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**SUBMISSION BY THE LEGAL RESOURCES CENTRE AND ESTIAN SMIT  
TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT IN  
RESPECT OF THE PREVENTION AND COMBATING OF HATE CRIMES AND  
HATE SPEECH BILL, 2016**

**31 JANUARY 2017**

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## **INTRODUCTION**

1. The Legal Resources Centre (hereinafter referred to as the “LRC”), and Estian Smit hereby submit comments and recommendations on the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill (hereinafter referred to as the “Draft Bill”) as advertised in Government Gazette no 40367 dated 24 October 2016.
  
2. We welcome the opportunity to make these submissions and to engage with issues that pertain to a legal framework in South Africa that recognises the severity of crimes motivated by hatred and intolerance towards certain groups on the grounds of, but not limited to, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
  
3. This submission is divided into three parts:
  - 3.1. In Part I, we set out the work and the interest of the authors of this submission
  - 3.2. In Part II, we set out our submissions relating to hate crimes; and
  - 3.3. In Part III, we set out our submissions relating to hate speech.

4. We deal with each of these in turn below. Should you require any further information regarding these submissions, please feel free to contact us at [charlene@lrc.org.za](mailto:charlene@lrc.org.za) / [avani@lrc.org.za](mailto:avani@lrc.org.za).

## **PART I: INTRODUCTION TO THE AUTHORS**

5. The LRC is a public interest, non-profit law clinic in South Africa that was founded in 1979. It has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as contribute to the development of human rights jurisprudence and to the social and economic transformation of society.
  
6. The LRC operates throughout South Africa from its offices situated in the cities of Johannesburg, Cape Town, Durban and Grahamstown. Through strategic litigation, advocacy, education and training, the LRC has played a pivotal role in developing a robust jurisprudence in the promotion and protection of equality and non-discrimination, as well as the right of freedom of expression. A significant proportion of the LRC's work, since 1996, has been in the sphere of equality and non-discrimination and it is hoped that the comments and recommendations set out below will be of assistance to the Department of Justice and Constitutional Development (hereinafter referred to as the "Department").

7. Estian Smit is a transgender activist, independent scholar and gender and bodily diversity consultant based in Cape Town. They played a central role in parliamentary advocacy involving South Africa's gender recognition law (Alteration of Sex Description and Sex Status Act, No. 49 of 2003) and have been involved in ongoing law reform efforts to secure greater protection for transgender and intersex rights. Over the past decade, they have worked as advocacy volunteer, staff member and/or consultant to South African transgender and intersex organisations, and have co-authored submissions to Parliament, as well as transgender and intersex shadow reports to the African Commission on Human and People's Rights (ACHPR) and various United Nations committees. Email: [estian.smit@gmail.com](mailto:estian.smit@gmail.com).

## **PART II: SUBMISSIONS RELATING TO HATE CRIMES**

### **SOUTH AFRICA'S DUTY AND OBLIGATION TO ADDRESS HATE CRIMES**

8. Hate crimes are most often described as crimes that are motivated by some form of bias or prejudice towards a particular social group within society. The motivation for the crime that is committed becomes as relevant as the crime itself. The victim of a hate crime is selected because of the prejudice or the bias that exists in the mind of the perpetrator. The victim may be a member of a particular social group or the perpetrator may perceive such membership, and is motivated by the bias towards the victim to commit the crime.
9. Crimes that are motivated by bias or prejudice and intolerance towards a certain group have a severe impact on not only the victim of the hate crime but also on the particular social group to which the victim belongs, or is perceived to belong. Hate crimes also impact on us as a society as it divides society into superior and inferior, tolerated and untolerated groups. It has the potential to create cycles of violence, disrupt public order and to jeopardize social peace and security.
10. The enactment of hate crime legislation protects, promotes and gives respect to the most vulnerable within our society. It further strengthens South Africa's commitment to comply with its international legal

obligations to combat xenophobia, gender-based violence, discrimination and intolerance.

11. The Constitution of the Republic of South Africa, Act 108 of 1996, dedicates its very first section to these principles:

*“The Republic of South Africa is one, sovereign, democratic state founded on the following values:*

*(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.*

*(b) Non-racialism and non-sexism.”*

12. This is complemented by section 9 of the Bill of Rights:

*“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National*

*legislation must be enacted to prevent or prohibit unfair discrimination.”*

13. Article 1 of the Universal Declaration of Human Rights (1948) states that:  
*“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”*
  
14. Whereas the principle of non-discrimination, complementary to the principle of equality, is enshrined in article 2 of the Universal Declaration of Human Rights (1948):  
*“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”*
  
15. In 2001, the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban adopted a Declaration condemning any form of discrimination based on specified protected characteristics, and urged the states to *“adopt, implement, or strengthen, national legislation and administrative measures that expressly and specifically counter racism and prohibit*

*racial discrimination, xenophobia and related intolerance, whether direct or indirect, in all spheres of public life, in accordance with their obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, ensuring that their reservations are not contrary to the object and purpose of the Convention*". Furthermore recognizing the value and diversity of the cultures and heritages as a fundamental factor for social stability and the development of the States they live in.

16. Article 4 of the International Convention on the Elimination of Racial Discrimination calls upon

*"States [to] condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:*

*(a) Shall 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 thereof;*

*(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;*

*(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”*

17. Article 2 of the African Charter on Human Rights and People’s Rights (1981) lays down the principle of non-discrimination with a non-exhaustive enumeration of protected characteristics:

*“Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”*

## **SUBMISSIONS REGARDING THE HATE CRIMES PROVISIONS OF THE DRAFT BILL**

### **A. The Preamble**

18. The Preamble to the Bill recognises that apartheid and racial discrimination has had a devastating impact on South Africa, and has left

a lasting impact on its people. It recognises since the dawning of democracy acts of prejudice and discrimination have continued to violate the rights of many, and that the State has a duty to address the continued injustice.

19. We acknowledge the need to address racial based discrimination and violence, but submit that racial motivated discrimination and violence is not the only kind of hate-based crimes of concern in the country. The United Nations Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonovic, states in her country Report that *“The violence inherited from apartheid still resonate profoundly in today’s society dominated by deeply entrenched patriarchal norms and attitudes towards the role of women and which make violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted phenomenon.”*<sup>1</sup> The Special Rapporteur further highlighted that violence perpetrated against women and children with disabilities are heightened due to their low status in communities, their social isolation, and their dependence on others.
  
