South African Institute of Race Relations NPC (IRR)
Submission to the
Department of Justice and Constitutional Development
regarding the draft
Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016
Johannesburg, 31st January 2017

Table of Contents

Introduction

The Department of Justice and Constitutional Development (the Department) has invited interested people and stakeholders to submit written comments, by 31st January 2017, on the draft Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016 (the Bill).

This submission on the Bill is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

The 'hate speech' provisions in the Bill

Under the Bill's wide definition, 'the offence of hate speech' has essentially the following elements:[1]

First, there must be a 'communication', either to one person or more. Communication is broadly defined to include any 'written, illustrated, visual, or other descriptive matter', along with any 'gesture', 'oral statement' or 'electronic communication'.[2] This definition is wide enough to include a speech, a song, a cartoon, a tweet, a posting on Facebook, or a confidential e-mail to a single recipient.

Second, this communication must 'intentionally' either:[3]

- 'advocate hatred' towards any person or group, or
- be 'threatening, abusive, or insulting' towards any person or group.

Given the way this clause is worded, a communication which is merely 'insulting' towards a single person would meet this test.

Third, this communication must 'demonstrate a clear intention' either:[4]

- to 'incite others to harm' any person or group (regardless of whether harm in fact results, or is even likely to result); or
- to 'stir up violence' against any person or group; or
- to bring any person or group 'into contempt or ridicule'.

This wording means that a tweet which intentionally 'insults' a single person with the intention of bringing him into 'ridicule' will meet the relevant criteria.

Fourth, the threat, abuse, insult, or ridicule in the communication must be based either on 'race' or any one of 19 further listed grounds. These grounds range from gender, sex, inter-sex, and sexual orientation to 'ethnic and social origin', religion, belief, language, disability, HIV status, and either 'occupation' or 'trade'.[5]

Further offences, which are punishable in the same way as hate speech itself, are also committed by those who 'intentionally distribute' hate speech through 'electronic communications systems', or who 'display any material…which constitutes hate speech'.[6] Hence, anyone who re-tweets a racially (or otherwise) insulting message will himself be guilty of hate speech and likewise punishable by fine or imprisonment. So too will any

journalist or other commentator who electronically distributes an analysis that includes this racially (or otherwise) insulting message. That the journalist is not herself the author of the message – and does not herself intend to 'insult' any person and thereby bring that person into 'contempt or ridicule' – will not be a defence against liability.

Any attempt to commit a hate speech offence is also itself a crime. So too is 'inciting', 'promoting', or 'encouraging' hate speech offences, or 'conspiring with others' to commit them.[7]

Any person convicted of hate speech, the intentional electronic distribution of hate speech, or these other ancillary offences is liable on a first conviction to a fine (no maximum amount is specified) or to imprisonment for up to three years, or to both these penalties. Any subsequent conviction is punishable by a fine (again with no specified maximum) and/or a prison term of up to ten years.[8] These penalties are extraordinarily severe, especially for offences which are so very broadly defined.

Stated rationale for these provisions

The stated rationale for these provisions lies in the offensive comments made in January 2016 by a former KwaZulu-Natal estate agent, Penny Sparrow. In a Facebook post, Ms Sparrow commented on the large number of black people evident on the province's beaches on New Year's Day. She lamented 'the monkeys that are allowed to be released' on to the beaches, saying to 'allow them loose is to invite huge dirt and troubles and discomfort to others'. In future, she added, she would 'address the blacks of South Africa as monkeys' because she saw 'cute little wild monkeys do the same: pick, drop and litter'.[9]

The post was intended solely for Sparrow's Facebook friends, but a screenshot of it was taken and distributed on social media, where it soon went viral. Most white South Africans strongly condemned Sparrow's insulting and inflammatory comments. Many black people expressed great hurt and anger at what she had said.[10]

Other allegedly racist comments by whites soon followed. Among other things, economist Chris Hart (in a series of comments on the failing economy) tweeted about a growing sense of victimhood, entitlement and 'hatred towards minorities'. He was quickly suspended by Standard Bank, his employer, for the 'racist undertones' of this statement. Gareth Cliff, one of the judges in a television talent contest, was dismissed (but later reinstated) for saying that those calling for the criminal prosecution of Ms Sparrow did not understand the meaning of free speech. Another TV presenter, Andrew Barnes, was taken off the air for highlighting the way in which Angie Motshekga, minister of basic education, had mispronounced the word 'epitome'.[11]

