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Promoting human rights and democracy through the media since 1993

**1 October 2021**

**TO: PORTFOLIO COMMITTEE ON JUSTICE AND CORRECTIONAL SERVICES**
**C/O: Mr V Ramaano**
E-mail: Hatecrimes@parliament.gov.za

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**SUBMISSION BY MEDIA MONITORING AFRICA:**

**PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9 – 2018]**

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**INTRODUCTION**

1. Media Monitoring Africa ("**MMA**") welcomes the opportunity to provide this submission to the Portfolio Committee on Justice and Correctional Services on the Prevention and Combating of Hate Crimes and Hate Speech Bill ("**the Bill**"). We recognise the Bill arises in the context of South Africa's deep and lasting injustices, which cut along the contours of social difference, including racism, patriarchy, classism, ableism, xenophobia, homophobia, transphobia, and other ills. It is accordingly important for South Africa to have a clear and effective legal framework for addressing hate crimes and hate speech while ensuring appropriate protections for freedom of expression and other constitutional rights.

2. We previously made submissions to the Ministry of Justice and Constitutional Development on the draft Bill published in 2017.[1] We note a range of positive changes in the drafting to address the concerns that the draft Bill was overbroad, vague, and could have a chilling effect on legitimate speech that is vital to democratic exchange. However, we remain concerned that aspects of the Bill require further amendment to ensure its constitutionality and to ensure the Bill is fit for purpose as an effective policy response to the scourge of hate crime and hate speech. We accordingly make this submission which is structured as follows:

    2.1. ***First,*** an overview of MMA.

    2.2. ***Second,*** an overview of the domestic and international legal framework.

    2.3. ***Third*****,** our submissions on the Bill's provisions on hate speech.

    2.4. ***Fourth*****,** our submissions on the Bill's provisions on hate crimes.

    2.5. ***Fifth*****,** additional recommendations.

3. These are dealt with in turn below.

**OVERVIEW OF MEDIA MONITORING AFRICA**

4. MMA is a not-for-profit organisation, based in South Africa, which has been monitoring the media since 1993. MMA's objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. Through our work, we engage in a range of legislative, litigious, and advocacy processes relating to the triad of information rights, which include the right to privacy, freedom of expression and access to information.

5. In the last 27 years, MMA's work has consistently related to key human rights issues, always with the objective of promoting democracy, human rights, and encouraging a just and fair

[1] MMA, 'Written Submissions on the Prevention and Combatting of Hate Crimes and Hate Speech Bill' (2017) (accessible here).

society. MMA has and continues to play an active role in media monitoring and seeks to proactively engage with media, civil society organisations, state institutions and citizens, and in doing so advocates for freedom of expression and the responsible free flow of information to the public on matters of public interest.

6. MMA has engaged in extensive work in navigating the appropriate balance to be struck between freedom of expression and other competing rights and interests, as is evidenced by its involvement in a range of policy, legislative, and advocacy processes. This includes participating as an amicus curiae in *Qwelane v South African Human Rights Commission and Another*[2] and *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku*.[3] In addition, and as noted above, MMA has been an active participant in the law reform process pertaining to this Bill, having prepared submissions both in its own name and on behalf of children from its Empowering Children and the Media Project.[4] Through its various litigious and legal submissions, MMA has promoted the constitutional rights to equality, freedom of expression, and access to information.

7. In addition to the above, MMA is actively working to address online harms, such as disinformation, hate speech, harassment, and incitement to violence. MMA launched the Real411 platform, which is a publicly accessible platform that enables members of the public to report concerns of different online harms.[5] The platform seeks to strike an appropriate balance between the right to freedom of expression and the need to tackle harmful content that is disseminated across online platforms. In addition, through its work with the Real411 platform, MMA is also working with the South African Human Rights Commission to help combat hate speech.

8. For more information about MMA, please visit mediamonitoringafrica.org.

**THE LEGAL FRAMEWORK**

**Domestic Law**

9. The Constitution of South Africa, 1996 provides the key obligations which this Bill must harmonise: the right of everyone to equality, dignity, freedom from unfair discrimination, and freedom of expression.

