THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

Mr V Ramaano
Portfolio Committee on Justice and Correctional Services
Parliament
Cape Town

Attention: Mr V Ramaano
Per email: **vramaano@parliament.gov.za**

15 February 2019

Dear Mr Ramaano,

CONCISE SUBMISSION ON THE *PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL* [B9-2018]

1. The FW de Klerk Foundation (the Foundation) is a non-profit organisation dedicated to upholding the Constitution of the Republic of South Africa, 1996 (the Constitution). To this end, the Foundation seeks to promote the Constitution and the values, rights and principles enshrined in the Constitution; to monitor developments including legislation and policy that may affect the Constitution or those values, rights and principles; to inform people and organisations of their constitutional rights and to assist them in claiming their rights. The Foundation does so in the interest of everyone in South Africa.
2. As such, the Foundation welcomes the opportunity to make a concise submission to the invitation by the Portfolio Committee on Justice and Correctional Services (the Committee) on the proposed *Prevention and Combating of Hate Crimes and Hate Speech Bill* [B9-2018] (the Bill).
3. In this regard, please find attached our submission for the Committee's attention and consideration.
4. We trust that our submission will be of assistance in guiding the Committee in its deliberations regarding the Bill. We are also available to make a verbal submission to the Committee.

Yours sincerely,

Dr Theuns Eloff
EXECUTIVE DIRECTOR

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1 Part A - Introduction and Foundation's approach to the Bill

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

1.2. We do, however, assert that the constitutional right to freedom of expression should be strenuously defended. Indeed, it is an essential prerequisite for democratic governance to ensure "accountability, responsiveness and openness", in terms of the founding values in section 1 of the Constitution.

1.3. By way of general introduction, we would like to warn against the danger of the proposed legislation in a multi-racial, multi-linguistic and multi-faith country, where much of the legitimate political debate centres on widely differing, but sincerely held, views on race, culture, language and religion. It was for this reason that the authors of the Constitution, in line with international law, drafted very limited exceptions to the right to freedom of expression in section 16(2).

1.4. The Foundation previously commented on the 2016 draft *Prevention and Combatting of Hate Crimes and Hate Speech Bill*[1] (2016 Bill). The Foundation found that the hate speech offence created in the 2016 Bill fell outside the parameters of expression prohibited in terms of section 16(2)(c) of the Constitution. The 2016 Bill's hate speech offence in fact criminalised various forms of expression, which could not be justified as a reasonable limitation to the right to freedom of expression, in terms of section 36 of the Constitution. The Foundation recommended that the hate speech offence in the 2016 Bill be removed in its entirety due to its unconstitutionality and that the Bill should only address the issue of hate crimes. We furthermore emphasised that before such drastic, life-altering measures were considered, adequate reform of current legislative measures that already regulate hate speech had to be undertaken.

1.5. We noted that many of the serious concerns of the 2016 Bill have been addressed in the current Bill and to this extent we are pleased that the Department of Justice and Correctional Services seriously engaged with the concerns raised.

[1]As published by the Department of Justice and Correctional Services on 24 October 2016 in *Government Gazette Notice 698 of 2016.*

1.6. We do, however, strongly maintain that the statutory criminalisation of hate speech, which is still provided for in the current version of the Bill, should only be considered as an absolute last resort. We unequivocally hold that it is not clear that these drastic measures were the results of all other current regulatory methods failing.

1.7. The Bill's offence of hate speech is deeply flawed, as it does not relate to hate speech as understood in terms of section 16(2)(c) of the Constitution. It in fact prohibits constitutionally-protected expression. The severe limitation to the right to freedom of expression - which includes serious criminal sections, including imprisonment of three years on a first conviction of the broad offence - which fails to provide guidance on any thresholds, cannot in our view be justified as a reasonable limitation on the right to freedom of expression.

1.8. In effect, the proposed criminal offence of hate speech, which does not adhere to international law standards relating to public expressions of extreme hatred which constitute incitement to violence or hostility, could have a very negative impact on legitimate political and social discourse. Possibly, of the tens of thousands of private and public communications emanating every day from politicians, journalists, religious leaders and members of the general public, many might "reasonably be construed" to have the intention to incite "emotional, psychological, physical, social or economic harm" on the basis of their membership of one or more of the 15 categories listed in the Bill. This would, apart from anything else, make it virtually impossible to implement the Bill as envisaged.

1.9. We are strongly of the view that the current Bill's offence of hate speech is unconstitutional and should be removed. Legislative reform of current laws attempting to curb hate speech should urgently be addressed. We propose a working group to be established to report back to the Committee, as detailed further below. Only as an absolute last resort should statutory criminal measures be considered, which must be aligned with the text of section 16(2)(c) of the Constitution.

1.10. The Foundation's submission on the Bill was done as follows. We focused on the question of whether the Bill would pass constitutional scrutiny and to this extent we drew a clear distinction between the offence of hate speech and hate crimes created in the Bill. We only briefly considered the offence of hate crimes, as we are essentially in favour of the need to distinguish hate crimes from ordinary crimes.

1.11. The Foundation's core analysis related to the constitutionality of the offence of hate speech in clause 4(1)(a), read with the penalties in clause 6 of the Bill. In this regard we followed a two-stage approach.

1.12. Firstly, we considered whether the expression prohibited in terms of clause 4(1)(a) fell within the parameters of expression which is not protected in terms of section 16 of the Constitution. Section 16(2) of the Constitution stipulates clearly what expression is unworthy of constitutional protection and section 16(2)(c) in specific is colloquially known as the 'hate speech' prohibition. Secondly, we considered whether the offence, despite prohibiting expression which does not fall within the parameters of section 16(2)(c), and therefore concerns constitutionally-protected expression, can still be justified as a reasonable limitation on the right to freedom of expression in terms of section 36 of the Constitution.

1.13. In this analysis, international law was considered in terms of section 39(1)(b) of the Constitution, which South Africa must uphold. We also referred to the approaches in foreign jurisdiction that may guide the Committee, in the event that the Committee concludes there is a pressing societal need to provide for statutory criminal penalties to curb hate speech, as narrowly defined in terms of section 16(2)(c) of the Constitution.

1.14. For the sake of brevity, we have summarised some of our findings and recommendations in Part B for the Committee's attention. This is supported by a more-in-depth analysis of the provisions of the Bill and detailed recommendations in Part C.

2 Part B - Executive summary of findings and recommendations

2.1 The offence of hate crime

2.1.1 Although the Foundation is in favour of distinguishing hate crimes from ordinary crimes to allow proper data collection, reporting and prosecution, the lack of definitions for the key elements, such as "prejudice" and "intolerance", is concerning.

2.1.2 We submit that protected characteristics listed in clause 3(1)(a)-(q) should relate to an "unchangeable characteristic" of a natural person's dignity and therefore "political affiliation or conviction" and "occupation or trade" should be removed from the list.[2]

[2] At clause 3(1)(l) and (m).

2.1.3 We furthermore submit that the definition of a "victim" should not include reference to a juristic person, as the crime is motivated by a characteristic inherent to the dignity of a natural person.

