Executive Summary

Submission on the Prevention and Combatting of Hate Crimes and Hate Speech Bill

From the Campaign for Free Expression (CFE)

1 CFE is a registered Public Benefit Organisation, a non-profit body dedicated to defending and expanding the right to free expression for all in Southern Africa. It is independent and firmly non-partisan.

2 CFE abhors hate speech and discrimination based on immutable characteristics such as race, gender, religion, culture, sexual orientation, and so forth.

3 But, in our view, the answer to the societal scourge that is hate speech is not to criminalise such speech. The apartheid regime was infamous for criminalising speech that it regarded as threatening. The laws had the opposite effect to what they intended. The publications of the banned liberation movements became a prized commodity. Many South Africans risked jail sentences to read them. CFE fears that the democratic government is making the same mistake.

4 Criminalising hate speech will impinge on the freedom of expression, which is the lifeblood of our democracy, without effectively curbing it.

5 There are less restrictive means of effectively dealing with hate speech that already exist in our law. These include civil hate speech under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“the Equality Act”) as well as the criminal offences of, at least, incitement, *crimen injuria*, and assault. Clause 3 of the Bill, which we support, stregthens these measures by making them more serious offences if driven by hate. CFE contends that clause 4 should be deleted in its entirety.

6 If it not deleted, it is our view that criminal sanction should only target the most extreme expressions of hate speech, namely those the Constitution does not

protect, as set out in section 16(2) of the Constitution.

7 There are other key flaws in the Bill that render it unconstitutional:

- The criminal prohibitions target such a wide spectrum of speech that they would not be justifiable in terms of section 36 of the Constitution.

- The Bill imposes liability without the accused having a guilty mind.

- The prosecutorial discretion in the Bill does not cure the constitutional defects.

- The offence of distribution of hate speech is so broad that it will catch even those who distribute it to expose the culprit.

- The exception for "the publication of any information, commentary, advertisement or notice" (4(2)(c)) is impermisssibly vague and unhelpful.

8 CFE submits that the government should never again resort to the heavy hand of criminal law to limit free speech. Hate speech is to be deplored and the aims of the Bill are laudable. In particular, we support clause 3 of the Bill. But CFE submits that clause 4 should be excised from the Bill.

9 CFE respectively requests the opportunity to make an oral presentation on this matter.

October 1, 2021

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SUBMISSIONS ON THE PREVENTION AND COMBATTING OF HATE CRIMES AND HATE SPEECH BILL [B9 – 2018]

FOR THE ATTENTION OF:

MR V RAMAANO – hatecrimes@parliament.gov.za

ON BEHALF OF:

CAMPAIGN FOR FREE EXPRESSION NPC

1 October 2021

Submitted by: Prof Anton Harber
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INTRODUCTION

1 The Portfolio Committee on Justice and Correctional Services has re-published the Prevention and Combating of Hate Crimes and Hate Speech Bill for public comment.[1]

2 These are the submissions of the Campaign for Free Expression NPC ("**CFE**"). CFE also indicates its interest in making an oral presentation and respectfully requests the opportunity to do so.

(i) Background on CFE

3 CFE is a registered Public Benefit Organisation, a non-profit body dedicated to defending and expanding the right to free expression for all in Southern Africa. It is independent and firmly non-partisan.

4 CFE's aims and activities include:

4.1 Monitoring the free flow of ideas and information and reporting on relevant events and developments;

4.2 Injecting an informed, principled, consistent, and fact-based freedom of expression position into the national discourse;

4.3 Encouraging awareness of and support for freedom of expression across all elements of society, in particular ensuring it is not just a concern for members of the media, but one for all citizens and members of civil society.

4.4 Promoting transparency and access to information in all sectors of society.

4.5 Undertaking strategic litigation to promote and defend free expression.

[1] [B9 – 2018]

4.6 Acting as a think-tank on policy, particularly around the complex issues arising from digital media, disinformation, and regulation.

5 CFE's Directors are Professor Tawana Kupe, Advocate Carol Steinberg SC, Dr Ismail Mahomed, Editor Adriaan Basson and Professor Anton Harber (Executive Director).

(ii) CFE's core submissions

6 These submissions do **not** comment on the entire Bill but principally deal with the particular provisions related to the criminalisation of hate speech as set out in clause 4 of the Bill.

7 CFE abhors hate speech and discrimination based on immutable characteristics such as race, gender, religion, culture and sexual orientation.

8 However, the most effective way of addressing hate speech is not criminalisation. The apartheid regime was infamous for criminalising speech that it regarded as threatening. The laws had the opposite effect to what they intended. The publications of the banned liberation movements became a prized commodity. Many South Africans risked jail sentences to read them. CFE fears that the democratic government is making the same mistake. Instead of suppressing hate speech, there is every chance that the Bill will merely force it underground and the very fact that it is criminalised will encourage its dissemination.