10. While the right to freedom of expression is protected in section 16 of the Constitution, section 16(2) provides that this right does not extend to:

> "(a) propaganda for war;
> (b) incitement of imminent violence; or
> (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

[2] *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22.
[3] *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku* CCT 14/19.
[4] Above in 1 and MMA, 'Submission on behalf of children from its Empowering Children and the Media Project' (2017).
[5] Accessible at https://www.real411.org/.

11. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**the Equality Act**") – as amended by the Constitutional Court in *Qwelane* – places a civil prohibition on the publication, advocation and communication of words based on one or more of the prohibited grounds, which demonstrates a clear intention to be harmful or to incite harm, and to promote or propagate hatred. The Equality Act provides for several civil remedies to be granted by special Equality Courts,[6] and notes that the court may refer a case to the Director of Public Prosecutions for the institution of criminal proceedings in terms of the common law or relevant legislation.

12. Certain kinds of speech that may overlap with hate speech are already criminalised, by for example:

    12.1. the common-law offences of *crimen injuria*, incitement of public violence, or incitement to commit any other common law crime;

    12.2. intimidation under the Intimidation Act 72 of 1982, and incitement to commit any serious offence under the Riotous Assemblies Act 17 of 1956 (as amended by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*;[7] and

    12.3. in addition, incitement to commit genocide or crimes against humanity, under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

**International law**

13. South Africa is bound by several international and regional instruments which provide guidance on freedom of expression and the prohibition of hate speech.

    13.1. **The International Covenant on Civil and Political Rights**

        13.1.1. The United Nations adopted the International Covenant on Civil and Political Rights (the ICCPR) in 1966,[8] and South Africa ratified it in 1998.[9] Article 20(2) of the ICCPR provides that "[a]ny advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence shall be prohibited by law."

        13.1.2. It is important to note that although states are obliged to prohibit these forms of expression, they are not obliged to criminalise them.

[6] Section 21(2).
[7] *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25.
[8] Office of the High Commissioner for Human Rights (OHCHR), 'International Covenant on Civil and Political Rights', (accessible here).
[9] United Nations Human Rights Treaty Bodies, 'UN Treaty Body Database', (accessible here).

13.1.3. Article 19(3) of the ICCPR states that free expression may "be subject to certain restrictions, but these shall only be such as are provided by law and are necessary…" The UN Special Rapporteur on freedom of expression has interpreted this provision to mean that any limitations on freedom of expression must meet three conditions: legality, legitimacy, and necessity and proportionality.[10] Of relevance here, necessity and proportionality require that a limitation on speech must be "the least restrictive means" to achieve the intended purpose.

13.2. **The International Covenant on the Elimination of all Forms of Racial Discrimination**

13.2.1. The United Nations adopted the Convention on the Elimination of Racial Discrimination in 1965, and South Africa ratified the Convention in 1998.

13.2.2. Article 4(a) of the Convention provides that states 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."

13.2.3. Again, this provision has been interpreted to call for the least restrictive means necessary to achieve its aim. The Committee on the Elimination of Racial Discrimination, a body established to monitor implementation of the Convention, has remarked that: "The criminalization of forms of racist expression should be reserved for serious cases, to be proven beyond a reasonable doubt, while less serious cases should be addressed by means other than criminal law, taking into account, inter alia, the nature and extent of the impact on targeted persons and groups."

13.3. **Special rapporteurs and other bodies**

13.3.1. A range of international bodies has offered further guidance on the balance between freedom of expression and hate speech.

13.3.2. **The Rabat Plan of Action**

13.3.2.1. The United Nations Office of the High Commissioner for Human Rights (OHCHR) coordinated the development of the Rabat Plan of Action on the prohibition of advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence in 2013.

[10] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Seventy-fourth session of the United Nations General Assembly (2019) at para 6 (accessible here).

13.3.2.2. The Rabat Plan proposes a six-part test to evaluate whether expression rises to the threshold of being criminal. These are the social context, the status of the speaker, the intent to incite, the content of the speech, the breadth of its circulation, and the likelihood and imminence of harm.