2.2 **The offence of hate speech read with the penalties on conviction**

2.2.1 We highlight only some of our key findings on the offence of hate speech and our recommendations in this regard below.

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

2.2.3 On our analysis, the expression prohibited fell outside the parameters of section 16(2)(c) of the Constitution and we are not dealing here with the criminalisation of hate speech as understood in terms of the Constitution and international law.

2.2.4 To qualify as hate speech in terms of section 16(2)(c) of the Constitution, the expression prohibited **must amount** to "advocacy of hatred", **which is based** on the prohibited grounds of "race, ethnicity, gender or religion" **and that** "constitutes incitement to harm" (own emphasis). Legislation regulating hate speech must ensure the prohibition contains all these elements.

2.2.5 From the outset, the legal analysis was complicated by the fact that the Bill, except for the definition of "harm", failed to provide any definitions for key elements of the offence created in clauses 4(1)(a)(i) and (ii). No definitions are provided for "publishes"; "propagates"; "advocates"; "anything"; "harmful"; "incite harm" or "promote or propagate hatred". There is no indication of the threshold in this instance.

2.2.6 The above is a glaring omission, especially since a statutory criminal offence is created with severe, life-changing consequences. A person charged with such an offence needs to know exactly what the charge concerns, to prepare his or her defence.

2.2.7 Furthermore, even if one focuses only on the terms that find resonance with section 16(2)(c) of the Constitution (the definition of which can be sourced from international law guidance and local jurisprudence) - if read in its entirety, it falls clearly outside the parameters of section 16(2)(c) of the Constitution.

2.2.8 For instance, on the current provision of clause 4(1)(a)(ii) there is no need for whatever is being "advocated" to be linked to the likelihood to cause "harm" to the targeted group. The provision only requires that whatever is being "advocated" on the listed prohibited grounds - such as race - could be reasonably construed to "promote or propagate hatred."

2.2.9 However, "promote or propagate hatred" cannot be equated to "incitement to cause harm", especially if one considers the ordinary meaning of the word "propagate" and the fact that the drafters used the term "propagate" interchangeably to "advocacy" in the first part.

2.2.10 Section 16(2)(c) of the Constitution requires the "advocacy of hatred" **to be causally connected to "incitement to cause harm"**. Even though harm does not necessarily need to manifest, there has be a reasonable likelihood that it could occur. Both elements therefore must be present. The core purpose of curbing hate speech is to ensure that this extreme public manifestation of hatred does not expose a vulnerable group of people to further discriminatory attacks.

2.2.11 Lastly, the undefined prohibited grounds in terms of clause 4(1)(a)(aa)-(o) by far exceed the four limited grounds of section 16(2)(c) of the Constitution, which are also aligned with article 20(2) of the *International Convention on Civil and Political Rights* (ICCPR).We submit that, read in conjunction with the rest of clause 4(1)(a), the provisions exceed the parameters of section 16(2)(c) of the Constitution.

2.2.12 We found clause 4(1)(a) fell outside the scope of expression prohibited in terms of section 16(2)(c) of the Constitution, which would have justified legislative regulation.

2.2.13 The offence created in fact deals with the criminalisation of expression, which is constitutionally-protected. On considering the factors listed in section 36 of the Constitution, we found the limitation on the right to freedom of expression to be severe and unreasonable. This is especially true considering the nature and extent of the limitation

2.2.14 The offence to a large extent appeared to be a simple replication of the wording used in section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (the Equality Act) relating to the prohibition of hate speech.

2.2.15 This replication is problematic as the constitutionality of the hate speech prohibition in the Equality Act itself is a contentious issue. At date of this submission, it forms the basis of a constitutional challenge to be heard by the Supreme Court of Appeal (SCA), and which would impact the outcome of this Bill.

2.2.16 We submit that no threshold is built in clause 4(1)(a) read with clause 6(3), which would justify such criminal sanctions. No consideration is given to the intensity, the frequency or the extent of the expression and there is no provision for correction.

2.2.17 The expression prohibited by this drastic measure is not restricted to public expression and it includes private communication. This is contrary to the recommended international law thresholds and approaches by foreign jurisdictions.

2.2.18 The nature of the limitation is so severe that there is a real danger that the Bill would stifle legitimate political and social discourse and people might be fearful that what they might say or write might make them guilty of this vague offence on the 15 listed grounds.

2.2.19 The statutory exceptions provided in clause 4(2) to a degree buffer the extent of the limitation, but it contains a critical contradiction. Both clauses 4(2)(a) and (d) refer to elements of the offence that are not present in clause 4(1)(a) - namely "advocates hatred" and "incitement to cause harm". These are ironically the elements of hate speech as understood in terms of section 16(2)(c) of the Constitution.

2.2.20 On the consideration of lesser restrictive means in terms of section 36 of the Constitution, it is unclear why current legislative remedies in terms of the Equality Act, which provide restorative measures to curb hate speech (even though ill-defined), are considered inadequate. There have also been successful cases of criminal prosecution in terms of the common law crime of *crimen iniuria*, in addition to these restorative measures. The memorandum of the Bill also fails to indicate the pressing societal need that would support such drastic statutory regulation.

2.2.21 We found that clause 4(1)(a) unreasonably and unjustifiably limits the right to freedom of expression and we submit that the subsequent clauses - to the extent that they rely on clause 4(1)(a), are also unconstitutional.

2.3 **Recommendations**

2.3.1 We recommend that that the current version of the offence of hate speech should be removed, so that hate crimes as a distinct crime can be addressed in terms of our criminal law without further delay.

2.3.2 We furthermore recommend that a working group on hate speech should be established - which should include members from civil society organisations and academia - to conduct a proper review on current legislative remedies relating to hate speech. This working group should also investigate whether there is a pressing societal need to address hate speech within criminal law and report back to the Committee.

2.3.3 We submit that an urgent reform of the Equality Act is required to ensure it is aligned with section 16(2)(c) of the Constitution and that appropriate remedies are provided in terms of the Equality Act, reflecting the nature of such prohibition. Reform of the Equality

Act should distinguish expression that is narrowly defined as hate speech in terms of the Constitution, with appropriate remedies, such as administrative fines and/or civil liability. The severity of the penalties should reflect the severity of the degree of hate speech.

2.3.4 We recommend that **only as a last resort** should statutory criminal measures be considered to address hate speech. This should be supported by the working group's findings indicating a pressing societal need for statutory criminal measures to prohibit hate speech, over and above reform of the Equality Act.

2.3.5 If such an offence is created **(as a last resort)** then it must reflect the prohibition expressed in section 16(2)(c) of the Constitution. It must contain both the elements of "**advocacy of hatred"** on the prohibited grounds which must "**constitute incitement to cause harm**". Clear definitions should be provided for "advocacy", "hatred" and "incitement to cause harm", with reference to international law guidelines. Thresholds will need to be built in, relating to the content of the speech, the form, the extent of the public expression, frequency and the status of the speaker. The subsequent criminal penalties must reflect these thresholds.

2.3.6 In the above scenario we are in favour of statutory defences that are again narrowly-defined and reflect the elements of the offence. In this regard, we suggest considering the approach followed in Canada.