9 At the same time, the criminal offences will inevitably impinge on South African's right to freedom of expression, which is the lifeblood of any democracy. Accordingly, our primary submission the criminal provisions speech will create a

lose-lose for South Africa: they will not effectively address the scourge of hate speech and they will drastically attenuate the right to freedom of expression

10 CFE's primary submission is therefore that clause 4 should be deleted in its entirety.

10.1 The offences in clause 4 are not necessary in order to curb hate speech. There are less restrictive means of effectively dealing with hate speech that already exist in our law. These include civil hate speech under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act") as well as the criminal offences of, at least, incitement, *crimen injuria*, and assault. Existing law is now bolstered by the introduction of clause 3 of the Bill, which CFE welcomes.

10.2 If Parliament is intent on criminal sanctions, then it should target only the most extreme expressions of hate speech namely, those the Constitution deems unworthy of protection, as provided by section 16(2).

11 In the second place, and regardless of whether Parliament accepts CFE's primary submission, there are other key flaws in the Bill which render it unconstitutional:

11.1 *First*, the criminal prohibitions target such a wide spectrum of speech that they would not be justifiable in terms of section 36 of the Constitution;

11.2 *Second*, the Bill imposes liability for hate speech without the accused having a guilty mind (i.e. the Bill does not require fault);

11.3 *Third*, the prosecutorial discretion set out in the Bill is insufficient to cure the constitutional defects;

11.4 *Fourth*, the offence under clause 4(1)(c) is overbroad;

11.5 *Fifth*, the exception in section 4(2)(c) is impermissibly vague and unhelpful.

12 We address the following topics:

12.1 We begin by outlining key features of the right to freedom of expression under section 16 of the Constitution;

12.2 Thereafter, we deal with four important constitutional principles relating to free speech which frame the discussion of the flaws in the Bill.

12.3 Next, we examine the forms of speech that are <u>not</u> protected expression under section 16(1) of the Constitution.

12.4 Thereafter, we show that the definition of hate speech in the Bill goes beyond the speech that is not protected under section 16(1) of the Constitution. It follows that the Bill is required to satisfy the limitations clause in section 36 of the Constitution.

12.5 We then turn to the reasons that CFE submits that the Bill, in its present form, fails to satisfy the limitations clause.

THE RIGHT TO FREEDOM OF EXPRESSION

13 Section 16 of the Constitution of South Africa, 1996 provides:

> "(1) Everyone has the right to freedom of expression which includes-
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> (a) freedom of the press and other media;
>
> (b) freedom to receive or impart information and ideas;
>
> (c) freedom of artistic creativity;

(d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to -

(a) propaganda for war;

(b) incitement of imminent violence;

(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

14 Our highest courts have repeatedly emphasised the significance of freedom of expression in an open and democratic.[2] It is accepted as a right that "*lies at the heart of democracy*"[3] and an "*indispensable element of a democratic society*"[4] due to its importance in the development of society.

15 The Constitutional Court emphasises that the right to freedom of expression is particularly important because of our history: we have "*recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments*".[5] Langa DCJ, as he then was, referred to these restrictions as "*a denial of democracy itself*" and noted that those restrictions would be "*incompatible with South Africa's present commitment to a society based on a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours*".[6]

16 It also recognizes that freedom of expression is not only important in itself, but is essential to supporting other basic human rights, like the right to freedom of

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[2] See, for example, *South African National Defence Union v Minister of Defence & Another* 1999 (4) SA 469 (CC) at para 7 ("*South African National Defence Union* "); *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC) ("*Laugh It Off*") at para 7; *NM v Smith* 2007 (5) SA 250 (CC) at para 145 ("*NM v Smith*"); *Khumalo v Holomisa* 2002 (5) SA 401 (CC) at para 22.

[3] *South African National Defence Union* at para 7.

[4] *NM v Smith* at para 145.

[5] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) ("*Islamic Unity Convention*") at para 25.

[6] Ibid at para 25 (footnote omitted).

conscience, religion, thought, belief and opinion.[7]

CONSTITUTIONAL PRINCIPLES

(i) Limitations on the right to freedom of expression must be interpreted narrowly

17 In order to withstand constitutional scrutiny – any statute that limits constitutionally-protected expression must be interpreted as narrowly as possible.[8]

(ii) Freedom of expression cannot be limited on a speculative basis

18 The Courts will not allow freedom of expression to be restricted on a speculative basis or on the basis of conjecture.[9]

(iii) Freedom of speech includes the freedom to engage in offensive speech

19 Legitimate speech that is protected under the Constitution includes robust political speech,[10] legitimate criticism,[11] and public debate which does not amount to hate speech.[12] In other words, speech that is thought-provoking and can stimulate meaningful debate is protected.

20 But our Constitution goes much further than this. The only speech that is not protected by section 16(1) is the speech described in section 16(2). The

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[7] Section 15(1) of the Constitution provides: "*Everyone has the right to freedom of conscience, religion, thought, belief and opinion*".
[8] *Laugh It Off* at para 59.
[9] *S v Mamabolo* 2001 (3) SA 409 (CC) at para 45; *Laugh It Off* at para 59.
[10] *Chairperson, National Council Of Provinces v Malema and Another* 2016 (5) SA 335 (SCA) at para 22. In that case, Malema had criticised the government and its ruling party for the conduct of the police in Marikana.
[11] *Laugh it Off* at para 86 where the Constitutional Court stated that "*there is a legitimate place for criticism of a particular trade mark*".
[12] *The Citizen 1978 (Pty) Ltd and Others v Mcbride (Johnstone And Others, Amici Curiae)* 2011 (4) SA 191 (CC) at para 100.

