal liability based on the protective grounds. The proviso effectively cancels and defeats the protective exemption, exposing again *bona fide* expressions to prosecution.

93. We also note that clauses 4(2)(b) and (c) do not contain any provisos. It is unclear why the Bill would seek to treat religious speech differently (affording it less protection) than other speech.

Absence of a clause to prevent double criminality

Proposals and comments

94. In order to clarify the wording of the Bill and avoid punishing a person twice for one and the same culpable action, we propose that a new sub-clause 4(4) be inserted with the following proposed wording:

(4) A person who has been found guilty of an offence in terms of this section, shall not be guilty of an offence in terms of section 3 in respect of the same actions that established guilt in terms of this section.

Grounds for Proposals (Reasoning):

95. Both proposed new offences – "hate crime" and "hate speech" – are triggered by an almost identical list of protected grounds/characteristics. From reading the definition of "hate crime", it is unclear whether a person who commits the newly created crime of hate speech, would simultaneously be guilty of a hate crime as well. Therefore, lack of clarity in the current wording

of the Bill, creates the risk that a person who has committed hate speech, may potentially be found guilty simultaneously of both hate speech and a hate crime.

96. We submit, however that the purpose of the hate crime offense is to create further criminality (and aggravating circumstances for the purpose of sentencing) for existing (pre-existing) offenses, where the *motive* for committing the offence is hate (prejudice and/or intolerance) based on one or more of the listed protected grounds/characteristics.

97. The basis for convicting a person of a hate crime, is that the person must already be guilty of some other crime. The hate crime conviction accordingly only amounts to criminalising hateful intent/motivation for criminal activity.

98. In other words, the purpose of clause 3 (hate crime) is to provide further criminal liability for pre-existing "basis crimes" – because a hate motivation is present, not to create new crimes in relation to hateful motivations.

99. With hate speech (clause 4), an integral element of the crime itself is hate motive. It would be both illogical/irrational and unreasonable for a person to be found guilty of hate speech (under clause 4) and then to be found guilty of a further crime under clause 3.

CLAUSE 5 – VICTIM IMPACT STATEMENT

Legislative text

100. In terms of clause 5(1) and (2) of the Bill, the impact of the offence on the victim must be taken into account for purposes of sentencing, by way of a sworn statement/affidavit be made by the victim or someone authorised by the victim to do so, which reflect the "physical, psychological, social, economic or any other consequence of the offence for the victim and his or her family member or associate".

101. Furthermore, the contents of a victim impact statement are admissible as evidence, unless a court on good cause shown, decides otherwise (clause 5(3)).

Proposals and comments

102. **We propose the following amendments to *clause 5(1)*:**

102.1 Remove the words "physical, psychological, social, economic or any other consequence" and replace it with the words ***"evidence of harm"***.

102.2 Delete the words “and his or her family member or associate”.

103. **We propose the following amendments to *clause 5(2)*:**

103.1 Replace the word “must” with **“may”**.

104. **We propose that *clause 5(3)* be amended to read as follows:**

104.1 *“(3) The contents of –*

(i) an undisputed victim impact statement are admissible,
(ii) a disputed victim impact statement are inadmissible,

unless the court, on good cause shown, decides otherwise.”

Grounds for Proposals (Reasoning):

Clause 5(1)

105. We refer to our discussion above (paragraph 9 to 29) about the nature, definition and assessment of harm. The consequences or impact of the offence on the victim relates to the harm the offence caused to him/her and accordingly the wording in this clause should be linked to the definition of harm in clause 1.

106. The inclusion of “and his or her family member or associate” is problematic for several reasons.

106.1 If the consequences relevant for sentencing purposes are expanded to effects on third persons, even family members and associates of the victim, it will not be possible to limit the application of the Bill to the real harm done by the perpetrator. The Bill will be overbroad and accordingly unconstitutional on account thereof. Only if further measures can be proposed by the state or the Committee to limit the scope of effects on family members and associates that may be taken into account, this proposal can be reconsidered.