3 Part C: Legal analysis of the Bill - Constitutional and International Law prescripts

3.1 Hate speech - in the context of the Constitution and International Law

3.1.1 The starting point in this analysis is the right to freedom of expression, as provided for in section 16(1) of the Constitution and expression which the Constitution identifies as not deserving constitutional protection in terms of section 16(2) of the Constitution.

3.1.2 The right to freedom of expression and the demarcation of expression not deserving protection in terms of the Constitution, echo article 19 and 20 of the ICCPR. South Africa is bound in terms of the ICCPR to uphold civil and political rights. Any measures proposed to curb civil and political rights must therefore be in line with the ICCPR.[3]

3.1.3 Section 16(1) of the Constitution, in line with article 19 of the ICCPR, guarantees everyone the right to seek, receive and impart information and ideas in all forms and provides that-

"(1*) Everyone has the right to freedom of expression, which includes -*

[3] South Africa ratified the ICCPR in 1998.

a. *freedom of 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*."

3.1.4 The United Nations Human Rights Committee's comment[4] (UNHRC Comment) on article 19 of the ICCPR, emphasised that the right to freedom of expression "constitute[s] the foundation stone for every free and democratic society."

3.1.5 In the matter of *South African National Defence Force Union v Minister of Defence*[5] *the* Constitutional Court emphasised that -

> *"Freedom of expression lies at the heart of democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society…"*[6] (own emphasis)

3.1.6 However, the right to freedom of expression is not absolute right, which is also emphasised in article 19(3) of the ICCPR. The right can be legitimately restricted to protect the rights of others, such as the right to dignity and equality, as claimed in the preamble of the Bill. It will, however, have to pass the limitation threshold of section 36 of the Constitution (the right limitation inquiry).[7]

3.1.7 Furthermore, certain forms of expression, due to their nature and impact, are not protected in terms of international law and our Constitution. Article 20 of the ICCPR specifically provides that law must limit certain forms of expression, such as:

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

[4] Unites Nations Human Rights Committee. *International Convention on Civil and Political Rights*. General comment No.34 on article 19, freedom of opinion and expression. CCPR/C/GC/34.12 September 2011.

[5] 1999(4) SA 469 (CC).

[6] At paragraph 7 of the judgment.

[7] The right limitation inquiry specifically provides that it must be law of general application and it stipulates a list of factors that must be weighed up to justify that the limitation of the right in the Bill of Rights, would be reasonable in an open and democratic society. Section 36(1) of the Constitution provides: "*The rights in the Bill of Rights may be limited only in terms of law of general application 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 - (a) the nature of the limitation; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and the purpose; (e) less restrictive means to achieve the purpose."*

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

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

3.1.9 Any legislative prohibition of hate speech must ensure that the expression prohibited falls within the parameters of section 16(2)(c) of the Constitution. The express phrasing of section 16(2)(c) of the Constitution mirrors article 20(2) of the ICCPR and it specifically provides that hate speech must have the following components:

> 1.The expression must constitute **advocacy of hatred based on race, ethnicity, gender or religion**; **AND**
>
> 2. must constitute **incitement to cause harm.**

3.1.10 It is crucial to take note that unless the expression prohibited falls within the narrow scope of section 16(2)(c) of the Constitution, there is a limitation of the right to freedom of expression, which can only be justified if it succeeds the limitation threshold in section 36 of the Constitution.[8]

3.1.11 The *Camden principles on Freedom of Expression and Equality* (the Camden principles),[9] provide interpretative guidance on the meaning of the elements of hate speech in terms of article 20(2) of the ICCPR. The Camden principles state that national legal systems should provide clear definitions for the following key terms of hate speech which should be in line with the following:

- "**Advocacy**" - "is to be understood to as requiring an intention to promote hatred publicly towards the targeted group".[10] A further comparative study by ARTICLE19 provides that "advocacy is present when there is a direct call for the audience to act in a certain way. The Court should consider whether the speech specifically calls for violence, hostility or discrimination."[11]

[8] This approach was confirmed in the Constitutional Court matter of *Islamic Unity Convention v Independent Broadcasting Authority 2002 (4) SA 294.*

[9] The principles were compiled by the global organisation ARTICLE19, on consultation with United Nation officials and academic experts. For the full reference see - ARTICLE 19, Global Campaign for Free Expression, *The Camden principles of Freedom of Expression and Equality, April* 2009.

[10] Principle 12 of above publication. At page 10.

[11] ARTICLE 19, Global Campaign for Free Expression, Towards an interpretation of article 20 of the ICCPR: Thresholds for the prohibition of incitement to hatred, Work in Progress. A study prepared for the regional expert meeting organised by the Office of the High Commissioner, Vienna, February 8-9, 2010.

- "**Hatred**" and "**hostility**" - "refer to intense and irrational emotions of opprobrium, enmity and detestation towards the targeted group".[12]
- "**Incitement**" - "refers to statements about national, racial or religious groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups."[13] A comparative study by ARTICLE 19, expands on the meaning of "incitement" by stating that "to qualify as incitement, the speech would have to reach a certain level of intensity - in terms of its frequency, amount and the extent."[14] ARTICLE 19 also agrees that the speech should be of public nature and that although incitement is an inchoate crime - "some degree of risk or resulting harm must be identified".[15] (own emphasis)

3.1.12 South African jurisprudence on section 16(2)(c) has found in a similar vein that "advocacy of hatred" must be statements which are reflective of extreme emotion.[16] Secondly, the requirement of "incitement to cause harm" must be present. The mere expression is not enough.

3.1.13 In the matter of *Freedom Front v South African Human Rights Commission*[17] *(Freedom Front* matter*)*, this was interpreted to mean a call to act in a certain manner, meaning an intention to incite, to produce harm, which could be physical or emotional. The "harm" element does not necessarily mean the harm has to manifest but there has to be objective likelihood of it occurring.[18]

3.1.14 The *Freedom Front* matter has emphasised that the question should be "whether a reasonable person… within its context and having regard to its impact and consequences would objectively conclude that there is a real likelihood that the expression causes harm."[19]

3.1.15 Therefore, it is very clear that the prohibition of hate speech in the Constitution and with reference to article 20(2) of the ICCPR involves expression of a severe form of detestation on the grounds of race, ethnicity, gender or religion, which if objectively considered in

[12] See note 9 at page 10 of the publication.
[13] See note 9 at page 10 of the publication.
[14] See note 11at page 13 of the publication.
[15] See note 11 at page 15 of the publication.
[16] See *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC). See also I Currie & De Waal J. The Bill of Rights Handbook, 5th Edition. At page 375-376.
[17] See above reference.
[18] See I Currie & De Waal J. The Bill of Rights Handbook, 5th Edition. At page 377.
[19] At 1283.

relation to the context of the expression, create a real likelihood that it could cause harm to members of the targeted group. These are the parameters to apply.

3.1.16 On the question of prohibiting hate speech by creating criminal statutory penalties, it is important to take note that article 20 of the ICCPR does not require that the legislative means State parties are required to apply to regulate hate speech must include criminal statutory penalties.