Constitution protects speech that is not necessarily valuable and meritorious. It even protects speech that might be offensive, as long as it does not seek to incite imminent violence or advocate hatred.

21 In ***Handyside v The United Kingdom***[13] the European Court of Human Rights held that freedom of expression extends not only to information or ideas that are favourably received or regarded as inoffensive, "*but also to those that offend, shock or disturb*."

22 This proposition was endorsed by the Constitutional Court in ***Islamic Unity Convention***[14] and again in July this year in the leading case on hate speech, ***Qwelane***.[15] It has also been accepted by the Broadcasting Complaints Commission of South Africa[16] and courts in various other jurisdictions have expressed similar views.[17]

23 Speech that causes offence, shocks or even disturbs people is still protected by the Constitution. Parliament has to justify any limitations on offensive speech that does not seek to incite imminent violence or advocate hatred under section 36 of the Constitution.

HATE SPEECH UNDER THE CONSTITUTION

24 Section 16(1) of the Constitution provides that everyone has the right to freedom

[13] (1974) 1 EHRR 737 at 754.
[14] *Islamic Unity Convention* at paras 26 and 27.
[15] *Qwelane v South African Human Rights Commission* [2021] ZACC 22 (31 July 2021) at paras 74 and 79.
[16] See, for example, *SABC v Blem and Others* [2012] JOL 28941 at para 7 where Dr Venter held: "*One of the demands of living in a democratic society is that one should be tolerant of material that offends, shocks, or disturbs*".
[17] See, for instance the Supreme Court of Sri Lanka's decision in *Lerins Peiris v Neil Rupasinghe, Member of Parliament and Others* [1999] LKSC 27; and the Supreme Court of India's decision in *S. Rangarajan etc. v. P. Jagjivan Ram* 1989 (2) SCR 204 at 224.

of expression. Section 16(2) of the Constitution, however, 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." (Emphasis added.)

25 Hate speech under the Constitution has three components.

25.1 First, the expression must advocate hatred.[18]

25.2 Second, the advocacy of hatred cannot "*simply advocate hatred of a specific person*" but must instead advocate hatred based on "*group characteristics*".[19] It must be based on one of four listed grounds: race, ethnicity, gender, or religion.

25.3 Third, the expression must also amount to "*incitement to cause harm*". This means that the expression must "*instigate or actively persuade others to cause harm*".[20]

26 Where legislation prohibits expression that is not "hate speech" within the meaning of section 16(2) of the Constitution, it will only be constitutionally permissible if it satisfies the provisions of the limitations clause under section 36 of the Constitution.

The definition of hate speech under the Bill is broader than the Constitution

27 The definition of hate speech under the Bill is broader than the exclusion under

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[18] In the matter of *R v Keegstra* [1990] 3 SCR 697 at 777, the Canadian Supreme Court explained that the term hatred "*connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation*". In *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) the Human Rights Commission found that "calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly indicates otherwise."

[19] Milo D, Penfold G and Stein, A, 'Freedom of Expression' in Woolman S, Roux T and Bishop M (eds), *Constitutional Law of South Africa* (2008) at 42–80 to 42–81.

[20] Ibid at 42–80.

section 16(2) of the Constitution in at least four key respects.

27.1 First the grounds have been extended. The grounds under the Bill extend to race, gender, religion, or ethnicity (the four constitutional grounds). But also to:

> Age, albinism, birth, colour, culture, disability, HIV status, language, nationality, migrant or refugee status, sex (which includes intersex), or sexual orientation.

27.2 Second, the threshold of harm has been lowered significantly. Under the Constitution, "hate speech" that does not enjoy protection must both amount to advocacy of hatred and constitute incitement to cause harm. Clause 4(1)(a) of the Bill, on the other hand, targets speech that could reasonably be construed to demonstrate a clear intention to (i) be harmful or to incite harm; or (ii) promote or propagate hatred.

27.3 Third, the term "harm" has been given a wide definition to include not only physical harm but also emotional, psychological, physical, social or economic harm.

27.4 Fourth, in clauses 4(1)(b) and (4)(1)(c) the Bill creates entirely new offences for distributing an electronic communication of known hate speech (for instance, sharing a viral video depicting hate speech) and/or for displaying or making hate speech material available.

28 The Bill must, therefore, satisfy the limitations clause under section 36 of the Constitution.

CLAUSE 4 OF THE BILL FAILS THE LIMITATIONS ANALYSIS

29 Section 36 of the Constitution sets out the circumstances under which rights in the Bill of Rights may be limited. It 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 all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

30 The Bill seeks to target categories of speech that are protected by section 16(1) of the Constitution, this means that the government bears the onus of proving that the limitations are justifiable under section 36 of the Constitution.[21] In our view, the government would not be able to discharge its onus because the Bill fails to strike an appropriate balance between the laudable purpose it seeks to achieve (preventing hate speech) and the right that is being limited (freedom of expression). Our law "*does not permit a sledgehammer to be used to crack a nut.*"[22] But that is precisely what the Bill does.