20. The Special Rapporteur makes specific reference to the violence and discrimination faced by lesbian women and persons based on their sexual orientation and gender identity. Rape is often used as a tool by

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<sup>1</sup> Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa.

which to punish women who do not fall into patriarchal stereotypes. This was described as a form of “*extreme violence*”. The Special Rapporteur also states that she looked forward to the possibility of legislation being drafted that would address such hate crimes.

21. We live in a society where many transgender and gender diverse persons face pervasive discrimination and structural violence in all spheres of society, and often experience rejection by their families and communities, homelessness, violence, rape and murder. For transgender women in particular, sex work is often the only option left for earning a livelihood, yet they are further marginalized and oppressed by the state who criminalises them for sex work and drug use, and the police who victimize them rather than offer protection against perpetrators. Gender identity, gender expression, homelessness, HIV and health status, sex work, drug use and other factors often intersect to render transgender persons extremely vulnerable to hate crime in a very prejudiced society. An intersectionality approach to hate crime and public education is therefore vital, and the Bill should also give greater attention to addressing hate crimes and human rights violations perpetrated by the state and its institutions.
  
22. We live in a society where intersex persons are invisibilised, viewed with suspicion and subjected to gross human rights violations, including reported murders of intersex infants, and intersex genital mutilation (IGM)

at the hands of medical professionals in South African state hospitals with utter disregard for intersex children's right to bodily integrity, bodily autonomy and health. This is possible because of the dominant societal belief that female and male are the only two legitimate or 'normal' sexes (sex binarism), and that female and male bodies only come in certain specific shapes, and therefore bodies with different sex characteristics are viewed as 'abnormal' and in need of medical and other interventions. Hate crime and human rights violations against intersex persons cannot be fully addressed unless these harmful presuppositions about physical sex characteristics held by government, its institutions and society at large, are not changed. Moreover, currently the Bill does not make mention of reparative justice. However, consideration must be given to making provision for reparations where human rights violations have been perpetrated by the state or other actors. An interagency statement on *Eliminating Forced, Coercive and Otherwise Involuntary Sterilization* by the OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO has for instance called upon states to provide redress mechanisms and reparations where individuals have been subjected to forced, coercive or involuntary procedures as infants or children.<sup>2</sup>

23. We therefore encourage the Department to view the legislation in a more holistic manner in that the legislation provides an opportunity where a

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<sup>2</sup> World Health Organization (WHO). 2014. *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement* – OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Geneva, Switzerland: WHO, pp.15-16.  
[http://www.unfpa.org/sites/default/files/resource-pdf/Eliminating\\_forced\\_sterilization.pdf](http://www.unfpa.org/sites/default/files/resource-pdf/Eliminating_forced_sterilization.pdf)

number of hate and prejudice based offences can be addressed. The introduction and preamble to the Bill therefore need to be strengthened to address the obligations that the state has, but also to emphasise that hate-based crimes are more than merely crimes motivated by racial discrimination. For instance, the Bill's introductory summary mentions "racism, racial discrimination, xenophobia and related intolerance", but all forms of intolerance are not necessarily related to racism and xenophobia. It would be better to replace "related" with "other forms of". Alternatively, the introductory summary could either merely state that it will deal with "all forms of intolerance" without naming them, or alternatively, enumerate all the additional forms of intolerance as well, including sexism, homophobia, transphobia, intersexphobia, intolerance towards persons with disabilities or persons who are HIV positive, etc., but this would again risk omitting some forms of intolerance. A similar problem presents itself in the Preamble with the mention of human rights instruments addressing racism, but excluding other relevant international human rights instruments, for instance, those relating to women, people with disabilities, sexual orientation and gender identity, etc.

## B. Section 1 Definitions

24. The following submissions relate to the Definitions section of the Bill:

24.1. "data": The Bill currently defines "data" as "*means electronic representations of information in any form*". We submit that this definition is potentially too vague and ambiguous and that further

thought be given to narrowing the scope of the form that data can take.

24.2. “harm”: The Bill currently defines “harm” as “*includes any mental, psychological, physical or economic harm*”; once again we will submit that this definition is too vague and ambiguous and leaves too much for subjective interpretation. We have learned from the implementation of the Domestic Violence Act that by not defining terms such mental or psychological harm, it is left to the Police or Magistrate to determine whether within their own subjective interpretation the experience of the victim amounts to abuse. It is also worth noting that the Domestic Violence Act in fact defines “economic abuse”. We recommend that the Department defines the terms so as to ensure proper implementation.

24.3. “intersex”: The Bill currently defines “intersex” as “... *a congenital sexual differentiation which is atypical, to whatever degree*”. This definition is identical to the definitions included in the *Alteration of Sex Description and Sex Status Act, No.49 of 2003* and the *Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000*. Although the former definition is not inaccurate and had in fact been inserted by the pioneering South African intersex activist, the late Ms Sally Gross, international intersex human rights discourse has changed over the past decade and a half, and

the term “sex characteristics” has now become widely used in defining the term “intersex” and as a ground for prohibiting discrimination. We therefore suggest the following definition, which draws from reports<sup>3</sup> and presentations<sup>4</sup> by international and South African intersex human rights advocates and scholars, and United Nations statements<sup>5</sup> and publications<sup>6</sup>: “***intersex***’ means being born with physical sex characteristics (including sex anatomy/genitals, reproductive organs and chromosome patterns) that are more diverse than dominant (binary) social constructions of male and female bodies, and includes a wide range of natural bodily variations”. This definition intentionally avoids marginalising terms such as “atypical”, medically pathologising terms such as “conditions”, and also the term “sexual”, which is often confused with sexual orientation and behaviour.

25. In general, we would suggest that hate crime and hate speech is defined in the definition section in full. Referring to the meaning in the sections is

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<sup>3</sup> Carpenter, M. & Cabral, M. (Eds.). 2015. Intersex Issues in the International Classification of Diseases – a revision. <https://globaltransaction.files.wordpress.com/2015/10/intersex-issues-in-the-icd.pdf>

<sup>4</sup> Van der Have, Miriam. 2016. Intersex: A ~~Post-Medicine~~ Definition. Paper presented at the Symposium of the World Professional Association for Transgender Health (WPATH), 17-21 June 2016, Amsterdam.