3.1.17 There is clear guidance from the United Office of the High Commissioner for Human Rights (OHCHR) on this aspect in the form of the *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence* [20] (Rabat Plan of Action).

3.1.18 The Rabat Plan of Action emphasises that article 20 of the ICCPR requires a high threshold as fundamentally any limitation of speech "must remain an exception."[21] Therefore, **even legislative provisions curbing hate speech** must also adhere to "**legality, proportionality and necessity**".[22] Legislative provisions curbing hate speech therefore must be "**clearly and narrowly defined**"; "**must respond to a pressing societal need**"; must be the "**least intrusive measure available**"; "**not overly broad**" and not **"wide and untargeted".**[23]

3.1.19 The Rabat Plan of Action furthermore makes the following key recommendations, vital for the Committee's attention on analysing the proposed criminal offence in clause 4(1) of the Bill, read with the proposed penalties in clause 6(3):

- A "clear distinction should be made between 3 types of expression": 1. expression that constitutes a criminal offence; 2. expression that is not criminally punishable but may justify a civil suit or administrative sanction; 3. expression that does not give rise to criminal or civil liability but still raises concern in terms of tolerance."
- Domestic legal frameworks on incitement to hatred should be guided by express reference to article 20(2) of ICCPR and **should include "robust definitions for key terms such as hatred; discrimination, violence, hostility, etc**."[24] The Plan

[20] United Nations. Human Rights Council. Annual Report of the United Nations High Commissioner for Human Rights. Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred. A/HRC/22/17/Add.4 (Appendix - Rabat Plan of Action). The Rabat Plan of Action is the result of a multi-stakeholder consultative process following various workshops hosted by the OHCHR and it contains conclusions and recommendations.

[21] See above reference at page 9 - under conclusions.

[22] See note 20 above at page 10.

[23] See note 20 above at page 9.

[24] See note 20 above at page 9.

recommends considering the Camden principles to guide definitions, as discussed above.

- Criminal sanctions to curb hate speech should be "seen as last resort measures to be applied only in strictly justifiable situations".[25] Civil sanctions, administrative sanctions and the right to correct should also be considered.
- A "**six-part threshold test" was proposed for expressions considered a criminal offence**, which includes consideration of the following factors on criminalising hate speech:
  - **1. Context:** "Analysis of the context should place the speech within the social and political context prevalent at the time the speech was made and disseminated."[26]
  - **2. Speaker:** "The speaker's position and status in the society should be considered … especially in the context of the audience to whom the speech is directed."[27]
  - **3. Intent:** Article 20(2) of the ICCPR "provides for 'advocacy' and 'incitement' rather than mere distribution or circulation of material."
  - **4. Content and Form:** This is a "critical element of incitement." Consideration must be given to "degree to which the speech was provocative and direct, as well as the form, style, nature and arguments deployed in the speech."[28]
  - **5. Extent of the speech act:** Consideration should be given to the reach of the speech, its public nature, its magnitude and the size of the audience. Other factors include "means used, frequency, quantity and extent and whether the audience had the means to act on the incitement."[29]
  - **6. Likelihood, including imminence:** Some degree of risk of harm must be identified.[30]

[25] See note 20 above at page 12.
[26] See note 20 above at page 11.
[27] See note 20 above at page 11.
[28] See note 20 above at page 11.
[29] See note 20 above at page 11.
[30] See note 20 above at page 11.

3.1.20 The Rabat Plan of Action recommendations are critical guiding factors on determining the constitutionality and alignment of the proposed criminal offence of hate speech with South Africa's compliance with the ICCPR.

3.2 **An analysis of the provisions of the Bill**

3.2.1 **Ad clause 3(1) - the offence of hate crime as read with clause 1 of the Bill**

3.2.1.1 As previously stated, the Foundation is in favour of distinguishing hate crimes from ordinary crimes. This will ensure proper prosecution of these specific incidents and lead to proper data collection on this specific crime, which appears to be greatly needed in South Africa.[31]

3.2.1.2 We also submit that the distinction will not only give effect to article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD)[32], but also to section 12 of the Constitution, which relates to the right to freedom and security of the person.[33]

3.2.1.3 We are however, concerned about the lack of definitions for the key elements of the offence. It is vital that clause 1 of the Bill provides clear definitions for "prejudice" and "intolerance" and for listed characteristics such as "gender identity" at clause 3(1)(h).

3.2.1.4 Furthermore, it appears an additional protected characteristic has been added to the current version of the Bill, which was not present in the 2016 Bill. The additional protected ground now includes "3(1)(m) political affiliation or conviction".

3.2.1.5 We, however, submit that the protected characteristics listed in clause 3(1)(a) should be closely connected to the person's dignity. The *Organisation for Security and Co-Operation in Europe* (OSCE), which is the worlds' largest regional security organisation, states in their practical guide on hate crimes that a "protected characteristic" should be an "unchangeable characteristic", related to the self-worth of a person.[34]

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[31] To this extent, consideration was given to the research compiled by the Hate Crimes Working Group that operates in South Africa.

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

[33] Section 12 of the Constitution - "everyone has the right to freedom and security of the person which includes the right *to be …*

(c) to be free from all forms of violence and from either public and private sources and…

(e) not to be treated or punished in a cruel, inhuman or degrading way."

[34] See "Hate Crimes Law - a practical guide" published by the Office for Democratic Institution and Human Rights of the OSCE in 2009. This guide can be accessed on - https://www.osce.org/odihr/36426.

3.2.1.6 To this extent we submit that both clause 3(1)(l) which related to an "occupation or trade" and clause 3(1)(m) relating to "political affiliation" cannot be considered unchangeable characteristics related to the dignity of a person.

3.2.1.7 The definition of a "victim" should also not include reference to a juristic person, as it loses sight of the fact that the crime is motivated by a characteristic inherent to the dignity of a person, being a natural person. A juristic person in our view can never qualify to be a carrier of human dignity, which has been confirmed by the Constitutional Court.[35]

3.2.2 **Ad clause 4(1)(a) of the Bill: The offence of hate speech read with clause 1 of the Bill: Does it fall within the parameters of section 16(2)(c) of the Constitution?**

3.2.2.1 As previously stated, one first needs to determine whether the expression prohibited in terms of the clause 4(1)(a) falls within section 16(2)(c) of the Constitution. If it does then one does not need to proceed with a limitation inquiry in terms of section 36 of the Constitution, as the expression is not constitutionally-protected.

3.2.2.2 We do however submit that even if the expression prohibited falls within section 16(2)(c) of the Constitution, the legislative means curbing such expression must - in accordance with the Rabat Plan of Action - still adhere to the principles of "legality, proportionality and necessity."

3.2.2.3 We reiterate in this instance that section 16(2)(c) of the Constitution only relates to "advocacy of hatred" that is based on "race, ethnicity, gender or religions" **and** that "constitutes incitement to cause harm." All these elements need to be present to qualify as hate speech prohibited in terms of the Constitution.