(i) The criminalisation of hate speech is not necessary – adequate legal mechanisms already exist

31 World-renowned free speech expert Dr Agnès Callamard comments, based on a survey of international jurisprudence, that any criminal restrictions on expression in a democratic society must only be used where truly necessary.[23]

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[21] *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening* 2001 (4) SA 491 (CC) at para 31; *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* 2005 (3) SA 280 (CC) at paras 33-7; *Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others* 2003 (3) SA 345 (CC) at para 20.

[22] *S v Manamela and Another* 2000 (3) SA 1 (CC) at para 34.

[23] Agnès Callamard "Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence" UN HCHR available at: http://menschenrechte.org/wp-

32 The offences created in clause 4 of the Bill are not necessary to address the purposes of the Bill. These are less restrictive means to achieve the purposes of the Bill that are already operational. Hate speech is already dealt with comprehensively, by means of civil law, under the Equality Act and criminally in the form of *crimen injuria*, incitement and assault.

33 In ***Qwelane v South African Human Rights Commission and Another***,[24] the Constitutional Court recently noted that South Africa regulates hate speech through civil remedies, which accords with the United Nations Rabat Plan of Action.[25]

34 The Constitutional Court has emphasised that: "[i]f society represses views it considers unacceptable, they may never be exposed as wrong. Open debate enhances truth-finding and enables us to scrutinise political argument and deliberate social values."[26]

35 Far from achieving the laudable intentions of the Bill, criminalisation may actually result in the opposite: it may encourage proponents of hatred to be more circumspect in the manner in which they conduct themselves, and drive the extremists underground rather than attempting to alter their position.

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content/uploads/2013/05/Freedom-of-expression-and-advocacy-of-religious-hatred-that-constitutes-incitement-to-discrimination-hostility-or-violence.pdf (Accessed 20 January 2017). Dr Callamard is presently the Secretary General of Amnesty International and was a former Special Rapporteur for the United Nations. She also until recently headed up Columbia University's Global Freedom of Expression and Freedom of Information project.

[24] (CCT 13/20) [2021] ZACC 22 (31 July 2021) at para 90

[25] The Rabat Plan of Action (The Rabat Plan of Action considers the distinction between freedom of expression and incitement to hatred) recommends that: "*Criminal sanctions related to unlawful forms of expression should be seen as last resort measures to be applied only in strictly justifiable situations. Civil sanctions and remedies should also be considered, including pecuniary and non-pecuniary damages, along with the right of correction and the right of reply*." (Emphasis added) [Annual Report of the United Nations High Commissioner for Human Rights, 11 January 2013 A/HRC/22/17/Add 4 at para 34]. This stance is also supported by jurisprudence of the European Court of Human Rights. See, for example, *Fáber v. Hungary* Application no. 40721/08.

[26] *Democratic Alliance v African National Congress and Another* 2015 (2) SA 232 (CC) at para 122

36 This is precisely what happened when the apartheid state criminalised, for example, the publications of the banned liberation movements. Their literature was merely forced underground and became more valuable and sought after because it was illegal. It would be sad and ironic if the democratic government were to repeat these mistakes.

37 Another example of criminalisation having the unintended effect of giving hate speech more prominence is the David Irving trial. In 1989, historian Irving made two speeches in Austria denying the Holocaust, calling for an end to the "*gas chambers fairy tale*" and claiming that claiming that Adolf Hitler had helped Europe's Jews. Irving was sentenced to three years' imprisonment.[27] Irving's trial attracted massive publicity, made him famous and a hero of the right-wing. It has also been argued that by imprisoning Irving, the Austrian Courts made a martyr out of him, which did more damage than good.[28]

Existing civil law mechanism: hate speech under the Equality Act

38 The Equality Act already regulates hate speech using civil remedies. This means that the Bill is not necessary to address hate speech.

39 The Equality Courts have effectively dealt with numerous matters which would now be criminalised by the Bill.[29]

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[27] He was convicted and sentenced in accordance with the Austrian Federal Law on the prohibition of National Socialist activities. Before Irving's sentencing hearing, he stated through his lawyer that he had changed his views and his ways. At the trial, Judge Liebtreu quoted numerous statements of Irving's, including "there were no gas chambers at Auschwitz" and "it makes no sense to transport people from Amsterdam, Vienna and Brussels 500 kilometres to Auschwitz simply to liquidate them when it can be more easily done 8 km from the city where they live".

[28] http://news.bbc.co.uk/2/hi/uk_news/4578534.stm

[29] *Strydom v v Nederduitse Geregformeerde Gemeente Moreleta Park* 2009 (4) SA 510, *Zonke Gender Justice Network v Malema* Case Number 2/2008 and *N G Kempton v André van Deventer* Case Number 9/2013.