13.3.2.3. While each aspect of the threshold test is worth considering in the context of the Bill, the consideration of the likelihood and imminence of violence is especially relevant. The action advocated through incitement speech does not have to be committed for it to amount to a crime. However, some degree of risk of resulting harm must be identified. This means that there must be a reasonable probability that the speech could succeed in inciting actual action against the target group.

13.3.3. **UN Special Rapporteur on freedom of expression**

13.3.3.1. In 2019, the UN Special Rapporteur on the right to freedom of opinion and expression released a report on states' efforts to regulate online hate speech. The Special Rapporteur noted the risks of states using disproportionate means and excessive criminalisation of speech and urged states to find the least restrictive means to regulate freedom of expression. The Special Rapporteur also highlighted that: "[s]ome States have taken steps to address illegal hate speech through other creative and seemingly proportionate means" by creating platforms for dialogue, multistakeholder engagement, and citizen reporting of online hate.[11]

13.3.4. **UNESCO**

13.3.4.1. The United Nations Educational, Scientific and Cultural Organization ("**UNESCO**") has emphasised that non-legal methods of countering hate speech should be given equal footing to criminal sanction, such as promoting greater media and information literacy.[12]

14. We submit that, in line with the international legal principles detailed above, it is necessary for the Bill to strike an appropriate balance between freedom of expression and the protection of human dignity. The Bill should "foster an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be," as required by the "dictates of pluralism, tolerance and

[11] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Seventy-fourth session of the United Nations General Assembly (9 October 2019) (accessible here).
[12] UNESCO, Iginio Gagliardone et al, 'Countering online hate speech' at p 58 (accessible here).

open-mindedness,"[13] and prevent hate speech that subverts the "dignity and self-worth of human beings."[14]

**SUBMISSIONS ON THE PROVISIONS ON HATE SPEECH**

**The offence of hate speech**

15. Section 4(1)(a) of the Bill provides for the offence of hate speech in the following terms:

> Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—
> (i) be harmful or to incite harm; or
> (ii) promote or propagate hatred, based on one or more of the following grounds:
> (aa) age;
> (bb) albinism;
> (cc) birth;
> (dd) colour;
> (ee) culture;
> (ff) disability;
> (gg) ethnic or social origin;
> (hh) gender or gender identity;
> (ii) HIV status;
> (jj) language;
> (kk) nationality, migrant or refugee status;
> (ll) race;
> (mm) religion;
> (nn) sex, which includes intersex; or
> (oo) sexual orientation,
> is guilty of an offence of hate speech.

16. This provision largely copies the language of section 10(1) of the Equality Act (as amended by the Constitutional Court in *Qwelane*), except that:

16.1. There must have been a subjective intention to *express* the expression in question, but (like under the Equality Act) there does not have to be a subjective intention for that expression to be harmful or hateful (that is an objective question of whether an intention is demonstrated).

16.2. It requires an objectively demonstrable intention *either* (a) to be harmful or incite harm, *or* (b) to promote or propagate hatred (i.e. disjunctive requirements), whereas the Equality Act (post-*Qwelane*) requires *both* elements (i.e. conjunctive, or cumulative requirements).

[13] *Qwelane* at para. 74, referencing the commonly cited case of *Handyside v the United Kingdom*, no 5493/72, 49, ECHR, 1976.
[14] Id at para. 1.

16.3. It slightly broadens the prohibited grounds.

16.4. And, obviously, it is a criminal rather than civil prohibition.

17. MMA has three main concerns about the constitutionality of this provision:

17.1. First, it is unnecessary and thus disproportionate to impose a criminal prohibition, at all, for substantially the same conduct that is already subject to a civil prohibition under the Equality Act.

17.2. Second, if the above concern is unfounded, the disjunctive approach and the objective test employed disproportionately limit the right to freedom of expression.

17.3. Third, the crime applies even to private communications, and disproportionately limits the right to privacy.

**Criminalising the same speech prohibited by the Equality Act**

18. The need to combat hate speech is undeniable. However, it is not clear that combating hate speech necessarily means criminalising hate speech.

19. MMA reiterates its previous submissions, that what is required in respect of hate speech is to criminalise only that kind of expression that falls squarely within section 16(2)(c) of the Constitution, as that expression is not protected under the right to freedom of expression and can be limited by the state without it needing to meet the limitations clause requirements of section 36(1) of the Constitution. The proviso to this is that the prohibited grounds should be expanded from the four mentioned in section 16(2)(c) to include those currently included in the Bill.