<sup>5</sup> World Health Organization (WHO). 2014. Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement – OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF and WHO. Geneva, Switzerland: WHO. [http://www.unfpa.org/sites/default/files/resource-pdf/Eliminating\\_forced\\_sterilization.pdf](http://www.unfpa.org/sites/default/files/resource-pdf/Eliminating_forced_sterilization.pdf)

<sup>6</sup> Free & Equal – United Nations for LGBT Equality. 2015. Factsheet: Intersex. Geneva, New York: United Nations Human Rights Office. [https://www.unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf)

both confusing and convoluted, as the reference in no way clarifies the definition of the terms.

26. The confusion in the definition section is further exacerbated by the fact that “intersex” is defined, but that terms such as “sexual orientation” and “gender identity” are not. There has in recent years been confusion around the meaning of these terms in documents such as the Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances, which conflated sexual orientation and gender identity with each other.
27. The Definitions section of the Bill requires a definition of “gender expression”. We therefore suggest the following definition that is informed by the *Yogyakarta Principles*<sup>7</sup> and recent examples of international best practices, such as Malta’s gender recognition law<sup>8</sup>:  
*“**gender expression**’ means the way in which a person expresses their gender identity, or how it is perceived by others. It may involve using dress, speech, mannerisms or other means, and, if freely chosen, modification of bodily appearance or function by medical, surgical or other means.*”

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<sup>7</sup> *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*. 2007.

[http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles\\_en.pdf](http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf)

<sup>8</sup> Malta: *Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015*

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

28. The Definitions section of the Bill requires a definition of “gender identity”. We therefore suggest the following definition drawn from the *Yogyakarta Principles*<sup>9</sup> and recent examples of international best practices in gender recognition law (such as the gender recognition laws of Argentina<sup>10</sup> and Malta<sup>11</sup>): “**gender identity**’ means a person’s deeply felt internal and individual experience of gender, which may or may not correspond with the gender they were assigned at birth, including their personal sense of the body”.
29. The Definitions section of the Bill requires a definition of “sex” that is broad enough to include intersex persons, transgender persons and other persons who may have a nonbinary physical appearance, or who may have altered or be in the process of altering their sex characteristics. We therefore suggest the following definition: “**sex**’ means female, male, intersex and all other forms of sex characteristics, as well as the alteration of sex characteristics, whether this results from gender affirming surgery or other surgeries, medical treatment (e.g. hormonal), or through injury or disease”.
30. The Definitions section of the Bill requires a definition of “sex characteristics”. We therefore suggest the following definition drawn from

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<sup>9</sup> Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity. 2007.

[http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles\\_en.pdf](http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf)

<sup>10</sup> Argentina: Gender Identity Law of 2012. <http://www.tgeu.org/sites/default/files/Argentina%20-%20Gender%20Identity%20Law%20ENG.pdf>

<sup>11</sup> Malta: Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015 <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

Malta's groundbreaking *Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015*<sup>12</sup>, which has become the first law to protect the right to bodily integrity and physical autonomy of intersex minors by prohibiting surgical interventions or sex assignment treatment on the sex characteristics of minors who are too young to be able to provide informed consent: “**sex characteristics**’ mean the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia, and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure”.

31. The Definitions section of the Bill requires a definition of “sexual orientation”. We therefore suggest the following definition from the *Yogyakarta Principles*<sup>13</sup>: “**sexual orientation**’ means a person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.

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<sup>12</sup> Malta: *Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015*  
<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

<sup>13</sup> *Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity*. 2007.  
[http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles\\_en.pdf](http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf)

### C. Objective of the Bill

32. The Objectives of the Bill make no reference to the overarching purpose of the Bill and so there is no connection between what the preamble envisages and what the objectives are. The objectives reference South Africa's international obligations to address intolerance and prejudice, but fail to address that the objective is to ensure that the state complies with its Constitutional obligations to respect, protect and promote the rights to equality, dignity, safety and security as well as bodily integrity, to name but a few. The objective of the legislation is surely to protect the most vulnerable within our society from discrimination and prejudice and from the commission of heinous offences based on such discrimination. All of this rhetoric is absent from the objectives set by the Bill in its current form.

### D. The offence of hate crime

33. Section 3 (1) of the Bill states that a "... *hate crime is an offence recognized under any law, the commission of which by a person is motivated on the basis of that person's prejudice, bias or intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member...*"

34. The State has a duty in terms of section 7(2) of the Constitution to "respect, protect, *promote* and fulfil" the rights contained in the Bill of

Rights. One of the ways in which it fulfils its constitutional and international obligations is to impose criminal sanctions on persons who breach such rights. There is therefore no doubt that both our Constitution and under international law, Parliament is obliged to create offences of this sort and the National Prosecuting Authority will be obliged to prosecute these offences.

35. What is in doubt in the reading of this section is whether the Bill seeks to create a new offence or whether it merely attaches prejudice, bias and intolerance as elements to already existing offences. A simple reading of the section appears to only create or add an additional element to an already existing crime, which will have to be shown in Court in some way or form. In many instances the motive of a perpetrator is difficult to ascertain and more difficult to prove. In its current wording we submit prosecutors will find it extremely difficult to implement and prosecute successfully as they not only have to show that the perpetrator committed the already existing offence, but will need to show the court that the perpetrator had the intention to commit the offence as well as what motivated the perpetrator to commit the offence. Motivation for committing crimes is not currently a requirement for a successful prosecution.
36. The characteristics should be listed alphabetically.

37. In section 3(1), we suggest that the pronouns “*his or her*” be omitted since they reinforce binary gender norms to the exclusion of other gender identities. In this case, pronouns are not needed grammatically, but an alternative is to use the gender-neutral pronoun “*their*”.
38. In section 3(1), we suggest that “*family member*” be replaced by “those associated with the victim”, since a person may not only be targeted because of characteristics of their family members, but also because of characteristics of other acquaintances, friends, colleagues, etc.
39. The Bill further lists what it terms characteristics or perceived characteristics which are listed in section 3(1)(a) to (q). We refer here to our submissions made under the Part B above and would emphasise a need to define some of the characteristics so as to ensure that there is an understanding by the public who are meant to abide by the legislation and the justice cluster that must enforce the legislation.
40. Section 3(1)(c) lists the following characteristic: “*sex, which includes intersex*”. To ensure inclusion of transgender persons and other persons who may have a nonbinary physical appearance, or who may have altered or be in the process of altering their sex characteristics, we suggest broadening the definition as follows: “*sex, which includes intersex; sex characteristics in general; as well as the alteration of sex characteristics, whether this results from gender affirming surgery or*

*other surgeries, medical treatment (e.g. hormonal), or through injury or disease*". It is advisable that this definition also be included in the Definitions section of the Bill as indicated under Part B above.

