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Right2Know Campaign Submission on the draft Prevention & Combating of Hate Crimes & Hate Speech Bill

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1. Introduction

This is the Right2Know Campaign's submission on the draft ***Prevention and Combating of Hate Crimes and Hate Speech Bill*** (the "draft Bill"), published for public comment by the Department of Justice and Constitutional Development. The draft Bill would set criminal sanctions for a new category of crime – hate crimes and hate speech. The draft Bill therefore goes beyond existing laws governing unfair discrimination, hate speech, *crimen injuria* and defamation under which such acts could be prosecuted.

This submission will deal largely with the provisions on hate speech, which we view as an extraordinary attack on freedom of expression.

This draft Bill is introduced against a backdrop of South Africa's continued struggle against the legacy of colonial conquest and Apartheid dispossession, which has left our society with entrenched, undemocratic power relations, and high incidence of social conflict, racism, misogyny, patriarchy, and other forms of oppression. Moreover, it comes at a time of deepening global economic crisis and associated stagnation, exploitation, inequality and unemployment. The resulting social crisis is characterised by polarisation, conservatism and social conflict. In these conditions, governments and other power structures, such as corporations, often resort to draconian responses to the growing social and political conflict generated by this crisis. These measures include increased militarisation and securitisation of the state, closing down of democratic spaces, targeting of voices of dissent, and clamping

down on the flow of information.

Our society is plagued by gross misogyny, racism[1], xenophobia[2], homophobia[3] and transphobia and other forms of bigotry. These social toxins are not only structural, but also personalised, manifesting in daily attacks and vitriol by individuals in private and public spaces, including social media.

Under these conditions, the draft Bill attempts to fix the social crisis by criminalising its ugliest byproducts. It does this by making it a crime to communicate, in any way, a message that could be insulting, offensive, ridiculing, harmful or hateful – going far beyond the Constitutionally defined limits on freedom of expression.

We view this as a 'securitised' response that violates the constitutional protections for freedom of expression, does nothing to address the root causes of the problem, but may actually deepen them.

1.2 About the Right2Know Campaign

The Right2Know Campaign ("R2K") is a nation-wide coalition of people and organisations concerned with promoting openness and the free flow of information, particular in terms of the right to access information and freedom of expression. Our campaign is coordinated through voluntary working groups in the Western Cape, Gauteng, KwaZulu-Natal, as well as an elected national working group consisting of representatives from key civil society organisations, community groups and social movements across the country.

The Right2Know Campaign's vision is to "seek a country and a world where we all have the right to know – that is to be free to access and to share information. This right is fundamental to any democracy that is open, accountable, participatory and responsive; able to deliver the social, economic and environmental justice we need. On this foundation a society and an international community can be built in which we all live free from want, in equality and in

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1 Over 60% of South Africans polled said they experience racism in their lives (SA Reconcilation Barometer, 2015)

2 45% of South Africans polled either agreed or strongly agreed that foreigners should not be allowed to live in South Africa because they take jobs and benefits away from South Africans (Afrobarometer, 2011)

3 61% of South Africans polled think society should not accept homosexuality (Pew, 2013)

dignity."[4]

2. The Right to Freedom of Expression

It goes without saying that in an open democracy, the ability of people to express their opinions and divergent views freely and without fear is vital.

Our Constitution seeks to foster unity in our diversity, promoting difference while prohibiting unfair discrimination. The freedom to express and contest views is an important way to strengthen democracy, and to allow citizens to participate in decisions that affect them free from coercion and on an informed basis. Along with freedom of association, and the right to petition and protest, freedom of expression promotes a culture of critical conversation and tolerance of differences.

Freedom of expression also allows for legitimate challenges to existing power structures. Limits to freedom of expression often act to protect existing power structures – often the patriarchal leadership of political parties, religious and cultural institutions, or the family.

Free speech for everyone except bigots is not free speech. The real test for freedom of expression comes when we have to defend the rights of people with whose views we profoundly disagree.

2.2 Freedom of expression in the Constitution

The Bill of Rights under the Constitution enshrines a range of fundamental civil and political rights which include the right to equality before the law, the right to human dignity and the right not to be unfairly discriminated against – by either the State or by other persons. The Constitution does not outlaw discrimination – only unfair discrimination.

The Bill of Rights also gives everyone the right to freedom of association, the right to gather and protest peacefully on any issue of social or political importance. And very importantly, s16 of the Bill of Rights gives everyone the right to freedom of expression, including: -

- Freedom of the press and other media;
- Freedom to receive or impart information or ideas;

[4] More information on our programme, our principles, key documents of the organisation and financial information is available at www.r2k.org.za

- Freedom of artistic creativity; and
- Academic freedom and freedom of scientific research.