3.2.2.4 If we consider clause 4(1)(a) it becomes clear that the drafters of the Bill in effect, to a large extent, used the exact same wording used in section 10 of the Equality Act, relating to the prohibition of hate speech. Section 10(1) of the Equality Act provides that

> "*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 incite harm***

[35] See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors* 2001 (1) SA 545(CC) para 17.

(c) ***promote or propagate hatred*.”** (words in bold for below purpose)

3.2.2.5 Clause 4(1)(a) of the Bill also refers to “publishes, propagates or advocates”, which can also “reasonably be construed to demonstrate a clear intention” to either be (i) “harmful or incite harm” or (ii) “promote or propagate hatred”.

3.2.2.6 This replication is problematic, especially since there have been concerns about the constitutionality of section 10 of the Equality Act itself in that the expression prohibited exceeds the hate speech parameters of section 16(2)(c) of the Constitution.

3.2.2.7 The only case in which the constitutionality of section 10 of the Equality Act was specifically challenged was in the 2017 matter of *South African Human Rights Commission v Qwelane*[36] (*Qwelane* High Court judgment).

3.2.2.8 It was argued in the *Qwelane* matter that the article written by Qwelane did not amount to hate speech in terms of section 16(2)(c) of the Constitution and that the hate speech provision in the Equality Act was overbroad and vague. The High Court dismissed the constitutional challenge.

3.2.2.9 However, with respect, we submit the High Court provided very little substance in the *Qwelane* judgment for its finding. It failed to show why the hate speech provision in the Equality Act - despite not falling within the parameters of section 16(2)(c) of the Constitution - constitutes a justifiable limitation on the right to freedom of expression in terms of section 36 of the Constitution.

3.2.2.10 The above observation becomes even more relevant if one considers that the same High Court granted Qwelane leave to appeal to the Supreme Court of Appeal (the SCA) on 20 April 2018. In the leave to appeal order the Judge held:

> “*On proper reflection, I may have been incorrect in my construction and interpretation of the provisions of the Equality Court proceedings,* ***as well as the constitutional challenge, which led to my finding*.**”[37] (own emphasis)

3.2.2.11 To date it is uncertain for when the appeal matter has been set down in the SCA. There is the possibility that the SCA might overturn the High Court's finding and declare section 10 of the Equality Act unconstitutional. If this is the case it will have

[36] 2018(2) SA 149(GJ).

[37] *Qwelane v South African Human Rights Commission and Others, In Re: South African Human Rights Commission v Qwelane and Others; Qwelane v Minister of Justice and Correctional Services and Others (EQ44/2009) [2018] ZAGPJHC 67.* (20 April 2018) at paragraph 3.

a great impact on the Bill's proposed wording, considering the large extent it replicates the Equality Act's wording.

3.2.2.12 In a more recent case, the SCA also in specific questioned the constitutionality of the hate speech provision in the Equality Act - even though the constitutionality of the hate speech provision was not challenged. In *Masuku and Another v South African Human Rights Commission obo South African Jewish Board of Deputies*[38] (*Masuku* SCA judgment) delivered on 4 December 2018, the SCA held:

> "*There is cause for concern that the provisions of s 10 of the Equality Act have the effect of condemning speech that is protected under s 16(1) of the Constitution*…"[39]

3.2.2.13 The SCA in the *Masuka* matter did not analyse the High Court's application of the Equality Act, but instead measured the statement directly against section 16(2)(c) of the Constitution to find that it did not constitute hate speech. This approach might be criticised as this was not the parties' pleaded case. However, the remarks made by the SCA show clearly the contentious nature of the issue. The SCA's findings to the best of our knowledge also stand, to date of this submission.

3.2.2.14 Turning to the analysis again, a key concern on considering clause 4(1)(a) as a start is that no definitions are provided for key elements of the offence namely: "publishes"; "propagates"; "advocates"; "anything"; "harmful"; "incite"; "promote" and "hatred" in clause 1 of the Bill. This glaring failure makes the legal analysis of the provision very difficult as it is unclear what constitutes "harmful" and what is meant by "anything".

3.2.2.15 Only the element of "harm" is defined in clause 1 to mean "any emotional, psychological, physical, social or economic harm". This definition itself is glaringly broad, as it is unclear what is meant by "social" harm, for instance, as no guidance is provided in the Bill.

3.2.2.16 Furthermore, only the terms "advocates" and "hatred" are constitutionally-aligned (with reference to section 16(2)(c) of the Constitution) and "incite harm" finds resonance in "incitement to harm". However, even if these exact constitutionally-aligned terms were used in a statutory criminal offence, clear definitions must be provided to avoid arbitrary application by law enforcers and to ensure the public

[38] [2018] ZA SCA 180 (4 December 2018).

[39] At paragraph 14 of the judgment.

knows what conduct could lead to such severe penalty. This would be line with the Rabat Plan of Action.

3.2.2.17 A further core concern with clause 4(1)(a) is that even if one only focuses on the provisions which find resonance with section 16(2)(c) of the Constitution such as "advocacy", "hatred" and "incite harm" - on reading it in its entirety it falls clearly outside section 16(2)(c) of the Constitution and article 20(2) of the ICCPR.

3.2.2.18 It appears that the drafters have essentially broken up the key components of hate speech as understood in terms of international law and section 16(2)(c) of the Constitution. This is demonstrated below.

3.2.2.19 If one reads clause 4(1)(a)(i) and <u>again only focuses on the constitutionally-aligned terminology</u>, then it appears that an offence is committed when:

- a person who **"advocates**" - "anything" or "communicates" (which we suppose relates to the definition of "communication", but it is unclear what "anything" means);
- to "one or more persons" in a manner;
- "**that could reasonably be construed to demonstrate a clear intention**" to either
- be "harmful **or incite harm**" and which is
- **based on one of the prohibited listed grounds** listed in (aa)-(oo)

3.2.2.20 There is no requirement that what is being "**advocated**" must **<u>be hatred</u>** towards the targeted group, which is intended to "**incite harm**". There is therefore no threshold built in for the expression as understood in terms of international law.

3.2.2.21 Again, we reiterate international law principles on article 20(2) of the ICCPR indicate clearly that we are dealing with severe emotions of detest towards a targeted group on a listed ground.

3.2.2.22 Furthermore, as pointed out earlier, no definition is provided for "harmful" whereas "incitement" in terms of the Camden principles has the connotation that there is an "<u>imminent risk</u> of discrimination, hostility or violence" that could occur against people of the targeted group if the statement is not prevented.[40]

3.2.2.23 Since the Bill fails to define "harmful", which would have allowed the public to test the threshold created in this instance with reference to the Rabat Action Plan's six-part threshold test, one cannot simply equate harmful with "incitement to cause harm".

[40] At page 10. For full reference of the Camden principles see note 9 above.

3.2.2.24 We therefore submit that one cannot reasonably interpret the current version of clause 4(1)(a)(i) to fall within the parameters of section 16(2)(c) of the Constitution. This is especially so, considering a statuary criminal offence is created, and each element of the offence has to be defined in order to provide the public with clear guidelines on what conduct is being prohibited. It must be clear what the threshold is in this instance. This would also be in line with the Rule of Law.

