



FW de Klerk
FOUNDATION

CRIMINAL OFFENCE OF HATE SPEECH - FUNDAMENTALLY FLAWED

On 15 February 2019, the FW de Klerk Foundation made a written submission on the *Prevention and Combatting of Hate Crimes and Hate Speech Bill* [B9-2018] (the Bill) to the Portfolio Committee on Justice and Correctional Services. The Bill essentially provides for the offences of hate speech and hate crimes. A person found guilty on a first offence of hate speech in terms of the Bill might be looking at imprisonment of three years, and five years on a subsequent conviction.

The Foundation is not opposed to the statutory recognition of hate crimes, as there is a clear need to distinguish hate crimes from ordinary crimes so that proper data collection of these specific crimes can take place and it can be properly prosecuted. We are, however, highly concerned about the proposed statutory criminal offence of hate speech and we submitted that the current version - although an improved version of the 2016 version - is highly flawed and unconstitutional.

The expression prohibited in terms of the offence does not relate to hate speech as understood in terms of section 16(2)(c) the Constitution, which must relate to “advocacy of hatred” based on the prohibited grounds of “race, ethnicity, gender or religion”, **and** must constitute “incitement to harm”. These critical elements of hate speech are aligned with international law. Regulation of expression by law (and as an absolute last resort by means of criminal law) would only be justified if it related to this narrow category of expression prohibited in terms of the Constitution. Anything outside the limited parameters of section 16(2) of the Constitution infringe on the right to freedom of expression. In fact, drastic, life-altering penalties are proposed to regulate constitutionally-protected expression. In our analysis, this drastic measure proposes a severe limitation on the right to freedom of expression, which is vital for a young democracy to stimulate political and social debate. This limitation cannot be justified as a reasonable limitation to the right to freedom of expression in terms of section 36 of the Constitution.

The Foundation proposes that before such a drastic statutory criminal measure is proposed to regulate hate speech, an urgent review and reform of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (Equality Act) is required. There must be clear evidence that there is a pressing societal need for additional criminal measures to regulate hate speech. Only then, as an absolute last resort, should statutory criminal measures be considered. In this instance, it would have to be narrowly limited to hate speech as understood in terms of the Constitution, with clear definitions for each element of the offence. As it currently stands, the Bill will have a chilling effect on political and social discourse. We submit the offence of hate speech should be removed in its entirety from the Bill.

Issued by the FW de Klerk Foundation

17 February 2019

[A full legal analysis by the Foundation’s CFCR will follow within the next few days]