Freedom of expression does not extend to three categories of expression: -

- 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 (emphasis added)

In these limitations on freedom of expression, the Constitution domesticates the principles contained in the International Covenant on Civil and Political Rights[5] and in the International Convention on the Elimination of all Forms of Racial Discrimination.

Hate speech then in the Bill of Rights consists of at least two components – advocacy of hatred on certain, limited grounds **and** incitement to cause harm. If speech does not satisfy both of these qualifications, it is protected under the Constitution – even if it is deeply unpleasant, offensive, wrong or worthy of condemnation.

While no right in the Constitution is absolute, Section 36 of the Constitution requires that any limitation on a fundamental right must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: -

- The nature of the right
- The importance of the purpose of the limitation;
- The nature and extent of the limitation;
- The relation between the limitation and its purpose; and
- [any] less restrictive means to achieve the purpose.

In other words, restrictions on these fundamental rights must be **rational**, **reasonable**, **purposive** and **as limited as possible** if we are to work towards achieving an open, democratic society.

[5] Art 20: 1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial and religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

2.3 Existing remedies against discriminatory and harmful speech

Where there is a right, there must be a remedy[6]. South African law does have a range of remedies already to deal with discriminatory behaviours that undermine the dignity of people, though some of them raise serious freedom of expression concerns of their own:

Behaviour	**Civil Recourse**	**Criminal Recourse**
Speech that is serious impairment of dignity	Defamation	Criminal defamation Crimen iniuria
Hurtful speech, publication	Defamation Equality Act Employment Equity Act	Crimen iniuria
Bullying, harassment	Employment Equity Act Labour Relations Act Equality Act	Prohibition of Harassment Act,
Intimidation		Intimidation Act
Incitement, Propaganda for War		Film & Publications Act Riotous Assemblies Act 1956

2.3.1 The Equality Act

Hate speech is dealt with in the ***Promotion of Equality and Prohibition of Unfair Discrimination Act*** (the Equality Act), proscribing against any communication "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" along a wide range of prohibited grounds (Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, among others).

As these provisions in the Equality Act cast the net wider than the Constitutional exemptions on freedom of expression (prohibiting expression which is "*hurtful*" or "*harmful*" as well as those that are "*hateful*" or incite harm), it is not clear that the Constitutional Court would uphold them if they were challenged. Nonetheless, the Equality Act seeks to create a set of **civil remedies** for an actual person who has suffered discrimination or has had they own dignity undermined or has suffered systemic disadvantage. The emphasis in the Equality Act is on a restoration of social relations – both through its processes, its settlements (where

[6] Roman law maxim "ubi ius, ibi remedium"

possible) and its imposition of fines and other restorative remedies. The Courts have handed down orders for:

- An unconditional apology;
- An instruction to the Respondent to do or not to do something or restraining them from an unfairly discriminatory practice;
- Payment of damages for actual financial loss, loss of dignity or pain and suffering (including emotional and psychological suffering);
- Payment of a fine to an appropriate organisation; or
- Any other declaratory order.
- The Court can also confirm any settlement the parties arrive at without coercion and that is fair.

The Equality Courts are intended to provide ready access to justice: parties can approach the courts directly, without the need for costly lawyers; the processes are less daunting than formal court processes, with an emphasis on problem-solving in an "expeditious and informal manner which facilitates and promotes participation by the parties". 220 courts, located at magistrate's courts to improve access, have been designated Equality Courts nation-wide, although one would be hard pressed to find them in reality.

Though not without fault, the Equality Court system represents a well-intentioned remedy for dealing with discrimination has been let down by a lack of adequate financial resources, adequately trained staff and poor promotion by government. The current draft Bill would not address these shortcomings, but rather undermine this system further. Overlooking and failing to implement fully the existing remedies cannot be an argument for introducing new, harsher restrictions on freedom of expression.

2.3.2 Common law

The common law in South Africa still contains the crime of ***crimen iniuria*** or the act of 'unlawfully, intentionally and seriously impairing the dignity or privacy of another". The essential requirements of the offence are:

- Intention
- Unlawfulness
- Impairment of the dignity of another

The requirement of unlawfulness means that the impairment of one's dignity has to be

serious, not petty or even merely 'hurtful'.

Our common law also provides for the offence of **defamation**. A publication is defamatory if it has the 'tendency' or is intended to undermine the status, good name or reputation of another[7]. Defamation considers the **possible** injury – not the actual injury - to someone's reputation objectively. Defamation also considers whether the subject is a private individual or the holder of public office. Someone in the public eye, and especially someone holding public office is expected to withstand harsher and more robust criticism than a private individual. The draft Bill does not take any of these well-worn legal principles into account.