3.2.2.25 Furthermore, if one reads clause 4(1)(a)(ii) and again if one only concentrates on the constitutionally-aligned terminology - an offence is committed when:

- a person "**advocates**" - "anything" or "communicates";
- to "**one or more persons**";
- "**that could reasonably be construed to demonstrate a clear intention**" to either
- promote or propagate **"hatred**" on
- **based on one or more of the listed grounds** in (aa) - (oo)

3.2.2.26 The above is highly problematic as section 16(2)(c) of the Constitution requires the "advocacy of hatred" **to be causally connected to "incitement to cause harm". ** Both elements must be present. This causal connection is also reiterated in article 20(2) of the ICCPR.

3.2.2.27 On the current provision of clause 4(1)(a)(ii) there is no need for whatever is being "advocated" to be linked to the likelihood to cause "harm" to the targeted group. The provision only requires that the "advocacy of hatred" on the listed grounds "promote or propagate hatred."

3.2.2.28 However, "promote or propagate hatred" (which again is not defined) cannot be equated to "incitement to cause harm". This is especially so if one considers that the drafters used the term "propagate" in similar fashion to "advocacy" in the first part. The verb "propagate" in terms of the *Oxford English Dictionary* means to "spread and promote (an idea, theory, etc.) widely". There is no element of harm or likelihood that harm might occur in the notion of "propagate".

3.2.2.29 Harm to this targeted group does not need to manifest but there must be an objective likelihood of it happening. This was confirmed both in the *Freedom Front* matter and in terms of the Rabat Action Plan. This aspect is critical to the definition of hate speech and without which the expression prohibited in terms of clause 4(1)(a)(ii) falls outside article 20(2) of the ICCPR and section 16(2)(c) of the Constitution.

3.2.2.30 Furthermore, the expression prohibited in both clause 4(1)(a)(i) and (ii) it not restricted to only public expression as reference is made to "one or more persons". This is contrary to the guiding principles on article 20(2) in the ICCPR, as detailed in the Rabat Plan of Action.

3.2.2.31 The Rabat Plan of Action's six-part threshold emphasises that consideration should be given to the public nature and size of the audience. As detailed further below, this approach is also contrary to approaches seen in foreign jurisdictions, such as Canada, where emphasis is on the public nature of the expression.

3.2.2.32 Lastly in relation to clause 4(1)(a), the prohibited grounds in terms of (aa)-(o) by far exceed the four limited grounds of section 16(2)(c) of the Constitution of "race, ethnicity, gender or religion." These listed grounds are also aligned with article 20(2) of the ICCPR. No definitions, other than for "intersex" are provided and which again might create confusion on application.

3.2.2.33 There might however be an argument to be made that the additional listed grounds could be justified in terms of section 36 of the Constitution in a modern society and in response to a clear societal need. However, read in conjunction with the rest of clause 4(1)(a), the provisions exceed the parameters of section 16(2)(c) of the Constitution.

3.2.2.34 One will therefore need to test whether the limitation on the right to freedom of expression can still be saved by section 36 of the Constitution.

3.3 **Ad clause 4(1)(a) and (2) read with clause 6(3) - An analysis of the clause in terms of the limitation inquiry of section 36 of the Constitution**

3.3.1 Since the expression prohibited in clause 4(1)(a) exceeds section 16(2)(c) of the Constitution, we are dealing with constitutionally-protected expression. One must therefore test whether the criminal offence created for such expression is a justifiable and reasonable limitation on the right to freedom of expression in a democratic society, weighing up the factors listed in section 36 of the Constitution.

3.3.2 This is not simply a question of whether the expression prohibited justifies legislative regulation, but rather, whether this drastic measure, which involves criminalising constitutionally-protected expression, is justified in terms of section 36 of the Constitution.

3.3.3 The first two factors section 36 of the Constitution emphasises are the consideration of the nature of the right and the importance of the purpose of the limitation.

3.3.4 In this regard, the following rights must be balanced out in this Bill - namely the right to dignity and equality against the right to freedom of expression - as highlighted in the preamble of the Bill. The importance of the right to freedom of expression in a young and democratic society has been expanded on earlier and we reiterate that it is a crucial to stimulate political and social debate in a democracy.

3.3.5 On consideration of the right to dignity, one must keep in mind that our Courts have confirmed that it does not only involve an individual's self-worth but also how the public perceives the individual's worth.[41] Any infringement on the right to dignity must be viewed in context of the communication with reference to the tone, the audience and how the reasonable person would perceive the communication.

3.3.6 It is therefore crucial that proper thresholds are built in any proposed legislation that aims to regulate speech. As detailed further below, the offence created in clause 4(1)(a) provides low thresholds in relation to the magnitude of the consequences. Legal remedies already exist in terms of the law of defamation and criminal defamation, which can be specifically enforced if a person's dignity or self-worth is infringed.

3.3.7 On the consideration of the right to equality, we submit it is important to keep in mind that equality does not imply homogenisation of behaviour but it implies the celebration and acceptance of differences.[42] It is vital in a democracy that the right to express diverse views - no matter how unpopular or offensive - be protected to facilitate "the search for truth by individuals and society generally."[43]

3.3.8 The preamble of the Bill highlights section 9(3) and (4) of the Constitution, concerning the right to be protected from unfair discrimination. It is unclear why the right not to be unfairly discriminated against is highlighted, as various legislative means already exist, such as the Equality Act, which specifically gives effect to section 9(4) of the Constitution.[44]

3.3.9 The curbing of hate speech is not about the fairness of discrimination. The purpose of curbing hate speech is to protect people from a targeted group (who share a characteristic such as religious beliefs) from further potential violence because of

[41] This was confirmed by Justice O'Reagen in the matter of *Khumalo and Others v Hollisima 2002(5) SA 401*.
[42] See the Constitutional Court's argument in *Minister of Home Affairs and Another v Fourie 2006 (1) SA 524 (CC)* at paragraph 30.
[43] In *South African National Defence Force Union v Minister of Defence 1999 (4) SA 469 (CC*), at paragraph 9 of the judgment.
[44] The Equality Act specifically provides legal remedies to protect the right not to be unfairly discriminated against, which is echoed in the context of the employment sector in the *Employment Equity Act* 55 of 1998.

extreme public manifestations of hatred being directed at this targeted group. Therefore, the right to freedom and security of the person should be emphasised in any legislative proposal prohibiting hate speech.[45]

3.3.10 In relation to the importance of the purpose of the limitation, in terms of section 36(1)(b) of the Constitution, it is agreed that the State is obliged to protect vulnerable people from potential harm that could incur due to hatred being advocated against them based on a protected characteristic. However, again in this case, the hate speech prohibition would have had to fall within constitutionally-aligned parameters of section 16(2)(c) of the Constitution - which would not have triggered section 36 of the Constitution. There are different means the State could apply to combat intolerance, if that was the purpose, without applying legislative regulation.

3.3.11 Sections 36(1)(c) and (d) of the Constitution provide weighing up the nature, extent and the relation between the limitation and its purpose. On this consideration one should read clause 4(1)(a) with clause 4(2), and clause 6(3) relating to penalties.