41. Section 3(1)(m) lists "*HIV status*". We suggest changing it to "*Health status, which includes HIV status*" since there are other health statuses that are also subject to hate crime and victimisation.
42. Section 3(1)(o) lists "*gender identity*", which we strongly commend. However, this is not sufficient, as often a person's gender identity may not be known to a perpetrator and it may be their gender expression instead which is the target of prejudice and hate crime. We therefore strongly suggest inclusion of "*gender expression*" as another characteristic under a separate bullet.
43. Hate crimes legislation often omits to protect the most vulnerable and marginalised groups and individuals in society, such as homeless persons, sex workers and people who use drugs, all of whom tend to be among the most exposed to hate crimes while also being victimised by police, left completely without protection and unable to access assistance since they do not meet society's notions of the ideal, legitimate or deserving victim and do not have political currency for governments.<sup>14 15</sup>

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<sup>14</sup> Duggan, M., & Heap, V. 2014. *Administrating Victimization: The Politics of Anti-Social Behaviour and Hate Crime Policy*. Basingstoke & New York: Palgrave Macmillan, pp.20-21.

<sup>15</sup> Schweppe, J. 2012. Defining characteristics and politicising victims: A legal perspective. *Journal of Hate Studies*, 10(1), 173-198.

<sup>16</sup> The current list of characteristics commits the same omissions. To ensure a more comprehensive list of characteristics often targeted for hate crimes, and to ensure that the most vulnerable persons and groups in society are also protected by the Bill, we strongly suggest inclusion of the following characteristics or perceived characteristics: marginalised socio-economic status (including homelessness, unemployment), asylum/refugee status, age, sex work, drug use, personal appearance, and current or past incarceration or detention in correctional or psychiatric facilities. In addition, it is advisable to indicate that the list is open-ended/non-exhaustive, by inserting “*or any other real or perceived characteristics*” at the end of the introductory sentence of section 3(1).

#### E. Implementation of the Draft Bill

##### 44. Impact and sentence

44.1. We are concerned about the wording in section 5(2) of the Bill which states that a prosecutor may when adducing evidence address the Court on the interest of and the impact of the offence. One of the objectives of the Bill is to seek to give effect to the rights of victims and to recognize the impact that hate crimes have on us as a society. The motivation for having committed the offence and the impact or interest of the victim in instances of hate crimes is critically linked. It therefore cannot be optional for the prosecutor to lead evidence on the impact of the crime on the

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<sup>16</sup> Chakraborti, N., & Garland, J. 2012. Reconceptualizing hate crime victimization through the lens of vulnerability and ‘difference’. *Theoretical Criminology*, 16(4), 499-514.

victim and the victim impact statement cannot be reduced to a document that is provided only when it is practical to do so. The Bill does not stipulate who it should be practical for and so absolves the state from having to produce such a document. Will the onus on providing the impact statement therefore fall onto the victim? We submit that the purpose of the Bill is trivialized if much needed procedural elements are made optional extras based on practicality.

45. Directives and reporting

45.1. Of further concern is section 7 which deals with Directives which must be issued by the National Director of Public Prosecutions. The section is equally vague in stating that Directives will be issued on “matters which are reasonably necessary or expedient” We do not know what these matters are and perhaps they should be unpacked in a transparent manner so that accountability mechanisms may be put in place in the implementation of the legislation. Here we reference in particular the manner in which National Instructions under the Domestic Violence Act allows for parliament to hold SAPS accountable for their implementation of the Domestic Violence Act.

45.2. At the same time, we note an absence in the presence of SAPS in this key legislation. In legislation such as the Domestic Violence

Act, the Protection from Harassment Act and the Sexual Offences Amendment Act, SAPS has a clear role in the legislation. We anticipate as they will be charged with investigations of hate crimes and as such cases will be reported to them, they have a critical role to play in the implementation of the Bill. They too should have a duty to issue National Instructions on the implementation of Hate Crimes legislation so that implementation can be monitored and accountability mechanisms can be built into the process. We are concerned that these accountability mechanisms will fall into a process of regulation rather than within the legislation itself, and that reports on the implementation of the legislation as per section 8(2) will only be made available to parliament, the South African Human Rights Commission and the Commission for Gender Equality. These reports should be public documents to which the public will have access, and surely should include Chapter 9 Institutions, such as the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. This Commission in particular has as its core mandate the promotion of peace, friendship, humanity, tolerance and national unity amongst the communities of South Africa.

## 46. Prevention

46.1. A key objective of the Bill is the prevention and elimination of crimes based on bias and prejudice. Section 9 of the Bill is therefore a welcome inclusion in the legislation as it seeks not only to address crime and punishment, but seeks to address the root causes, and address the consequences of hate crimes. It is therefore disappointing that the Bill in its current form relegates this constitutional imperative to the development of programmes. The Bill in no way deals with the development, implementation, cost and evaluation of such programmes. Therefore leaving us with very little in terms of accountability or realising substantive behavioral change within society. It is also noteworthy that the Department of Social Development, Department of Correctional Services, Department of Health and the Ministry of Women are not given any responsibility in the development of programmes in respect of key mandates and obligations that they hold towards the most vulnerable.

## **PART III: SUBMISSIONS RELATING TO HATE SPEECH**

### **PRELIMINARY OBSERVATIONS**

47. The Draft Bill draws a distinction between hate crimes and hate speech, and creates a separate regime for each. An act of hate speech is not tantamount to committing a hate crime; in our understanding, hate speech deals with expression, whereas hate crimes deal with physical acts.
48. The right to freedom of expression is contained in section 16 of the Constitution, which provides in section 16(1) that:
- “Everyone has the right to freedom of expression, which includes—*
- (a) freedom of the 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.”*
49. Section 16(2) of the Constitution contains internal limitations to the right, and stipulates that the right contained in subsection (1) does not extend to propaganda for war; incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Any limitation of the right to freedom of expression that goes beyond what is set out in section 16(2) of the

Constitution must be capable of being justified in accordance with section 36 of the Constitution in order to pass constitutional muster. In other words, any such limitation must be reasonable and justifiable in an open and democratic society.