106.2 The Bill does not define “associate” and the inclusion of the term is vague and accordingly unconstitutional, lacking the necessary clarity to pass the threshold required for legislative texts.

Clause 5(2)

107. Clause 5(2) places an obligation on the prosecutor to consider the interests of the victim. The wording of the 2016 Bill allowed the prosecutor to exercise his/her reasonable discretion in this

regard. We submit that it is better to allow the prosecutor to determine the best way to prosecute a particular case.

Clause 5(3)

108. It makes sense that an undisputed victim impact statement can be presumed to be admissible evidence. However, if the admissibility of a piece of evidence is disputed, it should be interrogated first. The prosecutor, representing the state – the *dominus litis* – bears the burden of proving its case. If the prosecution seeks to reply on a piece of evidence to prove its case, and that piece of evidence is disputed, it is reasonable to place the burden of proving the admissibility of that piece of evidence on the prosecution.

109. The current wording of clause 5(3) is too vague: It fails to effectively address two completely different potential scenarios that the court will have to deal with.

109.1 One the one hand, if an ***undisputed*** victim impact statement is presented before the court, it will be presumed admissible, unless good cause is shown to disallow the evidence. It is not clear who will contest the admissibility of an undisputed piece of evidence.

109.2 On the other hand, if a ***disputed*** victim impact statement is presented, it will be allowed (as the clause currently reads), unless good cause is shown. It would be unreasonable to place the burden of proving that a ***disputed*** victim impact statement is admissible, on the accused.

CLAUSE 9 – PREVENTION OF HATE CRIMES AND HATE SPEECH

Legislative text

110. Clause 9(1) and (2) of the Bill places a duty on the State, the South African Human Rights Commission ("the SAHRC"), and the Commission for Gender Equality ("the CGE"), to develop and conduct educational programmes and training interventions to prevent and combat hate crimes and hate speech. The Commission for the Promotion and Protection of the Rights of Cultural, Religious, or Linguistic Communities ("the CRL") is excluded from the clause.

111. Clauses 9(2)(d) and 9(3) furthermore purports to oblige cabinet members designated by the President and the South African Judicial Education Institute to develop and implement "social context training".

Proposals and comments

Clause 9(1)

Apparent side-lining of the Commission for the Promotion and Protection of the Rights of Cultural, Religious, or Linguistic Communities

112. We propose that a reference to **the CRL should be inserted into clause 9(1)**.

113. It is unclear why the CRL has been excluded from this clause, *especially considering that clause 8(2) of the Bill refers to the SAHRC and CGE, as well as the CRL*. If all three these institutions that support democracy have a duty to report on the implementation of the Bill, it is not clear why only two, the SAHRC and CGE, have a duty to prevent hate crimes and hate speech while the CRL does not.

114. The CRL promotes and protects the rights of cultural, religious and linguistic communities. These groups and communities are potential targets for hate crimes and hate speech. ***In fact, both clauses 3(1) and 4(1) of the Bill include culture, religion and language as protected grounds/group characteristics.***

115. In the light of the aforementioned, we propose that the CRL should be included in clause 9(1).

Clause 9(2)(d) and 9(3)

"Social context training" and threats to independence of Judiciary and other institutions of South Africa's constitutional democracy

116. We propose that **all references in the Bill to "social context training" should be deleted**.

117. CFJ does not object to the State and institutions supporting democracy to promoting awareness of hate crimes and hate speech, and the prohibition thereof, within the parameters of the Bill.

118. However, CFJ notes with concern that however benevolent the intentions of the drafters of the Bill, the duty created by clause 9(2)(d) and 9(3) to provide "social context training" creates a risk for individuals, groups or officials to do propaganda for their own agendas/ideologies with the force of the state behind them. The risk of state capture and ideological totalitarianism is accordingly in our view real and should be guarded against with all diligence.

Concerns regarding "social context training" generally

119. In this regard, CFJ is especially concerned regarding "social context training". The Bill does not provide any definition for this highly ambiguous and controversial concept.