20. As explained above, the Bill criminalises essentially the same conduct as that which is already the subject of a civil prohibition under section 10 of the Equality Act. Any person, including the State in the form of the South African Human Rights Commission or the Commission for Gender Equality, can obtain civil remedies for hate speech in the Equality Courts. Is it *necessary* and *proportionate* to criminalise the same conduct? We submit that it is not.

21. A useful analogy is the anachronistic common law offence of criminal defamation. Although the Supreme Court of Appeal held in *S v Hoho* that the offence was not unconstitutional, this was never confirmed by the Constitutional Court, and subsequent developments in international and foreign law have rendered this judgment outdated.[15] See in particular the judgments of the Constitutional Courts of Lesotho and Zimbabwe, which expressly rejected the reasoning in *S v Hoho*, and struck down the common law offence of criminal

[15] *S v Hoho* [2008] ZASCA 98; [2009] 1 All SA 103 (SCA).

defamation, because it was excessive to criminalise that which was already the subject of the civil delict of defamation.[16]

22. In addition to the above, MMA notes again that certain kinds of speech that may overlap with hate speech are already criminalised, by for example:

    22.1. the common law offences of *crimen injuria*, incitement of public violence, or incitement to commit any other common law crime;

    22.2. intimidation under the Intimidation Act 72 of 1982;

    22.3. incitement to commit any serious offence under the Riotous Assemblies Act 17 of 1956 (as amended by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021 (2) SA 1 (CC); and

    22.4. incitement to commit genocide or crimes against humanity, under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

23. While we hold some reservations about aspects of the recently passed Cybercrimes Act, this law also contains relevant penalties: it criminalises electronic messages that advocate for violence or property damage against a person or group of people.[17]

24. The Bill's provisions on *hate crime*s are sufficient to ensure that, when *crimen injuria*, incitement or intimidation, or any other expression-based offence, are committed with a hateful motive, this is taken into account as an aggravating factor for sentencing.

25. We also point out that criminalising hate speech too broadly carries with it the risk of stifling expression that is aimed at *promoting* the achievement of equality, by exposing anti-racist and anti-sexist activists to the risk of arrest and prosecution for challenging white supremacy and patriarchy.

26. A cautionary tale in this regard is the case of a (black female) editor who was found guilty of hate speech by the (white male) Press Ombud after a complaint by Afriforum, because she had published an article and written an editorial critical of white supremacy and patriarchy. The Press Appeals Panel (agreeing with submissions made by MMA as amicus curiae) ultimately found that the complaint was unfounded, but the Press Ombud's ruling resulted in the editor being fired from her position and leaving her career in journalism for several years.[18]

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[16] *Peta v Minister of Law, Constitutional Affairs and Human Rights* [2018] LSHC 3 (18 May 2018) (accessible here) and *Madanhire and Another v Attorney General* [2014] ZWCC 2 (12 June 2014) (accessible here), both citing Bhardwaj & Winks, "The Dangers of Criminalising Defamation", *Mail & Guardian*, 31 October 2013 (accessible here).
[17] Cybercrimes Act No 19 of 2020 at section 14.
[18] *Pillay v Afriforum*, Press Appeals Panel, Case No 3239/04/2017, 21 August 2017 (accessible here).

27. Another conceivable example would be a queer rights activist who speaks out against "conversion therapy" practices at a homophobic church, who could then face a criminal complaint of hate speech at the instance of the church.

28. For these reasons, we do not believe that criminalising the same or substantially the same speech as that already prohibited by section 10 of the Equality Act, will pass constitutional muster. It is not necessary and is thus an excessive or disproportionate limitation of the right to freedom of expression.

29. We therefore submit that section 4(1)(a) should be reworded as follows:

> Any person who intentionally engages in advocacy of hatred that constitutes incitement to cause harm, based on one or more of the following grounds:
> (aa) age;
> (bb) albinism;
> (cc) birth;
> (dd) colour;
> (ee) culture;
> (ff) disability;
> (gg) ethnic or social origin;
> (hh) gender or gender identity;
> (ii) HIV status;
> (jj) language;
> (kk) nationality, migrant or refugee status;
> (ll) race;
> (mm) religion;
> (nn) sex, which includes intersex; or
> (oo) sexual orientation,
> is guilty of an offence of hate speech.