Furthermore, in 2009 the Supreme Court of Appeal confirmed that criminal defamation was still part of our law[8] and that the crime of the '*unlawful and intentional publication of a matter concerning another which tends to injure his reputation*' and which is restricted to serious cases[9] is consistent with the Constitution. Leaving aside for now our concerns with criminal defamation, the drafters of this Bill offer no reason why these remedies that already exist in criminal law are inadequate or insufficient, nor why they seek to cast the net even wider to include less serious occurrences in the face of the existing jurisprudence.

Significantly, our law relating to defamation recognises that where a matter that is published is true and published for the public benefit, or constitutes fair comment or is published on a privileged occasion, that publication is not unlawful. The draft Bill offers no similar provision even though it broadens the scope of potential 'hate speech" into unchartered territory.

3. Hate Speech in the draft Bill

The draft Bill's definition of hate speech is cast way too broadly when compared to the limitation on freedom of expression in the Constitution.

According to section 4(1)(a) of the draft Bill, hate speech includes "any communication whatsoever" 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

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7 J Neethling et al Neethling's Law of Personality 2nd ed (2005) p 131 and Sindani v Van Der Merwe 2002 (2) SA 32 (SCA)

8 S v Hoho [2008] ZASCA 98; [2009] 1 All SA 103 SCA; 2009 (1) SACR 279 (SCA)

9 De minimis non curat lex – the law does not concern itself with trifles

> persons, 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.* (emphasis added to new categories not in the Constitution).

This definition is dangerously broad and vague. First, it goes beyond the advocating of hatred to words or gestures that are merely threatening, abusive or insulting. Hatred is an extreme emotion and advocacy of hatred should be confined to statements manifesting 'detestation, enmity, ill-will and malevolence'[10]. "Bringing into contempt or ridicule" must fall outside of that construction except in very select circumstances.

Secondly, it goes beyond the incitement of harm to stirring up violence and even mere ridicule or bringing into contempt of another person. These provisions have far reaching consequences for the rights of ordinary South Africans to engage in robust debate and criticism of one another. Political discourse, satire or even social engagement will become fraught in the pluralistic society in which we live.

It is also worth noting that it includes several new grounds of discrimination not contained in any other legislation, or the Constitution itself. Thus, anyone who "brings into contempt or ridicule any person or group of persons" plying their trade as politicians could conceivably be guilty of hate speech in terms of this draft Bill. Bringing contempt and ridicule onto politicians, or corporate executives, government officials and other people of power and influence into contempt and ridicule is an important national activity. We submit that read in its entirety the expanded definition casts far too wide a net.

A person accused of the offence of hate speech, for which one may face up to 3 years in prison – or 10 years, if it is a repeat offence, is provided no defence. Works of art, or satire, or

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[10] R v Andrews (1988) 65 OR (2d) 161 at 179. Also Freedom Front v SAHRC 2003 (11) BCLR 1283 (SAHRC)

other public interest activities, are not excused.

Insult is also, for better or worse, a regular part of South African politics and public life. It may be instructive to consider the following examples to see whether they would fall foul of the definition of hate speech:

- “You're a highly respected black professional. Don't try to be a professional black. It demeans you” - H Zille
- “The Honourable Mazibuko may be a person of some weight, but is she of some stature?” - Hon J Jeffrey
- “She [Hon. Mazibuko] is not a politician, she is a servant of the madam. Lindiwe applied to make tea for the madam, and she must continue to make tea for the madam.” - J Malema
- “I can only think about words like Moruti wa Tsotsi when I think about him [Hon Maimaine]. I can think about the puppet of the master, the sell-out, the traitor, the token, the drug lord, the sex pest as reported in the paper, the mouthpiece of monopoly capital...” - Hon M Masina, referring to Hon Maimaine
- “Some of us don’t know English properly, and then we can only come and say HONG HONG HONG HONG like that member [Hon Pandor]. HONG HONG HONG HONG, that’s the only thing that she knows.” - Hon Madisha
- “You have put a cockroach in Cabinet and we need to remove that cockroach by voting the ANC into power.” J Malema, referring to H Zille
- “uMalema yinkwenkwe [uncircumcised boy]” - H Zille, referring to J Malema
- “You don’t look healthy and a body that is not healthy cannot have a healthy mind. Go look after that stomach... That stomach is hiding everything... You are a small boy... You are an intelligence minister who is not intelligent.” Hon J Malema, referring to Hon D Mahlobo

Sections 4(1)(b) and (c) go further, to make it an additional offence to distribute an “electronic communication” which constitutes hate speech as defined in the draft Bill. This could include the reposting on Facebook or retweeting on Twitter of a message authored by someone else. It takes no consideration of whether the person committing the offence is the author of the communication, and what their intention was to distribute it. In the 'Penny Sparrow' scenario, when one person posted offensive and racist views online, many other social media users 're-posted' the message to draw attention to it and bring criticism and public outrage to the

original author for their views. This is a common response to offensive online messages – it is a vital way for a community to challenge wrong or immoral ideas democratically. This draft Bill would criminalise this response as if it, too, were hate speech.