50. The importance of the right to freedom of expression has been repeatedly affirmed by the Constitutional Court. It has been described as a “*sine qua non for every person’s right to realise her or his full potential as a human being, free of the imposition of heteronomous power*”,<sup>17</sup> and “*essential to the proper functioning of our constitutional democracy*”.<sup>18</sup> In *South African National Defence Union v Minister of Defence and Another*, it was held that:<sup>19</sup>

*“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 and its facilitation of the search for truth by individuals and society generally.”*

51. Criticism is also protected as an element of the right to freedom of expression. In *National Media Ltd v Bogoshi*, the Supreme Court of Appeal held that “*we must not forget that it is the right, and indeed a vital*

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<sup>17</sup> *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others* 1996 (5) BCLR 609 (CC) at para 29.

<sup>18</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride* 2011 (8) BCLR 816 (CC) at para 141.

<sup>19</sup> 1999 (4) SA 469 (CC) at para 7.

*function, of the press to make available to the community information and criticism about every aspect of public, political, social and economic activity and thus to contribute to the formation of public opinion”.*<sup>20</sup>

Furthermore, in the context of the defence of fair (or protected) comment in defamation cases, the Constitutional Court has held that “[c]riticism is protected even if extreme, unjust, unbalanced, exaggerated and prejudiced, so long as expresses an honestly-held opinion, without malice, on a matter of public interest on facts that are true”.<sup>21</sup>

52. The criminalisation of speech in any form undoubtedly raises the possibility of having a chilling effect on the right to freedom of expression. As such, we would urge the Department to ensure that the crime of hate speech is narrowly construed and carefully circumscribed. This is important not only for the right to freedom of expression, but also for legal certainty.

53. However, we are equally cognisant of the importance of the right to human dignity contained in section 10 of the Constitution. In *S v Mamabolo*, the Constitutional Court noted that “[w]ith us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as is

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<sup>20</sup> 1998 (4) SA 1195 (SCA) at 1209.

<sup>21</sup> *The Citizen 1978 (Pty) Ltd and Others v McBride*, as above, at para 83.

*the right to freedom of expression*".<sup>22</sup> Entrenched in the protection of the right to dignity is a need to understand the power dynamics amongst the persons involved.<sup>23</sup>

54. In the recent judgment of *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*, a case dealing with the use of racist speech in the workplace, Chief Justice Mogoeng noted that the case "*bears testimony to the fact that there are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and effortless observance of the right to dignity is a practical reality*".<sup>24</sup> Importantly, Chief Justice Mogoeng went on to state:<sup>25</sup>

*"South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations. After all racism was the very foundation and essence of the apartheid system. But this would have to be approached with maturity and great*

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<sup>22</sup> 2001 (3) SA 409 (CC) at para 41.

<sup>23</sup> in the view of Yacoob J, in his minority judgment in *Le Roux and Others v Dey*, as above, at para 46:

*"[I]t must be remembered that some attacks on human dignity are more serious than others: the violation of dignity in the context of the violation of other constitutional rights would ordinarily be regarded as more serious than otherwise. ... Another factor which, in my view, has relevance to the intrusive character of the violation of the right to dignity would be the power relations between the person who committed the allegedly wrongful conduct in question and the person who was the target of the injury. I would regard the violation of the dignity of a relatively powerless and vulnerable person by a powerful, strong person in authority as more serious than the allegedly wrongful conduct involved here."*

<sup>24</sup> 2017 (1) SA 549 (CC) at para 1.

<sup>25</sup> *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*, as above, at paras 8-9.

*wisdom, obviously without playing down the horrendous nature of the slur. For, the most counter productive approach to its highly sensitive, emotive and hurtful effects would be an equally emotional and retaliatory reaction. But why is it that racism is still so openly practised by some despite its obviously unconstitutional and illegal character? How can racism persist notwithstanding so much profession of support for or commitment to the values enshrined in our progressive Constitution and so many active pro Constitution non governmental organisations?*

*Are we perhaps too soft on racism and the use of the word kaffir in particular? Should it not be of great concern that kaffir is the embodiment of racial supremacy and hatred all wrapped up in one? My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies.”*

55. There can be no doubt that a robust response is needed to address the proliferation of racist and other forms of egregious speech that are inimical to our constitutional democracy. In general, when considering a particular communication, a clear distinction should be made amongst three types of speech: (i) expression that may constitute a criminal

offence; (ii) expression that is not criminally punishable but may justify a civil claim or administrative sanction; and (iii) expression that does not give rise to criminal, civil or administrative sanctions, but still raises a concern in terms of tolerance, civility and respect for the rights of others.

56. We note, however, that internationally there is ongoing debate as to whether criminalisation of expression is the appropriate response to hate speech. For the purpose of this submission, we do not advance a view as to whether the criminalisation of hate speech as a separate offence in addition to the existing legal framework is appropriate or effective to achieve the objects sought to be achieved, or the constitutionality of the Draft Bill in its current form. Rather, the focus of this submission is the existing legal framework dealing with hate speech with which the Draft Bill would need to be rationalised, and particular areas of concern with the Draft Bill which we submit need further consideration.

## **SOUTH AFRICA'S INTERNATIONAL LAW OBLIGATION REGARDING HATE SPEECH**

57. The right to freedom of expression is guaranteed under various international instruments, including article 19 of the Universal Declaration of Human Rights, article 19 of the International Covenant on Civil and Political Rights, and article 9 of the African Charter on Human and Peoples' Rights.

58. Two international instruments in particular have notable relevance to the provisions of the Draft Bill: article 20 of the International Covenant on Civil and Political Rights (hereinafter referred to as the “ICCPR”),<sup>26</sup> which has been signed and ratified by South Africa; and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter referred to as “ICERD”), mentioned above, which has been signed but not ratified by South Africa.
59. When assessing the applicability of these provisions, it is important to bear in mind the Constitution’s treatment of international law. In particular, the Constitution requires that when interpreting the Bill of Rights, a court “*must consider international law*”,<sup>27</sup> and that when interpreting any legislation, a court “*must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law*”.<sup>28</sup> These provisions are peremptory in their terms, and would include both binding and non-binding sources of international law,

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<sup>26</sup> Article 20 states that:

“(1) Any propaganda for 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.”