40 In ***Qwelane***,[30] the Constitutional Court recently considered the constitutionality of hate speech under the Equality Act. The Constitutional Court retained most of the definition of hate speech and found that civil hate speech was not unconstitutional.

41 This does not, however, mean that clause 4 of the Bill would pass constitutional muster. The Constitutional Court upheld the Equality Act in the context of a civil remedy for hate speech, not a criminal sanction. The civil remedy under the Equality Act is a clearly less-restrictive choice than the Bill's suggested penalty of 3 years in prison.

Existing criminal law mechanism: *Crimen injuria*

42 Another effective means of addressing hate speech that already exists in South African law is the crime of *crimen injuria*. *Crimen injuria* consists of unlawfully and intentionally impairing the dignity or privacy of another person.[31]

43 The approach adopted by the court in ***ANC v Sparrow***[32] is instructive, where the Court found the defendant liable for civil damages, and included an order directing the Director of Public Prosecutions in KwaZulu-Natal to consider instituting criminal proceedings under the existing laws. Sparrow was subsequently convicted of *crimen injuria*.

44 There have been many other successful prosecutions where racists have been held to be criminally liable under the common law.[33] The common law is less

[30] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 (31 July 2021)
[31] J Burchell 'Principles of Criminal Law' 5 ed (2016), Juta and Company (Pty) Ltd at p 648
[32] (01/16) [2016] ZAEQC 1 (10 June 2016)
[33] In *State v Pistorius* [2014] ZASCA 47; 2014 (2) SACR 314 (SCA) – where the Supreme Court of Appeal upheld the conviction for *crimen injuria* of a farmer for saying of a security guard "die

restrictive than clause 6(3) of the Bill, which sets a maximum term of imprisonment of three years for a first conviction. There is no case in which a prison sentence of six months or more was imposed for a conviction of *crimen injuria*.[34]

Existing criminal law mechanism: incitement

45 Section 18(2)(b) of the Riotous Assemblies Act provides:

> "(2) Any person who—
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> …
>
> (b) incites, instigates, commands or procures any other person to commit,
>
> any offence whether at common law or against a statute or a statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable".

46 The offence of incitement was recently dealt with by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*.[35] The Constitutional Court declared the Riotous Assemblies Act inconsistent with section 16(1) of the Constitution to the extent that it criminalised the incitement of another person to commit "any offence". The Court made an interim order limiting the application of the offence only to "serious offences".

47 The Court acknowledged the "chilling consequences" that accompany a criminal

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k***** praat kak", at para 37. See also earlier decided cases such as *S v Meiring* 2011 JDR 1544 (FB) at paras 23, 25, 27 and 39; *Mostert v S* [2006] 4 All SA 83 (N) at pages 93 to 95; *S v Bugwandeen* 1987 (1) SA 787 (N) at 794E-796G.

[34] *Coetzee v National Commissioner of Police and Others* 2011 (2) SA 227 (GNP) at para 27. For instance, in *S v B* 1980 (3) SA 846 (A), the court combined the appellant's four convictions of crimen injuria to one. Even where there were four convictions the court imposed a suspended prison sentence of 12 months' imprisonment suspended for five years as well as some further conditions.

[35] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* 2021 (2) SA 1 (CC)

sanction, and made clear that offences limiting free speech should be as narrowly tailored as possible.

48 The Constitutional Court held that only extreme forms of speech - that incite serious offences - should be met with criminal sanction. This again shows that clause 4 is not necessary to prevent incitement of physical harm.

Existing criminal law mechanism: Assault

49 The common law crime of assault is also of assistance in targeting the kind of speech dealt with in section 16(2) of the Constitution.

50 The crime of assault is committed by applying force to another person. But it is also committed in any act, gesture or words that makes a person fear that they are about to suffer an attack on their person.[36]

51 This means that the ordinary crime of common assault already prohibits the type of speech listed in section 16(2) of the Constitution.

Additional criminal law mechanism introduced by the Bill: clause 3 of the Bill

52 Clause 3(1) of the Bill provides that –

> "A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics".

53 Clause 3(1) thereafter lists the extended grounds of discrimination.

[36] Burchell (supra) at p 597

54 CFE welcomes the introduction of clause 3 of the Bill. Importantly, the introduction of clause 3 of the Bill again emphasises why clause 4 is not necessary. Where incitement, *crimen injuria* or assault (by means creating fear of physical harm) are committed with hateful motives on the grounds in clause 3 of the Bill, then the hate crimes offence will be triggered, and the hateful component will be an aggravating factor at the point of sentencing.

(ii) Narrowing the target of the criminal provisions

55 CFE submits that if clause 4 is retained it should only apply to the speech not protected by the Constitution, that is, the speech section 16(2) excludes from constitutional protection. We believe, however, that clause 4 is entitled to include speech beyond the prohibited grounds, like homophobic speech, for example.

56 This approach is in line with findings of the Constitutional Court in the ***Islamic Unity*** and ***Qwelane*** case. It is also supported by foreign law. In Annex **A** we set out some cases and instruments that demonstrate how more extreme and abhorrent speech is protected in open and democratic societies.