3.3.12 The analysis of the nature and extent of the limitation is also made difficult with lack of definitions of the elements of the offence which include "publishes"; "propagate"; "advocates", "anything"; "harmful"; "incite harm" "promote"; "propagate" and "hatred".

3.3.13 One could only reasonably draw reference to those terms which have a constitutional and international law counterpart - being "advocate"; "incite harm" and hatred", which has a threshold built in from a comparative international law perspective, as previously illustrated. However, with the rest of the terminology used one is left in the dark on the threshold that would justify this drastic punishment.

3.3.14 With no definitions provided, it is unclear how one would distinguish speech prohibited in terms of clause 4(1)(a) - which has the harsh criminal penalty of imprisonment of three years on a first conviction, in terms of clause 6(3)(a) - from that which is prohibited in section 10 of the Equality Act.

3.3.15 Clause 6(3), which provides for imprisonment for a period of three years on a first conviction, provides no consideration of the content and form of the expression, the frequency of it or the size of the audience or potential audience exposed to it. These were specific factors the Rabat Plan of Action proposed to be built in the six-part threshold test that would justify a criminal sanction.

[45] Section 12 of the Constitution.

3.3.16 As stated earlier, clause 4(1)(a) to a large extent resembles section 10 of the Equality Act, except for speech which is intended to be "hurtful" in the Equality Act and the listing of additional prohibited grounds in the Bill. How would the public be able to distinguish expression that is intended to be "harmful" on a listed ground in terms of the Bill, punishable by imprisonment of three years, from that which is also intended to be "harmful" in section 10 of the Equality Act?

3.3.17 The lack of a threshold built in clause 4(1)(a) in consideration of the above remarks is a critical indicator of the broad and severe nature of the limitation.

3.3.18 At least in relation to the Equality Act, there is the provision that the Judge may refer the matter to the National Prosecuting Authority (NPA) to prosecute in terms of common law, for instance. In this example, one would assume the Judge would apply judicial discretion to determine whether the speech is of such severe nature - with reference to the content, the form, the intensity, the frequency, the audience directed towards - to justify referring the matter to the NPA. None such thresholds are built in clause 4(1)(a) read with clause 6(3).

3.3.19 Furthermore, it is also concerning that the expression prohibited by this drastic measure is not narrowly-defined to only public expression. Clause 4(1)(a) creates an offence if the prohibited expression is made to "one or more persons".

3.3.20 Besides the fact that this expression which "promotes hatred" does not need to hold any likelihood of harm to the targeted group, (falling outside section 16(2)(c) of the Constitution's parameters), it might simply be a vile expression sent only once to one person to constitute an offence punishable by imprisonment of three years.

3.3.21 There is no consideration of the extent or intensity of the speech that would justify criminal sanctions. If we compare it with foreign jurisdictions - which provide for the criminalisation of "promotion of hatred" such as the offence of "wilful promotion of hatred" in terms of the *Canadian Criminal Code* - explicit reference is made to the condition that it does not include private conversations.[46]

3.3.22 The nature of the limitation is to a certain extent buffered by the inclusion of statutory exceptions/defences stipulated in clause 4(2), which the 2016 Bill clearly lacked.

[46] The *Canadian Criminal Code* R.S.C., 1985, c.C-46. Section 319(2) of the *Canadian Criminal Code* provides for the "wilful promotion of hatred" which states that "*Everyone, who by communicating statements, other than in private conversation, wilfully promotes hatred against an identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction*."

3.3.23 We are essentially in support of the inclusion of statutory defences if a statutory offence of hate speech is created. This finds resonance to the approach in the *Canadian Criminal Code,* which provides statutory exceptions for the offences of "wilful promotion of hatred" and "public incitement of hatred".[47]

3.3.24 However, the statutory exceptions/defences provided for in clause 4(2) show a critical flaw in the drafting of the offence created in clause 4(1)(a).

3.3.25 The exceptions provided in clauses 4(2)(a) and (d) both highlight the elements of "advocate hatred" and "incitement to cause harm" - which resonates with the prohibition of hate speech in section 16(2)(c) of the Constitution. However, these elements do not form the basis of the offence of hate speech in clause 4(1)(a) to which reference is made. Therefore, a contradiction exists.

3.3.26 Furthermore, the drafters of the Bill again (except for clause 4(2)(d)) simply replicated section 12 of the Equality Act, without again ensuring that it is appropriate in this instance.

3.3.27 It is therefore submitted that the extent of the limitation on the right to freedom of expression is unjustifiably wide and the relation between the limitation is not narrowly tailored to the purpose of protecting vulnerable people from potential harm.

3.3.28 Finally, section 36(1)(e) of the Constitution requires the consideration of less restrictive means to achieve the purpose of protecting people's rights to dignity and equality. We reiterate that international law guidance on this point has held that criminal penalties should only be considered as a last resort.[48]

3.3.29 The Equality Act's remedies provide unique legal remedies, which are restorative in nature, providing the offender with the opportunity to correct his or her conduct, and the Court has the discretion to refer cases to be prosecuted as well.

3.3.30 In the matter *of ANC v Penny Sparrow*[49] the payment of damages ordered by the Equality Court was for instance paid to a civil society organisation that aims to eradicate racism. In this same matter, the offender (Ms Sparrow) was also charged under the common law crime of *crimen iniuria* and she agreed to a plea bargain with the State that involved a fine of R5 000 and a two-year suspended sentence. One cannot reasonably say that prosecution in terms of the common law offence of *crimen iniuria* for severe cases has

[47] Section 139(3) of the *Canadian Criminal Code*.
[48] Rabat Plan of Action referred to in note 20.
[49] [2017] ZAEQI (10 June 2016). The amount of R150 000 was awarded to the Oliver and Adelaide Tambo Fund.

not been effective, as Vicky Momberg was sentenced to three-year imprisonment (of which one year was suspended) in March 2018.[50]

3.3.31 Before turning to our conclusion on the limitation inquiry we do submit that the additional list of protected characteristics in clause 4(1)(a)(aa)-(oo) might perhaps constitute a reasonable limitation to the right to freedom of expression, if it was in line with those protected characteristics listed in section 9(3) of the Constitution. However, this consideration would in our view only come into play if the limitation itself was narrowly tailored and did not constitute such dire consequences. We therefore submit such justification could only be considered if the expression prohibited fell within the parameters of section 16(2)(c) of the Constitution.

3.3.32 In conclusion, the current version of clause 4(1)(a) unjustifiably limits the right to freedom of expression. We now turn to a brief discussion of the rest of the clauses in the Bill, to the extent that it is necessary.

3.4 **Ad clause 4(1)(b) and 4(1)(c) - the offences of distribution of electronic communication consisting of hate speech in terms of clause 4(1)(a) and displaying or making material available constituting hate speech in terms of clause 4(1)(a)**

3.4.1 Since the core of the offences relate to hate speech, as contemplated in clause 4(1)(a), (which we found to be unconstitutional) the offences in these clauses are also unconstitutional. However, we do we feel certain additional concerns in this regard should be raised that were not covered in clause 4(1)(a).