<sup>27</sup> Section 39(1)(b) of the Constitution.

<sup>28</sup> Section 233 of the Constitution.

provided that such international law was not inconsistent with the Constitution.<sup>29</sup>

60. Article 4 of ICERD is broad in its ambit, and goes further in its terms than article 20 of the ICCPR. However, in 2013, the Committee on the Elimination of Racial Discrimination adopted General Recommendation No. 35, which clarifies the scope of these provisions vis-à-vis the protection of the right to freedom of expression.<sup>30</sup> It is stated therein that “[t]he relationship between proscription of racist hate speech and the flourishing of freedom of expression should be seen as complementary and not the expression of a zero sum game where the priority given to one necessitates the diminution of the other. The rights to equality and freedom from discrimination, and the right to freedom of expression, should be fully reflected in law, policy and practice as mutually supportive human rights.”<sup>31</sup>

A. Overlap with existing laws

61. As stated above, the provisions relating to hate speech as contained in the Draft Bill overlap with various other laws. However, the Draft Bill goes further than any existing laws in this regard; the effect is that the

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<sup>29</sup> Section 2 of the Constitution.

<sup>30</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation No. 35: Combating racist hate speech*, 26 September 2013, CERD/C/GC/35, available at: <http://www.refworld.org/docid/53f457db4.html>.

<sup>31</sup> *General Recommendation No. 35*, as above, at para 45.

Draft Bill would criminalise speech that would otherwise be permitted. There is therefore urgent need for these laws to be rationalised to avoid uncertainty.

62. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter referred to as “**PEPUDA**”)

62.1. In terms of section 10(1) of PEPUDA, it is provided 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 to incite harm;*

*(c) promote or propagate hatred.”*

62.2. Section 10(1) of PEPUDA is not a direct replica of section 16(2) of the Constitution. One of the notable additions that it includes, which is not referenced in section 16(2) of the Constitution, is speech that is “*hurtful*” as hate speech.

62.3. Section 10(2) provides for a case contemplated in section 10(1) of PEPUDA to be referred to the Director of Public Prosecutions to institute criminal proceedings in terms of common law or legislation. Therefore, to the extent that section 10(1) of PEPUDA

overlaps with section 4(1) of the Draft Bill, the possibility of criminal proceedings being instituted for such is already catered for under existing law.

62.4. A possible alternative to the promulgation of the hate speech provisions contained in the Draft Bill could be an amendment to PEPUDA to avoid further proliferation of laws regulating the same subject-matter.

63. Existing provisions under criminal law

63.1. In order to contextualise the proposed criminalisation of hate speech under the Draft Bill, it is necessary to understand what is meant by incitement. Incitement to commit a crime is punishable in terms of section 18(2) of the Riotous Assemblies Act 17 of 1956, which states that:

*“Any person who ... incites, instigates, commands or procures any other person to commit any offence, whether at common law or against a statute, or 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.”*

63.2. Incitement requires intention, and can never be committed negligently.<sup>32</sup> According to academic authority, the inciter normally gets a lighter punishment than the actual perpetrator, as it only anticipates the commission of the eventual completed crime; it is further removed from someone who conspires or attempts to commit a crime.<sup>33</sup>

63.3. Also relevant to the hate speech provisions under the Draft Bill are the crimes of *crimen iniuria*, which consists in unlawfully and intentionally impairing the dignity or privacy of another person;<sup>34</sup> and criminal defamation, which consists of the unlawful and intentional publication of matter concerning another which tends to injure his or her reputation.<sup>35</sup>

64. The Films and Publications Amendment Bill 2015 (hereinafter referred to as the “FPAB”)

64.1. The FPAB proposes the insertion of a new section 18H into the Films and Publications Act 65 of 1996 (hereinafter referred to as the “FPA”), prohibiting the distribution of any film, game or publication which advocates propaganda for war, incites violence or advocates hate speech through any medium. Specifically, it

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<sup>32</sup> Snyman “Criminal law, 5th edition” (2008) at p 301.

<sup>33</sup> Snyman, as above, at p 305.

<sup>34</sup> Burchell “Principles of criminal law, 4<sup>th</sup> edition” (2014) at pp 632-642.

<sup>35</sup> Burchell, as above, at pp 625-631.

states that “[n]o person may distribute through any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech.”

64.2. Hate speech is defined to include “any speech, gesture, conduct, writing, display or publication which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group”.

64.3. The proposed section to be included in the FPAB puts itself squarely in the realm of the conduct prohibited in terms of section 16(2) of the Constitution. The formulation of hate speech as contained in the Draft Bill goes much further than this. This creates an anomaly, and a consequent risk that the Film and Publication Board may permit the distribution of content in accordance with section 16(2) of the Constitution and its own legislation, but that is criminalised as hate speech under the provisions of the Draft Bill.

65. Due regard to the existing plethora of overlapping laws is a key concern that needs to be addressed. It is important to bear in mind that criminal sanctions are the harshest sanctions that can be faced, and as such should be carefully circumscribed in their application and reach.

B. Definitions

66. We have already set out above certain concerns that we have with particular definitions. The key concern overall relates to the need for greater clarity and specificity in relation to the definitions. Further to what is set out above, we note that:

66.1. **“communication”**: The Draft Bill contains a broad definition of “communication”. For instance, it is difficult to conceive how a “gesture” or “display” would rise to the level of being criminal speech. There is also clear overlap with the types of communications identified in the definition. We would suggest that the definition be tapered to provide a clearer understanding of the type of speech that would be prohibited under the Draft Bill.

66.2. **“harm”**: As mentioned above, we submit that the Draft Bill should provide greater clarity on the forms of harm that it envisages. Furthermore, with regard to economic harm, we are concerned as to whether this form of harm – particularly in the event that it is suffered on its own, without mental, psychological or physical

harm – should in itself suffice to rise to the gravity of the crime of hate speech.