120. South Africa is a complex and diverse society. It seems highly improbable that South Africans would easily agree on the nature of South Africa's "social context". Therefore, trying to postulate any one definitive "social context" would be controversial and oppressive.

121. Based on the aforementioned, we propose that all references in the Bill to "social context training" should be deleted.

122. Persons, organisations or institutions in positions of power at any given point in time, may be tempted to prescribe the nature of South Africa's "social context" to ensure that the communicated understanding thereof is beneficial to their own agenda. Plato's issues an apt warning: Who will guard the guardians?

Threats to independence of the judiciary

123. In terms of the South African Judicial Education Institute Act,[27] the objectives of the South African Judicial Education Institute include promoting the independence and impartiality of the judiciary. This is another reason why judicial officers should not be subject to controversial "social context training".

124. Considering the high levels of corruption and state capture that seems to plague South Africa, the maintenance of a strong and independent judiciary is essential. Unfortunately, by no fault of its own, the judiciary has had to take strong and necessary stands against other branches of the state and state organs in recent years. Clearly, South Africa cannot afford to open any door to the training of judicial officers that will risk subjecting them to the dictates of other branches of the government, state organs or other powerful role players in society.

125. We therefore submit that it would be irresponsible to keep any references to social context training in the Bill. All references to "social context training" should be deleted.

[27] South African Judicial Education Institute Act 14 of 2008.

CLAUSE 11 AND SCHEDULE – LAWS AMENDED

126. Several South African statutes contain definitions of "hate speech". There is however a lack of uniformity in the text of these definitions, which should be addressed. The Bill however does not address these discrepancies in the Schedule to the Bill.

Proposals and comments

127. We propose that the Schedule to the Bill be amended to provide for the replacement of the hate speech definitions and provisions in other statutes with the definition and provisions in clause 4 of the Bill.

128. The following statutes and legislative proposals contain definitions of hate speech:

128.1 Section 16(2)(c) of the Constitution.

128.2 Section 10 of PEPUDA.[28]

128.3 Clause 1(k) of the Films and Publications Amendment Bill ("the FPAB"), [B37C-2015], which is currently being considered by the National Assembly.

129. **The Schedule should accordingly provide for–**

129.1 The deletion of section 10 of PEPUDA; and

129.2 The amendment of the definition of hate speech in Clause 1(k) of the FPAB, to read as follows:

> ***"hate speech"*** *means hate speech as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2019*

[28] Act 4 of 2000.

Grounds for Proposals (Reasoning):

PEPUDA

130. Hate speech is also prohibited in terms of PEPUDA.

131. Due to the introduction of the Bill, specifically clause 4, section 10 of PEPUDA will become obsolete and should be deleted.

The Films and Publications Amendment Bill [B37C-2015]

132. The Films and Publications Amendment Bill ("the FPAB"), [B37C-2015], which is currently being considered by the National Assembly, also contains a proposed definition of hate speech.[29]

133. The FPAB defines hates speech as follows:

> "'hate speech' includes any speech, gesture, conduct, writing, display or publication, made using the internet, which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group"

134. According to the FPAB "harmful" means "causing emotional, psychological or moral distress to a person, whether it be through a film, game or publication through any on or offline medium, including through the internet and 'harm' has the corresponding meaning."

135. The proposed definition of hate speech in the FPAB goes beyond the wording in section 16(2)(c) of the Constitution and differs from the definition in the Bill. It should accordingly be brought in line with the definition in the Bill.

CONCLUSION

136. We trust that the above submissions will be of assistance to the Committee and look forward to the Committee's response thereto (if any) in due course. CFJ remains at the Committee's disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes.

[29] Clause 1(k) of the FPAB.

137. **We also respectfully request the Committee to provide us with an opportunity to make oral submissions (representations) to the Committee in respect of the Bill.**

Yours faithfully,

Liesl Stander
Legal Advisor and Parliamentary Liaison

and

Ryan Smit
Executive Director and Legal Counsel