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THE STATE’S ATTEMPT TO CRIMINALISE HATE SPEECH - FLAWED AND UNCONSTITUTIONAL

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On 15 February 2019, the window closed for written submissions on the *Prevention and Combatting of Hate Crimes and Hate Speech Bill* (the Bill) to the Portfolio Committee on Justice and Correctional Services. The Bill - which proposes the statutory criminal offence of hate speech - is a much-improved version of its 2016 predecessor. However, the current offence of hate speech still poses a serious threat to the right to freedom of expression.

A person guilty of an offence of hate speech - as defined in the Bill - might be looking at a fine and/or imprisonment of three years on a first conviction. These are life-altering consequences and such a proposal needs to be carefully analysed through the lens of the Constitution. The starting point is section 16(1) of the Constitution - the right to freedom of expression. The right to freedom of expression, critical for social and political debate, indirectly fosters transparency and accountability in a democracy. However, the Constitution, in keeping with international law such as the *International Convention on Civil and Political Rights* (ICCPR), stipulates clearly in section 16(2) the type of expression that is undeserving of constitutional protection. Furthermore, the expression must fall within the narrow categories of section 16(2) - otherwise it will infringe on freedom to expression and trigger the need to justify the limitation as reasonable.

Section 16(2)(c) of the Constitution is colloquially known as the ‘hate speech’ prohibition. In line with the ICCPR, it provides that the expression prohibited must amount to “advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm”. These elements of hate speech must be present in any legislation prohibiting hate speech, to ensure it is constitutionally-aligned. An important point to keep in mind is that the ICCPR does not require South Africa to provide statutory criminal measures to regulate hate speech - it only requires regulation by law.

The first step is to determine whether the Bill’s hate speech offence aligns with section 16(2)(c) of the Constitution. A glaring failure of the Bill, from the outset, is the lack of definitions for elements of the hate speech offence. No definitions are provided for “publishes”; “propagates”; “advocates”; “harmful”; “anything” or “promote or propagate hatred”. This failure not only complicates legal analysis, but it is also contrary to international law guidance. It is a serious flaw, especially since the public is given no clarity on conduct that might make them guilty of such offence and that could lead to imprisonment.

The hate speech offence also expands the four listed characteristics in terms of the Constitution, to 19 listed characteristics (including albinism, HIV-status and nationality). Contrary to international law guidance, it is not limited to public expression. However, a critical flaw is that even if one only focuses on the constitutionally-aligned terminology in the offence such as “advocates”; “to incite harm” and “hatred”, it is still not aligned with section 16(2)(c) of the Constitution. It fails to require that what is being “advocated”



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publicly, should, firstly, relate to hatred on a specific characteristic, and which, secondly, must be linked to “incitement to cause harm”. Hate speech, as understood in terms of international law, relates to vile public expression of emotion, based on a characteristic such as religion, which has the potential to incite others to cause harm to members who share this characteristic. Even though harm (physical or psychological) does not necessarily have to occur, there must be an objective likelihood in the context that the expression will cause harm.

This vital connection is lost in the offence.

An offence punishable by imprisonment is, for instance, proposed where “anything” is being “advocated” to “one or more persons” that could “reasonably be construed” to demonstrate the intention to “promote or propagate hatred”. However, there is no requirement that this promotion or propagation of hatred must lead to any foreseeable harm.

The hate speech offence therefore does not relate to hate speech as understood in terms of the Constitution, and it therefore infringes on the right to freedom of expression.

As it infringes on freedom of expression, one is required to analyse whether this infringement can be justified as a reasonable limitation to freedom of expression. Section 36 of the Constitution provides various factors that must be weighed up in such an analysis. These include the nature and extent of the limitation and lesser restrictive means to achieve the goal. The hate speech offence, to a large extent, replicates the hate speech provision in the *Promotion of Equality and Prevention of Unfair Discrimination Act* (the Equality Act). This replication is problematic due to the contentious nature of the Equality Act’s prohibition - itself currently facing a constitutional challenge to be heard by the SCA on appeal. It is also unclear how the public would distinguish the Bill’s criminal offence from the same expression prohibited in the Equality Act. No thresholds are built into the offence with consideration to the reach, frequency or magnitude of the audience exposed to the speech, which would distinguish this criminal offence from the same expression prohibited in terms of the Equality Act.

This is in clear contrast to international law guidance, such as the *Rabat Plan of Action*, which recommends a six-part threshold test to be provided for expressions considered a criminal offence. Although these recommendations also relate to hate speech as understood in terms of the ICCPR, the lack of thresholds are clear indications of an overbroad limitation.

Furthermore, there are less restrictive means currently available to curb hate speech. It should have been made clear why there is this additional need for statutory criminal measures. The Equality Act’s remedies are specifically restorative of nature - it provides the offender with the opportunity to correct his/ her conduct and the Court has the discretion to refer cases to be prosecuted, which has happened. These drastic criminal measures must be supported with clear evidence of a pressing societal need. The limitation on freedom of



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expression is an unreasonably broad limitation, which cannot be justified. The current version of the offence of hate speech poses a serious threat to freedom of expression.

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