- 66.3. “victim”: In a similar vein to the concern regarding economic harm, we are concerned about the inclusion of a juristic person in the definition. Section 8(4) of the Constitution provides that “[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.” However, the Constitutional Court has held that “[j]uristic persons are not the bearers of human dignity”.<sup>36</sup> In the context of hate speech as a criminal offence, it is difficult to conceive of the harm that a juristic person would suffer as a result of hate speech that would necessitate its inclusion in the Draft Bill.

### C. The offence of hate speech

67. Section 4(1) of the Draft Bill provides as follows:

*“Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that –*

- (i) advocates hatred towards any other person or group of persons; or*
- (ii) is threatening, abusive or insulting towards any other person or group of persons,*

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<sup>36</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) at para 18.

*and which demonstrates a clear intention, having regard to all the circumstances, to –*

*(aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or*

*(bb) stir up violence against, or bring into contempt or ridicule, any person or group of persons,*

*based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade, is guilty of the offence of hate speech.”*

68. The first matter to note is the conduct that it prohibits. The operation of the Draft Bill’s hate speech provisions will depend on the interpretation of the elements of the crime that are articulated in the section. We must emphasise that particular regard should be had to the framing of the elements of the crime that go beyond that which is included in section 16(2) of the Constitution, most notably communications that are “*threatening, abusive or insulting towards*” and that which has the intention to “*bring into contempt or ridicule*”. We submit that the framing of the essential elements of the offence is unduly vague. We would urge the Department to give further consideration to the elements of the crime, and to consider providing definitions and/or interpretative guides within the Draft Bill to provide clarity on this.

69. An additional consideration to be addressed is the overlap between the conduct referred to as hate crimes under section 3 and that which is referred to as hate speech under section 4. Section 3(2)(c)(i) of the Draft Bill, for instance, includes instigating, commanding, promotion or encouraging the commission of a hate crime. This could, however, similarly fall within the realm of hate speech. It would be of assistance, therefore, if the Draft Bill could indicate the extent of the causal nexus needed for such communication to traverse from hate speech to a charge of a hate crime.
70. The second matter to note relates to the prohibited grounds listed in the Draft Bill. Different laws articulate different lists of prohibited grounds:

<b>s 4(1) of the Draft Bill</b>	<b>s 16(2) of the Constitution</b>	<b>s 9(3) of the Constitution</b>	<b>s 1 of PEPUDA</b>	<b>s 1 of the FPA</b>
Race	Race	Race	Race	Race
Gender	Gender	Gender	Gender	Gender
Sex (including intersex)	-	Sex	Sex (includes intersex)	Sex
Ethnic or social origin	Ethnicity	Ethnic or social origin	Ethnic or social origin	Ethnic or social origin
Colour	-	Colour	Colour	Colour
Sexual orientation	-	Sexual orientation	Sexual orientation	Sexual orientation
Religion	Religion	Religion	Religion	Religion
Belief	-	Belief	Belief	Belief
Culture	-	Culture	Culture	Culture
Language	-	Language	Language	Language
Birth	-	Birth	Birth	Birth
Disability	-	Disability	Disability	Disability
HIV status	-	-	-	-
Nationality	-	-	-	Nationality
Gender identity	-	-	-	-
Albinism	-	-	-	-
Occupation or trade	-	-	-	-
-	-	Pregnancy	Pregnancy	Pregnancy
-	-	Marital status	Marital status	Marital status
-	-	Age	Age	Age
-	-	Conscience	Conscience	Conscience

71. As is evident from the above, section 16(2) only identifies four prohibited grounds, whereas section 4(1) of the Draft Bill goes further than this. The inclusion of prohibited grounds additional to section 16(2) of the Constitution may well be justifiable, but it should be borne in mind that the inclusion of any additional grounds would need to be tested against the provisions of the limitations clause under section 36 of the Constitution.

72. The third matter to address is the severity threshold for the communications that are considered to amount to criminal hate speech. In this regard, the United Nations Rabat Plan of Action<sup>37</sup> proposes a six-part test for assessing the severity of expression that is criminally prohibited:

72.1. *Context:* Context is of great importance when assessing whether particular statements are likely to incite to discrimination, hostility or violence against the target group and it may have a bearing directly on both intent and/or causation. Analysis of the context should place the speech act within the social and political context prevalent at the time the speech was made and disseminated.

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<sup>37</sup> Office of the High Commissioner for Human Rights, *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, 5 October 2012, available at: [http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat\\_draft\\_outcome.pdf](http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf).

- 72.2. *Speaker*: The position or status of the speaker in the society should be considered, specifically the individual's or organisation's standing in the context of the audience to whom the speech is directed.
- 72.3. *Intent*: Negligence and recklessness are not sufficient; rather, what is required is the activation of a triangular relationship between the object and subject of the speech as well as the audience.
- 72.4. *Content or form*: The content of the speech constitutes one of the key foci of the court's deliberations and is a critical element of incitement. Content analysis may include the degree to which the speech was provocative and direct, as well as a focus on the form, style, nature of the arguments deployed in the speech at issue or in the balance struck between arguments deployed, etc.
- 72.5. *Extent of the speech*: This includes elements such as the reach of the speech, its public nature, magnitude and the size of its audience. Further elements are whether the speech is public, what the means of dissemination are, considering whether the speech was disseminated through one single leaflet or through broadcasting in the mainstream media or internet, what was the frequency, the amount and the extent of the communications, whether the audience had the means to act on the incitement,

whether the communication was circulated in a restricted environment or widely accessible to the general public.

- 72.6. *Likelihood, including imminence*: Incitement, by definition, is an inchoate crime. The action advocated through incitement speech does not have to be committed for that speech to amount to a crime. Nevertheless some degree of risk of resulting harm must be identified. It means the courts will have to determine that there was a reasonable probability that the speech would succeed in inciting actual action against the target group, recognising that such causation should be rather direct.

