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23 May 2022

Hon. S Shaikh, MP
Chairperson: Select Committee on Security and Justice.

Per email: HateCrimesBill9B-2018@parliament.gov.za

Dear Hon. Shaikh,

**WRITTEN SUBMISSION ON THE PREVENTION AND COMBATING OF
HATE CRIME AND HATE SPEECH BILL**

On 14 March 2023, the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] ("Bill") was passed by the National Assembly. The Bill aims to establish criminal offenses for hate crimes and hate speech, as stated in its preamble.

The Bill defines "hate speech" with three key elements. Firstly, it encompasses expressions that are harmful or incite harm. Secondly, it includes speech that promotes or spreads hatred against specific groups listed in the Bill. Lastly, it criminalizes the sharing or dissemination of comments deemed hate speech through public or targeted electronic communication systems.

One significant aspect of concern in the Bill is the broad definition of harm, which encompasses various forms of emotional, psychological, physical, social, or economic detriment that severely undermines the human dignity of individuals or groups. The inclusion of subjective emotional harm and the vague concept of social harm raise questions about the appropriateness of imposing imprisonment for hurt feelings within a constitutional democracy that relies on freedom of speech.

To address this, the definition of harm should be revised to mean "significant emotional and psychological damage that objectively and severely undermines the inherent worth and respect of the specific group being targeted."

Another problematic definition in the Bill is that of social detriment, which refers to any harm that undermines social cohesion among the people of South Africa. This definition is overly broad and challenges the principle of the rule of law, as different sections of society value and respect different things. Additionally, the Bill identifies specific protected groups, such as race, religion, gender, sexual orientation, and skin color. However, the fluid nature of some of these categories and the absence of clear definitions for each group create uncertainty regarding what speech might constitute hate speech in the future.

Balancing the protection of one's rights while respecting others' is a delicate task for the legislature. In section 4(2) of the Bill, an exemptions clause is provided to promote free speech while safeguarding society. Despite claims that the Bill includes exemptions for artists, journalists, religious beliefs, and academics, the language used in the exemption clauses is confusing and fails to offer adequate protection. The exemptions require actions to be undertaken in good faith and not advocate hatred constituting incitement to cause harm. However, these clauses closely resemble the elements of hate speech, rendering the exemptions practically ineffective. Consequently, individuals may be prosecuted for expressing their sincerely held beliefs, leaving Magistrates courts to determine the boundaries between protected speech and hate speech.

As it currently stands, the Bill will unduly restrict free speech, which is a fundamental characteristic of well-functioning democracies. It is recommended that the entire Bill be reconsidered, with particular attention given to the aforementioned sections. The decision to criminalize speech through this Bill contradicts South Africa's international obligations to protect the fundamental rights of freedom of expression and religious freedom. Various international instruments emphasize the importance of safeguarding these rights in the public sphere. Additionally, the United Nations supports the notion that promoting more speech, rather than less, is the key approach to address hate speech.

While the intentions behind the Bill are commendable, it is essential for the government to pause and reflect, especially considering the existing laws governing these matters and the deep-seated issues with the Bill. The social challenges faced by South Africa, including the increase in social discontent and conflicts, cannot be legislated away. It is crucial to address the challenges facing the country in a way that genuinely results in significant improvements to the quality of life.