<u>The international instruments target only the most extreme forms of speech</u>

57 The stated purposes of the Bill, in the preamble, explain that the offences in the Bill are linked to South Africa's international obligations and undertakings under the International Convention on the Elimination of All Forms of Racial Discrimination and the Durban Declaration.[37] But these instruments only require the prohibition of speech in section 16(2).

[37] That is, the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001.

58 The current wording of the Bill criminalises conduct far beyond what is suggested in these international documents. For example, the International Convention calls on member states to *criminally* sanction:

58.1 The dissemination of ideas based on racial superiority or hatred;

58.2 Incitement to racial discrimination;

58.3 Acts of violence or incitement to acts of violence against persons of another race or ethnic group.

59 The forms of speech targeted by the International Convention are substantially similar to (i) the thresholds set out in section 16(2) of the Constitution; as well as (ii) the forms of speech that are already prohibited by the common law crimes of *crimen injuria*, incitement and assault – read with clause 3 of the Bill.

60 Since mechanisms already exists which give effect to the principles of the international conventions referred to in the Bill, there is no rational reason to repeat those offences in clause 4.

61 Another purported catalyst for the hate speech provisions under clause 4 of the Bill is section 9(3) of the Constitution which prevents unfair discrimination on any of the listed grounds. But the Equality Act achieves that purpose with the civil remedy. The Constitution does not require a crime of hate speech.

(iii) The Bill imposes liability for hate speech without a guilty mind

62 Clause 4(1)(a) imposes criminal liability even in the absence of a "guilty mind" (i.e. fault or *mens rea*) on the part of the person committing the offence.

63 The culpability threshold set for hate speech is not intention and it is not even negligence: as long as a reasonable observer *could construe* the speech as

having been intended to be harmful or incite harm, or promote or propagate hatred, on the basis of race, religion, or various other prohibited grounds, then the crime has been committed.

64 The person must have intended to publish, propagate, advocate or communicate the particular content. The offence does not require the person committing the offence to have any appreciation that their speech is harmful, incites harm or promotes or propagates hatred.

65 This undermines certain core principles of our criminal law.[38]

66 If Parliament is intent on criminalising hate speech, then, at the very least, intention must expressly be referred to in the Bill in relation to the elements set out in clause 4(1)(a)(i) and (ii). The Bill should make it clear that only intention in the form of *dolus directus* (direct intention) rather than *dolus indirectus* or *dolus eventualis* will suffice. This is in keeping with South African[39] and international[40] jurisprudence.

67 CFE does not, however, want to be seen to be suggesting that, if section 4 were to be amended to include intention, it would render the section constitutional. Fault is necessary. But it is not sufficient. The Constitutional Court has made ut ckear that requiring criminal intent on the part of the accused is not sufficient to

[38] As Burchell points out: "Fault is an element of every crime. It takes the form of either intention (dolus) or negligence (culpa) … in order for an accused to be held liable, in addition to unlawful conduct (or actus reus) and capacity, there must be fault (or mens rea) on the part of the accused."

[39] The Appellate Division interpreted the Internal Security Act 74 of 1982 as requiring dolus directus rather than regarding dolus eventualis as sufficient for liability in relation to offences for subversion, sabotage and, by inference, terrorism as well. On this score, see *S v Nel* 1989 (4) SA 845 (A) and *Minister of Law and Order v Pavlicevic* 1989 (3) SA 679 (A).

[40] For example, in the international sphere, the intent required for commission of the crime of genocide under art 6 of the Statute of the International Criminal Court (and incitement to commit genocide) requires *dolus directus*.

save the constitutional defects in the Bill. [41]

68 People engaging in legitimate expression, without criminal intention, may ultimately be found to be innocent. But this does not eradicate the harms of criminalising the speech.

69 This is well illustrated by the Zimbabwean Constitutional Court in ***Madanhire***, where that Court struck down criminal defamation as unconstitutional.[42] It found, unanimously, that the crime failed the proportionality test in constitutional law.

70 According to the Court it was the very existence of the crime that created a stifling or chilling effect on freedom of expression and even if the person is acquitted she may have undergone the "traumatising gamut of arrest, detention, remand and trial" as well as a sizeable bill of costs which is not generally recoverable.

71 Citizens must not face the choice of having their free speech unnecessarily and severely limited or being exposed to the risk of arrest or even prosecution.[43]

(iv) The prosecutorial discretion in the Bill is insufficient to cure the constitutional defects

72 Clause 4(3) of the Bill provides:

> "(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her."

73 It might be suggested that, even if there are constitutional limitations or defects, this provision for prosecutorial discretion – regarding whether to prosecute a

[41] Economic Freedom Fighters at para 53
[42] *Madanhire v Attorney-General* 2014 JDR 1967 (ZiCC)
[43] *Economic Freedom Fighters* at para 56

particular person in each case – helps to cure them. Because (so the argument goes) on a case-by-case basis the Director of Public Prosecutions would only prosecute individuals where the facts cried out for it, and the offence would not be used lightly.