30. This approach will be consistent with the Constitution and will also remove the need for the complicated and somewhat confusing section 4(2) of the Bill.

**The disjunctive approach and objective test are unconstitutional**

31. If our suggested alternative wording proposed above is not acceptable, and Parliament is intent on replicating the language of section 10(1) of the Equality Act, then we submit that section 4(1)(a) of the Bill would still require revision.

32. The current formulation of the text in section 4(1)(a) of the Bill, specifically the use of the word 'or' provides for a disjunctive reading. Accordingly, to constitute hate speech, expression may either demonstrate a clear intention to (i) be harmful or to incite harm; **or** (ii) promote or propagate hatred.

33. The consequence of the current formulation of section 4(1)(a) is that offensive, but permissible speech would be prohibited. This is so because merely harmful speech – with

no element of hatred – could amount to prohibited hate speech. Such a formulation impermissibly infringes on the right to freedom of expression.

34. Our courts have consistently recognised that the right to freedom of expression does not only apply to expression that is popular, inoffensive or favourable, but also to that which "offends, shocks and disturbs."[19] As noted by the Constitutional Court in *Qwelane v South African Human Rights Commission and Another:*[20]

> Expressions that are merely hurtful, especially when understood in everyday parlance, are insufficient to constitute hate speech. It is well established that the prohibition of hate speech is not aimed at merely offensive speech, but that offensive speech is protected by freedom of expression. This point is eloquently articulated in *Whatcott,* where it was noted that merely offensive or hurtful expression should be excluded from the ambit of a hate speech prohibition and respect should be given to the Legislature's choice of a provision predicated on *hatred.*

35. In *Qwelane* the Constitutional Court provided guidance on the scope of hate speech in the context of section 10 of the Equality Act. One of the issues before the Court was whether section 10(1)(a)-(c) had to be read disjunctively or conjunctively. The Court endorsed a conjunctive approach where speech must be construed to have a clear intention <u>both</u> to "be harmful or to incite harm" <u>and</u> to "promote or propagate hatred" before it amounts to hate speech. In this regard the Constitutional Court reasoned that:[21]

> A disjunctive reading would render the impugned section unconstitutional, since merely hurtful speech, with no element of hatred or incitement, could for example constitute prohibited hate speech. This would be an impermissible infringement of freedom of expression as it would bar speech that disturbs, offends, and shocks. Therefore, for all the reasons canvassed above, a conjunctive interpretation is warranted. (References omitted.)

36. On this basis alone, the disjunctive approach employed in the Bill is unconstitutional.

37. A further problem with the replication of section 10 of the Equality Act is that the latter is a civil statute and thus employs the civil standard of fault – i.e., the objective perception of the reasonable observer (by saying "could reasonably be construed to demonstrate a clear intention") – the subjective intention of the speaker is irrelevant.[22]

38. This is incompatible with criminal law, which requires that a person should only be punished for a guilty mind (*mens rea*). The standard of fault in a criminal statute must be intention. Anything other will disproportionately limit the right to freedom of expression and be unconstitutional.

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[19] See for example: *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 and *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) para 49.
[20] *Qwelane* at para 103.
[21] *Qwelane* at para 103.
[22] *Qwelane* at paras 96 to 101.

39. In line with these submissions, we propose the following alternative text:

> Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that is intended to—
> (i) be harmful or to incite harm; and
> (ii) promote or propagate hatred,
> based on one or more of the following grounds

40. We submit that this formulation, too, would mean that there would be no need for the complicated and confusing section 4(2) of the Bill.