D. Distribution and display of hate speech

73. Section 4(1)(b) and 4(1)(c) of the Bill address the intentional distribution and display of material which constitutes hate speech respectively. The current framing of the section 4(1)(b) reads as follows:

*“Any person who intentionally distributes or makes available an electronic communication which 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.”*

74. Section 4(1)(c) of the Draft Bill states further that:

*“Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which constitutes hate speech as contemplated in paragraph (a), which is accessible by or directed at a specific person who can be considered to be a victim of hate speech, is guilty of an offence.”*

75. On a literal interpretation of the section as it stands, a person – such as a member of the media – who intentionally distributes or displays material that constitutes hate speech by another person or persons, is guilty of an offence. We submit that this situation is undesirable and will have a chilling effect on exercises of free expression that seek to inform and publicise news, facts and events. We submit that the mere distribution or display of material that constitutes hate speech absent the clear intention required in section 4(1)(a) ought not to be an offence. Distribution and display of communication which constitutes hate speech should only be made an offence where it accompanied by the intention described in section 4(1)(a). The section’s attempt to curtail the distribution and display of communication that constitutes hate speech has the potential to curtail legitimate exercises of free speech by, the media, the academy and the public, who may fall foul of this section by mere virtue of reporting or discussing the communication in question, in circumstances where such reportage or discussion may be important for asserting a counter-narrative.

E. Liability for internet service providers

76. Chapter XI of the Electronic Communications and Transactions Act 25 of 2002 (hereinafter referred to as “ECTA”) deals with the limitation of liability of internet service providers where it provides conduit, caching or hosting services (sections 73-75 of ECTA respectively). Moreover, section 78 of ECTA provides that internet service providers have no general obligation to monitor the data which it transmits or stores, or to actively seek facts or circumstances indicating unlawful activity.

77. The Draft Bill is currently silent on the sanctions that would be faced by internet service providers for content posted or shared by their users on their platforms. We would suggest that the Draft Bill adopt the approach currently contained in ECTA and expressly limit the liability of internet service providers.

F. Need for the inclusion of a public interest override

78. The Bill in its current form contains harsh penalties without exemptions for relevant circumstances that might justify the existence of that speech, such as cases of satire or journalistic reporting on incidents of hate speech. It also does not contain a public interest override.

79. Both PEPUDA and the FPA, for instance, contain exemptions to the prohibitions under the respective pieces of legislation on the grounds of (i) *bona fide* documentaries; (ii) publications of scientific, literary or artistic

merit; or (iii) on matters of public interest. We would urge the Department to consider including such a public interest override into the Draft Bill in order to ease the chilling effect that the Draft Bill might otherwise have on the exercise of freedom of expression.

#### G. Reports to assist judicial officers

80. The determination of what constitutes hate speech will tend to include a social inquiry, and hate speech allegations raise questions of social impact which are beyond the questions of law commonly adjudicated. Thus adjudication for hate speech must be designed to be contextual and based on approaches that reflect contemporary and developing social science norms and insights. In order to ensure that judicial officers adjudicating hate speech are apprised of all relevant considerations, including historical, cultural and socially significant information, we submit that the Draft Bill must provide for the submission of reports from suitably qualified officers within the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Protection of the Rights of Cultural, Religious and Linguistic Communities.

81. These reports must advise the court of significant considerations relating to each of the institutions' focus areas. An effective report submission process will ensure that courts adjudicating low profile cases, that don't typically attract amicus curiae interventions, are equally aware of the relevant considerations and can be assisted in its decision-making

process. This approach is not novel and similar procedures appear in section 9(3) the Extension of Security of Tenure Act 62 of 1997 (in the context of evictions), in the section 4 of the Probation Services Act 116 of 1991 (in the context of criminal matters and matters affecting children) and in the Children’s Act 38 of 2005 (which frequently requires reports of the family advocate or social workers to assist courts in making decisions).

#### H. Implementation of the Draft Bill

82. In addition to the submissions set out at paragraphs 44 to 46 above regarding the implementation of the Draft Bill, we also wish to highlight the following that pertains more directly to our submissions on the hate speech provisions.

83. Enforceability of online speech

83.1. The protection of anonymity is an important component in protecting the right to freedom of expression and the right to privacy, and makes it possible for persons to express themselves without fear of reprisals or censorship, facilitates whistle-blowing, and so on. In 2015, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (hereinafter referred to as the “Special Rapporteur on FOE”) published a report on encryption and anonymity in the digital age,

in which he highlighted the necessity of anonymous speech for human rights defenders, journalists and protestors.<sup>38</sup>

83.2. This, however, creates difficulty when seeking to enforce the hate speech provisions of the Draft Bill where it is not always possible to identify the perpetrator of the communication. Additionally, the global nature of the online space may facilitate the commission of hate speech outside of South Africa's borders. These are pragmatic considerations that the Department will need to take into account when considering the enforceability of the Draft Bill.

#### 84. Creating an enabling environment for complainants

84.1. The reporting of offences based on hate speech will inevitably depend on the ability of victims and witnesses to access authorities and have their grievances taken up expeditiously and within a framework that is not overly onerous on the complainant. We are concerned that within the existing frameworks to address hate speech, complainants experience difficulties with being able to file their complaints, as well as in pursuing them. We submit that a mechanism should be established to facilitate this process in a manner that is approachable, user-friendly and sensitive to the

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<sup>38</sup> Special Rapporteur on FOE, Report on encryption, anonymity and the human rights framework, 22 May 2015, A/HRC/29/32, available at: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>.

needs of the complainant, and that would best serve the interests of justice.

84.2. We submit that this mechanism should be accessible to people in remote areas and operate to ensuring complainants are not put to undue expense. The body responsible for receiving complaints must be able to ensure protection from reprisals by the accused, whether physical, social or economic, if the witness or victim motivates for such protection.

## 85. Sentencing

85.1. The Draft Bill has as its main remedy the sentences contemplated in sections 276 and 297 of the Criminal Procedure Act. We submit that the Draft Bill must be infused with an element of restorative justice which promotes reconciliation, restitution and responsibility through the involvement of victims and perpetrators. This process could facilitate healing and reconciliation between the parties and moves away from the all or nothing approach in which justice is conceived of as merely a conviction or acquittal. In accordance the victims of hate crimes should be allowed to participate in the process from its inception to its conclusion. In accordance with this, we submit that the Draft Bill should expressly provide for community service, rehabilitation and education as possible sentences upon conviction for hate speech.

85.2. Moreover, we submit that recourse to criminal sanctions should be avoided if less severe sanctions would achieve the intended effect. Indeed, in appropriate circumstances, effective counter-speech and education may be the most effective response. To this end, we have noted in paragraph 33 above that we welcome the inclusion of the section relating to prevention in seeking to address the root causes and consequences of the offences underpinning the Draft Bill, and re-iterate the need for the Draft Bill to expand upon the development, implementation, costing and evaluation of such programmes.

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*ENDS*