74 Our courts have made clear that this argument is untenable. In ***Teddy Bear Clinic***[44] the Constitutional Court said that the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions, because it is the mere spectre of prosecution that undermines a person's rights. By the time the discretion is exercised the person would have been investigated, arrested and questioned by the police.[45]

75 The fact that a person might not actually be prosecuted does not remove all of the harms occasioned by the overbroad criminalisation of constitutionally protected speech.

(v) The offence for sharing material in clause 4(1)(b) is overbroad

76 Clause 4(1)(b) of the Bill provides:

> "Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is –
>
> (i) accessible by any member of the public; or
>
> (ii) accessible by, or directed at, a specific person who can be considered to be a victim of hate speech,
>
> is guilty of an offence."

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[44] *Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another* 2014 (2) SA 168 (CC) at para 76; see also *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC) at para 23.

[45] *Teddy Bear Clinic* at para 76.

77 The Bill makes it an offence to distribute or make hate speech material available to members of the public. This would, for example, prevent individuals from sharing articles or videos in which another individual has engaged in hate speech.

78 We emphasise three points.

79 *First*, the Bill makes the mere sharing of the hateful speech an offence even where the person sharing the message does not endorse it.

79.1 International law sources make it clear that any penalties for dissemination must be extremely narrowly tailored (if they are permissible at all) and only where the person sharing the information does so for the purpose of inciting discrimination, hostility or violence. Airing the hateful speech is not enough. The person must endorse it.[46]

79.2 A collection of important bodies, including the United Nations Special Rapporteur on free speech, has emphasised that no one should be penalised for the dissemination of "hate speech" unless it has been

[46] *Jersild v Denmark* (1995) 19 EHRR 1 (ECtHR Grand Chamber): Mr Jersild, a Danish journalist, interviewed a group of extremist youth as part of a television programme. During the interview, the youths made racist comments, boasted about their hate crimes, and expressed the opinion that Denmark was for Danes and not for immigrants. Mr Jersild and the youths were all prosecuted and convicted in Denmark for various offences related to the publication of these statements. On appeal, the European Court of Human Rights held that the conviction of Mr Jersild was a violation of the Article 10 right to freedom of expression. See also: ***Lehideux and Isorni v France*** Application Number 24662/94 (September 23, 1998) where the European Court of Human Rights found that criminal penalties were not justifiable in a scenario in which certain individuals had published an advert praising Nazi collaborator Philippe Pétain in a French newspaper Le Monde. The Court held that the criminal penalty was not necessary in a democratic society and accordingly violated Article 10 of the European Convention (which deals with freedom of expression).

shown that they did so with the intention of inciting discrimination, hostility or violence."[47]

80 As presently formulated, the offence in clause 4(1)(b) only requires that the person intended to share the material more widely – in other words that the sharing was deliberate rather than done by accident. There is no requirement that the person endorses the remarks or is intending to incite further discrimination, hostility or violence.

81 The second point we emphasise is that the Bill would, for example, prevent individuals from sharing articles or videos in which another individual has been captured on video engaging in hate speech, even if the person sharing the message does so in a civic and patriotic duty to expose the hate speaker.

82 Yet, critically, sharing instances of hate speech widely in the public arena is often the very manner in which the people committing hate speech are exposed.

82.1 In August 2018, Mr Adam Catzavelos filmed himself making racist remarks on a beach in Greece while on holiday. This video was sent to a private WhatsApp group. Someone on that private group shared the video with people outside the group. In a matter of days the video had gone viral in South Africa and been viewed thousands of times. Importantly, it was the publication of Mr Catzavelos' remarks that led to steps being taken against him as well as public outcry in response to Mr Catzevelos' behaviour. Mr Catzavelos' family business was driven into

[47] See the 2001 joint statement was published by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe ("OSCE") Representative on Freedom of the Media, and the Organization of American States ("OAS") Special Rapporteur on Freedom of Expression. The joint statement stipulated various criteria which hate speech laws should respect. Available at: https://www.article19.org/data/files/pdfs/igo-documents/three-mandates-statement-1999.pdf

financial ruin and Nike – which employed Mr Catzavelos' wife – was also the subject of national boycotts. Mr Catzavelos was convicted of crimen injuria and received a suspended sentence.

82.2 The same was so in relation to Penny Sparrow (case discussed above) in 2016. Ms Sparrow became infamous for a post on Facebook which referred to black South African people as "monkeys". It was only because those who knew Ms Sparrow shared the post more widely (and then those people who saw it, again shared it even more widely) that the regrettable speech was discovered. The South African Human Rights Commission then took steps against Ms Sparrow. The Equality Court ordered Ms Sparrow to pay R150 000 for hate speech. She was also found guilty of crimen injuria and ordered to pay a fine of R5 000, or to serve a 12-month prison sentence.

83 Thirdly, the defence set out in clause 4(2)(c) would not protect individuals who shared the information in order to expose the person committing hate speech. Clause 4(2)(c) only protects a person who also engages in "*fair and accurate reporting*" or "*commentary in the public interest*". Where a member of the public simply reposts or shares hateful speech to expose it (without commentary dispelling the conduct) that in itself should plainly not be criminalised.