3.4.2 Any such related proposed offences must also be narrowly tailored, and the key elements must be clearly defined, such as "distribute" and "material". It is also unclear what is meant by "makes available" and it potentially provides a very low threshold.

3.4.3 Furthermore, reference to "victim" should only relate to a natural person as a juristic person cannot be a carrier of the protected characteristics listed in clause 4(1)(a)(aa)-(oo).

3.4.4 Lastly, we reiterate that such related offences must also be public of nature. The Rabat Plan of Action proposes that the public nature of the expression should be a key consideration in the threshold test for criminal sanctions curbing expression. This directly relates to considerations of the frequency and the reach of the expression. Both clauses 4(1)(b)(c) lack this threshold.

[50] It appears however that Ms Momberg is currently appealing the sentence (at date of the submission).

3.4.5 Furthermore, if we compare it with foreign jurisdiction, the public nature of the expression is emphasised in such criminal sanctions. For instance, the public nature of such expression is emphasised in the *Canadian Criminal Code* (as stated before). The European Union's 2008 Council *Framework Decision on Combatting Certain Forms of Expressions of Racism and Xenophobia by means of Criminal Law*[51] (EU Framework decision), also requires such offences to include "**publicly** inciting to violence or hatred" (own emphasis).

3.5 **Ad clause 6 (3) - Penalties and orders in relation to the offence of hate speech in clause 4(1)(a) of the Bill**

3.5.1 The provision of penalties for the offence of hate speech in clause 4(1)(a) has been analysed under the limitation inquiry of clause 4(1)(a). To this extent it is reiterated that due to the fact that no threshold is built into the offence of hate speech in clause 4(1)(a), the severe penalty of imprisonment of three years on a first conviction of such an offence in terms of Clause 6(3) is unjustifiable.

3.5.2 Again, no consideration is given to the factors listed in the Rabat Plan of Action's six-part threshold test - which includes reference to the context, the content and form or the extent of the speech that the severity of the penalty would also reflect. There is just one type of penalty provided for, with no consideration to any of these factors.

3.6 **Other general considerations of the Bill**

3.6.1 In addition to the legal analysis of the Bill, the Foundation is of the opinion there are further additional aspects that are more of a social nature that should also be considered.

3.6.2 The preamble of the Bill emphasises South Africa's commitment to the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD).[52] We believe that any legislative tool that aims to curb "prejudices" and "intolerance" in terms of the ICERD, should also provide clear definitions on what constitutes "racial discrimination" in order not to polarise the debate.

3.6.3 We believe in the context of South Africa, the debate on racism and racial discrimination is often politicised. Therefore it is necessary that any reference to "racial discrimination" should be in line with the ICERD's definition, which provides that it includes "...any distinction, exclusion, restriction or preference based on race, colour, descent, or

[51] Council Framework Decision 2008/913/JHA on Combatting Certain Forms and Expressions of Racism and Xenophobia by means of criminal law, adopted on 28 November 2008 by the Council of the European Union.
[52] South Africa ratified the ICERD in 1998.

national or ethnic origin which has the purpose of effect of nullifying of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[53]

3.6.4 Furthermore, the Foundation believes it is crucial that the focus on fighting and curbing "racial hatred" and "racial supremacy" should be on education and ensuring that civil servants, politicians and our leaders refrain from language that polarise races and cultures in South Africa. In this regard, we agree with the Rabat Plan of Action's recommendations that "political parties should adopt and enforce ethical guidelines in relation to the conduct of their representatives, particularly with respect to public speeches".[54]

3.7 **Conclusion and recommendations**

3.7.1 In conclusion, we submit that the offence of hate crimes should be created as soon as possible, as the lack of distinction has obstructed proper recording, monitoring and prosecution of these incidents. We submit that this should follow a separate legislative path, apart from the offence of hate speech.

3.7.2 In relation to the current offence of hate speech, we reiterate that the right to freedom of expression is an essential requirement for the maintenance of a "multi-party system of democratic government to ensure accountability, responsiveness and openness", in terms of section 1(d) of the Constitution.

3.7.3 We submit any legislation regulating hate speech must ensure it is strictly limited to the clear and unambiguous text of section 16(2)(c) of the Constitution. The current offence of hate speech in clause 4(1)(a) is far broader than the parameters of section 16(2)(c) of the Constitution. We are therefore in fact dealing with constitutionally-protected expression and the limitation on the right to freedom of expression could only be justified if the limitation was found to be reasonable in terms of section 36 of the Constitution.

3.7.4 On our analysis of the hate speech offence in clause 4(1)(a) in terms of section 36 of the Constitution, the limitation to the right to freedom of expression was found to be unconstitutional - especially since no threshold is provided that would justify such drastic consequences. We further held that all subsequent provisions relying on the current version of the offence by reference become unconstitutional.

3.7.5 Our recommendations relating to the offence of hate speech are four-fold:

[53] Article 1 of the ICERD.

[54] At page 14. See note 19 for reference to the Rabat Plan of Action.

- We submit that the current version of the offence of hate speech should be removed from the Bill, so that the criminalisation of hate crimes as a distinct crime is not further delayed.
- We recommend that a hate speech working group should be established with stakeholders from civil society, the media, and the Department of Justice and Correctional Services, to conduct a proper review of current legislative measures addressing hate speech. This working group should also conduct research on whether there is a pressing societal need for the criminalisation of hate speech over and above current legislative remedies. We submit there is an urgent need to review the Equality Act and ensure that it is constitutionally aligned with section 16(2)(c) of the Constitution and that appropriate remedies are provided for such severe instances in terms of the Equality Act.
- In the above instance we propose the recommendations of the Rabat Action Plan be seriously considered, regarding distinguishing between different types of expression which might require some form of State action. This includes expression that falls into the narrow category of hate speech that might in some circumstances justify criminal sanction; expression that is not criminally punishable but may justify administrative sanction and then lastly expression that does not give rise to criminal or civil liability but still raises concerns in terms of tolerance that could be addressed *via* dialogue initiatives and education for instance.
- Lastly, we recommend as a **last resort** that if there is a clear pressing societal need - supported by research by the hate speech working group - that indicates the need for criminal statutory measures that cannot be addressed by reform of the Equality Act, then the following must be considered:
  - Such an offence of hate speech must prohibit expression that falls within the narrow category of hate speech as understood in terms of section 16(2)(c) of the Constitution. It must contain both the element of "advocacy of hatred" on the prohibited grounds that "constitute incitement to cause harm".
  - Clear definitions should be provided for the elements of "advocacy"; "hatred" and "incitement to cause harm". The Camden principles provide clear guidance on such definitions. It should be in line with international law approaches.

- It should be clear in the offence that it relates to public expression and a threshold should be built into the offence - the penalty of which should reflect the severity of the expression. In this regard we refer to the six-part threshold test of the Rabat Action Plan that should be built into such a proposed offence. This should include consideration of the context, the speaker's position, intent, the content and form, the extent of the speech and the imminence of harm occurring.
- If the above is followed, then we suggest a range of penalties reflecting the severity of the expression and carefully-tailored defences, adequately defined, reflecting the approach in Canada, as discussed earlier.

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ACTING DIRECTOR

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