**Inclusion of private communications**

41. Section 4(1)(a) is broad enough to include private communications (for example, conversation among family members).

42. Section 4(1)(b) of the Bill is similarly broad. In this regard it provides as follows:

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

43. We submit that the extension of the prohibition to the private sphere is an excessive limitation on the right to privacy that is incongruent with its purpose. The Constitutional Court has recently remarked in *Qwelane* on the public nature of hate speech:[23]

> Ultimately, hate speech prohibitions are concerned with the *impact* and *effect* of the hate speech and protecting the public good; this is inevitably limited when communicated in the private sphere. Therefore, true hate speech presupposes a public dissemination of some sort, or at the very least it cannot be conveyed in mere private communications.

44. Our courts have repeatedly remarked on the private and personal nature of communications and recognised them as part of the "inner sanctum of the person."[24] We submit that the hate speech prohibition must be restricted to the public sphere. The Constitutional Court has recently affirmed this position in *Qwelane* wherein it held:[25]

[23] *Qwelane* at para 119.
[24] *Bernstein v Bester N.N.O* 1996 (2) SA 751 (CC) para 67.
[25] *Qwelane* at para 118.

> Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because that would be incongruent with the very purpose of regulating hate speech – that *public* hateful expression undermines the target group's dignity, social standing and assurance against exclusion, hostility, discrimination, and violence.

45. We submit that criminalising private communications will unconstitutionally invade the right to privacy.

46. We therefore submit that the Bill should include a proviso to section 4(1) which makes clear that the prohibition of hate speech does not apply to private communications.

**OFFENCE OF HATE CRIMES**

47. As an organisation with a unique mandate centred on freedom of expression, MMA's first focus in this submission is the provisions relating to hate speech. However, several aspects of the provisions relating to hate crimes bear mentioning.

**Streamlining the legal framework for hate crimes**

48. We believe it is crucial and long overdue for there to be a clear legal framework for the state to properly address the scourge of hate crimes.

49. In its current formulation, the Bill would effectively establish hate crimes as a new category of offences for actions that are already offences under existing law – for example, where an offender could either be charged for murder and/or for murder with a hateful motive, or for assault GBH and/or for assault GBH with a hateful motive.

50. We respectfully submit that the Bill should establish hateful intent as a compulsory aggravating factor in sentencing for existing offences, rather than separate offences. This would allow the state to pursue its existing criminal remedies for violent acts, while ensuring that the hateful intent at the heart of a hate crime is considered in sentencing an offender. We believe this solution would ensure appropriate consequences for these very serious offences, but also greatly simplify the legal framework, bring the Bill in line with international best practice, and minimise the additional burden on the criminal justice system by streamlining investigations and prosecutions.

**Categories of hate crimes**

51. Section 3(1) of the Bill lists the identity characteristics of groups whose targeting may be considered a hate crime: age, albinism, birth, colour, culture, disability, ethnic or social origin, gender or gender identity, HIV status, language, nationality, migrant or refugee

status, occupation or trade, political affiliation or conviction, race, religion, sex, which includes intersex, or sexual orientation.[26]

52. The rationale for the inclusion of most of these categories is clear, in that they are in line with the grounds for equality protections in the Bill of Rights, or they are associated with groups of people and communities who have faced appalling persecution and violence in South Africa, such as persons living with HIV or persons with albinism.

53. While we welcome the listed groups, we note and reiterate our previous submissions, that all listed grounds of section 9(3) be included to ensure the protection of all those recognised by our Constitution.

54. We further note that certain categories, while important, could be narrowed more clearly to provide specific protection to vulnerable groups. In this regard we refer the Committee to the category of 'Occupation or trade'. We understand from departmental briefings on this Bill that this category is intended in part to provide protection to sex workers, who are undeniably a vulnerable group facing extreme discrimination, marginalisation and risk of violence.[27] It is vital that such communities get legal protection from hate crimes.

55. We therefore submit that the intent and purpose of the Bill must be to protect those who have been systematically and historically subjugated because of protected characteristics in an ongoing pattern of disadvantage and harm. We submit that in fulfilling this objective, the Bill may benefit from further specificity. Accordingly, MMA supports the inclusion of 'sex worker' as a specific category in this provision. If there are other specific groupings of people or communities who face similar risks of being targeted for hate crimes and a similar history of unfair subjugation, the Committee should consider introducing specific terms to protect these groups.