(vi) The exception in clause 4(2)(c) is impermissibly vague

84 Clause 4(2)(c) of the Bill excludes from the ambit of clause 4:

> "the publication of any information, commentary, advertisement or notice, in accordance with section 16(1) of the Constitution…"

85 It is trite that the rule of law requires that laws be coherent, clear and practicable.[48] Where a law is vague and uncertain members of the public will not know which speech is permitted (and falls within the exception under clause 4(2)(c)) and which speech is prohibited. [49] That uncertainty, in itself, will have a patent chilling effect on free speech.

86 The wording of this exception is circular and vague. All expression apart from the narrow list specified in section 16(2) of the Constitution amounts to expression that is protected under section 16(1) of the Constitution. The provision is capable of various different meanings. If all expression that is protected under section 16(1) is protected then extending the reach of clause 4 of the Bill to speech beyond section 16(1) would be defeated by the exception. CFE has respectfully submitted that clause 4 should be removed from the Bill. However, if clause 4 remains then the meaning of the defence in clause 4(2)(c) must be clarified.

87 CFE hopes that what was intended was that only categories of speech in section 16(2) of the Constitution would be criminalised and that protected speech under section 16(1) would escape criminal sanction. Alternatively, that what was intended was that the threshold of harm in section 16(2) would be utilised but would apply to the expanded list of grounds in clause 3 and 4 (including albinism etc.).

[48] Fuller "The Morality of Law*"* (Yale University Press, New Haven and London 1964) at 63-5

[49] Qwelane *supra* at para 150, quoting Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression "Hate Speech and Incitement of Hatred" (7 September 2012) A/67/357 at para 41(a) and para 41.

CONCLUSION

88 Our Constitutional Court has made clear that our history "*remind[s] us that ours is a 'never again' Constitution: never again will we allow the right of ordinary people to freedom in all its forms to be taken away*."[50] CFE respectfully submits that the government should never again resort to the heavy hand of criminal law to limit free speech.

89 While clause 3 of the Bill is a welcome development that should be celebrated, and while the aims of the Bill are laudable and hate speech is to be deplored, CFE submits that clause 4 should be excised from the Bill. This will not have any negative effect on the purposes that Parliament seeks to achieve. The speech targeted under clause 4 of the Bill is already adequately dealt with under the civil prohibition of hate speech under the Equality Act as well as a series of existing crimes (incitement, crimen injuria and assault).

90 For all of these reasons, we respectfully submit that the Bill in its present form is unconstitutional and fails to limit the right to freedom of expression in accordance with the limitations clause in section 36 of the Constitution.

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[50] *South African Transport and Allied Workers Union and Another v Garvas and Others* 2013 (1) SA 83 (CC) at para 63.

International case law evidencing the negative impact of criminalising hate speech

In the ***Brandenburg*** case before the United States Supreme Court,[51] a leader of the Ku Klux Klan's Ohio sect held a rally in order to celebrate his racist ideology. He was captured on television stating, amongst other things: "*if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken*". His message also included racial slurs about black people and Jewish people.

Brandenburg was convicted of violating state law in Ohio which prohibited –

> "advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" as well as "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."

The United States Supreme Court overturned Brandenburg's conviction holding:

> "Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

As the rally was not aimed at inciting specific acts of violence – and was unlikely to do so – the restrictions on Brandenburg's speech was unconstitutional.

At the centre of this decision is the notion – made famous by John Stuart Mill – that the law should protect freedom of expression unless and until individuals might be physically harmed.

[51] *Brandenburg v Ohio* 395 U.S 444 (1969).

Similarly, in ***Virginia v Black***,[52] the United States Supreme Court three men were convicted in two separate cases of breaching a Virginia statute against cross burning. The Court distinguished between acts which could lawfully be outlawed: "*those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.*"[53] The Court held that it regarded intimidation as a type of real threat "*where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.*"[54] The Court found that the act of cross burning often involves intimidation and often creates fear in victims that they are a target of violence. Banning this kind of intimidation did not fall foul of the First Amendment. However, the Court ruled that the statute at hand went too far. Its provisions created the risk of suppressing the act of cross burning completely as its provisions stated that any cross burning amounted to prima facie evidence of intent to intimidate.[55]

Precedent from the United States Supreme Court has particular instructive value in the context of free speech under our law. In ***Mamabolo***, the Constitutional Court has emphasised that –

> "[H]aving regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way".[56]

[52] 538 U.S. 343 (2003).
[53] *Virginia judgment* at p 359.
[54] *Virginia judgment* at p 360.
[55] *Virginia judgment* at p 348.
[56] S v Mamabolo (E TV Intervening) 2001 (3) SA 409 (CC) at para 37

Similarly, in ***Economic Freedom Fighters***, in the context of the criminal offence of incitement, the Constitutional Court held that:

> "[L]egislation that seeks to limit free speech must thus be demonstrably meant to curb incitement of offences that seriously threaten the public interest, national security, the dignity or physical integrity of individuals – our democratic values."[57]

[57] *Economic Freedom Fighters* at para 47