In terms of section 4(2) anyone who attempts to commit an offence and anyone who incites, assists or procures anyone else to commit an offence is also guilty of an offence. Thus, the gallery that dares to hang an Ayanda Mabulu painting may also be committing an offence. The shop owner who sells a graffiti artist the spray paint to paint "Zuma Must Fall" or "Fuck the Police" may be guilty of an offence.

The draft Bill in its current form will have a chilling effect on another aspect of freedom of expression: the right to protest. Public criticism – especially of the powerful – may be severely curtailed. Already, the ANC and Julius Malema are prohibited from singing "*Dubhul' ubhunu*" in public. this draft Bill may make the singing of many more struggle songs outlawed. Indeed, frustration over a lack of service delivery that boils over into protest march on a councillor's home and pelting it with stones may now, because of the inclusion of "occupation" as a category even be classified as a hate crime. Similarly, the burning of paintings as part of a decolonisation project might now constitute an additional crime.

4. Hate Crimes in the Bill

We recognise that the 'hate crimes' provisions in this draft Bill are an attempt to make good on South Africa's undertaking at the 2001 World Conference against Racism to introduce legislation in relation to hate crimes in line with its international commitments and constitutional obligations.

Simply put, in terms of hate crimes, the draft Bill seeks to create a new offence where any other crime that is motivated by prejudice, bias or intolerance toward the victim is committed (or attempted or assisted or instigated or encouraged). In other words, the draft Bill creates a second offence for which the perpetrator can be charged. Thus, in terms of municipal by-laws dumping animal remains in a public area poses a public health risk and may be an offence; leaving a pig snout dripping blood on the front entrance of a mosque would clothe the act with prejudice, bias or intolerance toward a particular faith community. Under this draft Bill, that would constitute a separate offence. Being found guilty of the hate crime would also

constitute an aggravating circumstance for the original offence.

Penalties[11] for such a hate crime include

- Imprisonment (up to life imprisonment)
- Declaration as an habitual criminal
- Committal to any institution established by law;
- A fine;
- Correctional supervision

Minimum sentencing rules also apply. And the sentence may be suspended or postponed for a period of up to five years[12].

The practical challenges posed by the draft Bill's construction of a new offence are many. The intention in the section seems to be that the prejudice and intolerance present in the commission of the primary offence should be taken as an aggravating circumstance when considering sentencing for that primary offence. This is what the draft Bill should provide for.

We would recommend that instead of trying to criminalise the prejudice living inside someone, that the prejudice and intolerance acted upon be a factor taken into account in sentencing.

In respect of section 6(3) of the draft Bill relating to the sentencing for hate speech, we make no comment save to reject the criminalisation of hate speech in its entirety.

5. Conclusion

Apartheid was a system of discrimination built on a foundation of marginalisation and prejudice and intolerance against individuals and groups in society. The draft Bill does not address the structural vestiges of racism, sexism and related intolerances. The draft Bill seeks to criminalise individual behaviour while leaving relatively untouched the structural and institutional causes and factors that feed those intolerances.

The draft Bill seeks to create a new crime in relation to speech and expression and in relation to other crimes to criminalise the thought or motivation behind the action. The draft Bill does

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11 Section 276 Criminal Procedure Act

12 Section 297 Criminal Procedure Act

so in a way that also ignores a range of current remedies and avenues open to victims of actions and utterances that undermine their dignity. Rather than strengthening the institutions set up to enforce and promote those avenues, the draft Bill, if passed, will undermine them.

Any restriction on the fundamental rights to freedom of expression, freedom of association and on the right to petition (among others) can only be justified when it is **rational**, **reasonable**, **purposive** and **as limited as possible.** On hate speech, the draft Bill failed to adhere to these four established principles, and seeks to restrict those fundamental freedoms and rights in a way that our Constitution does not permit.

Rather than a Bill criminalising hate speech (and hate crimes), in reality we believe this draft Bill would protect the powerful against criticism from citizens; and protect powerful social groupings while leaving the marginalised unprotected. As a measure against genuine discrimination, racism, xenophobia, homophobia and other forms of hateful expressions, we view this draft Bill as a 'securitised' response that violates the constitutional protections for freedom of expression, does nothing to address the root causes of the problem.