56. In addition, we fear that the inclusion of 'Political affiliation or conviction' as a category could result in powerful political groupings or professional politicians seeking protection against fair criticism under this provision. We reiterate and submit that the Bill should protect those who have been systematically and historically subjugated because of protected characteristics in an ongoing pattern of disadvantage and harm, and not to protect those who are politically, socially, and economically privileged. Accordingly, we recommend that the 'Political affiliation or conviction' category be removed.

[26] Section 3(1): "A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association with, or support for, a group of persons who share the said characteristics:(a) age; (b) albinism; (c) birth; (d) colour; (e) culture; (f) disability; (g) ethnic or social origin; (h) gender or gender identity; (i) HIV status; (j) language; (k) nationality, migrant or refugee status; (l) occupation or trade; (m) political affiliation or conviction; (n) race; (o) religion; (p) sex, which includes intersex; or (q) sexual orientation."

[27] Briefing by Deputy Minister to Portfolio Committee on Justice and Correctional Services, 18 August 2021 (accessible here).

**OTHER PROVISIONS**

57. MMA wishes to offer a range of other recommendations which we believe will enhance the effectiveness of the Bill in combatting hate crimes and hate speech in our society:

57.1. The Bill should provide for a mechanism for monitoring and reporting on the implementation of hate crimes and hate speech legislation, and trends in categories of offences prosecuted under the legislation, which can inform future policy responses.

57.2. The Bill should provide for education, training and awareness for investigators, prosecutors and judicial officers in matters relating to hate crimes and hate speech to ensure effective implementation of its provisions and appropriate outcomes for victims of these offences.

57.3. Section 5(1) of the Bill makes provision for a victim impact statement, to be taken into consideration in prosecuting offences. We submit that the definition of "victim" should be broadened to allow other affected people, such as representatives of an affected community or group (who may not be direct victims of the offence), to provide impact statements. This is necessary, firstly, for the tragic reality that in the most grievous hate crimes, the victim is deceased and not able to give voice to the impact of the crime. Secondly, by definition hate crimes and hate speech target a broader community, not just an individual; the Bill should therefore make provision for other affected parties to give evidence of how the crime has affected the wider group.

57.4. Finally, we note that the Bill provides, in section 9(1) that the State, the South African Human Rights Commission and the Commission for Gender Equality have a duty to promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences. Section 9(2) further provides for education and information campaigns to inform the public about the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences. While we welcome these inclusions and view them as important, we submit that the principles of restorative and alternative justice form part of the education and information campaigns. This we submit, will assist in fostering a society founded on human dignity, the achievement of equality, and the advancement of human rights and freedoms. To this end, we urge the Committee to explore opportunities to infuse the principles of restorative justice as part of the education and information campaigns. Further, we submit that restorative and alternative justice measures should be included alongside criminal penalties. We note that our Constitutional Court has, on several occasions, applied restorative justice approaches. In *Dikoko,* restorative justice was linked to dignity and ubuntu.[28] More recently, the Constitutional Court explained that "restorative justice is understood to be both 'backward-looking' as it deals with the 'aftermath of the offence', and 'forward-looking', since it takes into account the implications for the future. Restorative justice

[28] *Dikoko v Mokhatla* [2006] ZACC 10 at para 114.

encourages rehabilitation and reintegration."[29] We submit that an emphasis on restorative justice, both in terms of penalties, and in terms of education will ensure real consequences for egregious acts of hate speech, while also building social cohesion and breaking cycles of hate and prejudice.

**CONCLUSION**

58. MMA thanks the Committee for the opportunity to comment on this Bill. We commend the Department for making significant improvements since receiving comment on the Draft Bill.

59. MMA believes there is vital need for a legal framework to address hate crimes and hate speech. However, we remain concerned that aspects of the Bill require further amendment to bring the legislation in line with the Constitution and best practice, and to ensure it will be an effective tool in combating these very serious social ills.

60. We therefore urge the Committee to take all necessary steps to ensure this Bill is narrowly focused and carefully drafted to deepen efforts to protect the marginalised and promote equality, justice, and social cohesion.

61. MMA is available at the Committee's request to make further submissions or participate in oral hearings on this Bill.

**Media Monitoring Africa**
**Johannesburg, 2021**

[29] *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46 at para 77.