With anger over these comments growing, some black South Africans used Twitter to retaliate. Velaphi Khumalo, an employee of the Gauteng provincial administration, called for whites to be 'hacked and killed like Jews' and for their children to be 'used as garden fertiliser'. He too was suspended by his employer. Other tweets called for whites to be 'poisoned and killed', urged 'the total destruction of white people', and called for a civil war

in which 'all white people would be killed'. The F W de Klerk Foundation referred 45 messages of this kind to the South African Human Rights Commission (HRC), asking it to investigate the 'extreme violence' which they incited against white South Africans. This evoked further anger, with the ruling African National Congress (ANC) saying that Mr de Klerk had 'insulted black people' and the Pan-Africanist Congress of Azania (PAC) warning that the former state president could be seen 'as inciting war by taking sides'.[12]

President Jacob Zuma initially responded with words of moderation, saying 'people have tended to exaggerate the issue of racism' and that the comments of 'less than five people' should not be seen as representative of the country as a whole. But the ANC soon seized on the fact that Ms Sparrow happened to be an (inactive) member of the Democratic Alliance (DA) and asked the HRC to investigate the official opposition as 'a breeding ground' for racists. The ruling party also laid charges of *crimen injuria* against Sparrow and other whites, and launched civil suits in the equality courts to compel them to pay damages for hate speech. The ANC also began pushing ahead with legislation to 'criminalise any act that perpetuates racism or glorifies apartheid', saying that existing civil remedies against hate speech were no longer enough.[13]

In August 2016 the deputy minister of justice and constitutional development, John Jeffery, said the government had decided to include hate speech provisions in new legislation it had long been busy developing to criminalise other forms of discrimination. This addition was necessary because of 'the plethora of racial incidents happening on social media', including the Penny Sparrow incident. Said Mr Jeffery: 'We then felt…that people seemed to think they could just say, "I'm sorry" and "I'm not a racist, I've got black friends" and get away with it.' The government had thus resolved to 'look into criminalising hate speech', knowing that 'other countries had also done that' and South Africa would not be unique in pursuing this path.[14]

Some proponents of the Bill have also claimed that 'public sentiment in South Africa seems to be more in favour of new legislation than against it, wanting to see dignity upheld and racist conduct punished'.[15] However, two recent field surveys commissioned by the IRR – the first conducted in September 2015 and the second carried in September 2016 – show relatively little public concern about racism or popular demand for strong action against it.

IRR field surveys of race relations

The IRR's two recent field surveys, along with a third survey conducted in 2001, canvassed the views of carefully balanced samples of South Africans. These samples were drawn from all provinces and all socio-economic groups and were fully representative in terms of race, age, employment status, and other relevant factors. All three surveys were carried out by MarkData (Pty) Ltd, an organisation with some 30 years' experience in conducting field surveys for public, private, and civil society organisations. All were 'omnibus' surveys, which were carried out across the country through personal, face-to-face interviews, which were conducted by trained and experienced field teams in the languages chosen by respondents themselves.

In the 2016 survey, despite the furore around Ms Sparrow and other racial utterances on social media, some 3.2% of South Africans – and 2.4% of blacks – identified racism as a serious unresolved problem. If problems of inequality and xenophobia were factored in too, then 6.4% of all respondents and 5.9% of blacks listed racism, in this broader sense, as a serious problem. This was a small increase on the 4.5% of South Africans and 3.9% of blacks who had identified racism (again viewed in this broader way) as a key problem in September 2015.

The small increase evident in 2016 was probably a response to the heightened media and ANC focus on race in the aftermath of the Penny Sparrow incident. However, even in the face of this media focus, few South Africans in general – and even fewer black people – identified racism as a serious problem. The long-term trend over 15 years is also positive, for the proportion identifying racism (again, as broadly defined) as a serious problem has come down since 2001, when it stood at 8%.[16]

All three of the IRR's field surveys also probed people's views on whether race relations had improved since 1994. In the 2016 survey, 54.5% of respondents and 58.7% of blacks said race relations had improved since 1994. This outcome is much the same as in 2015, when 54% of South Africans and 59.7% of blacks endorsed this statement. The 15-year trend on this issue is also positive, for in 2001 significantly smaller proportions (48% of all respondents and 49% of blacks) thought race relations had improved since 1994.[17]

All three field surveys also asked respondents about their personal experiences of racism, asking: 'If you do notice racism in your daily life, in what ways do you notice it?' Again, the results are encouraging, for in 2016 some 71.2% of blacks said that they had *not* noticed racism in their daily lives. Though the equivalent figure in 2015 was higher at 79.4%, the downward shift evident in 2016 was again probably the result of an increased political and media focus on race that year. The long-term trend is also favourable, for in 2001 the proportion of blacks saying they had not noticed racism in their daily lives stood at the much lower figure of 46%.[18]

The outcomes of these field surveys cast doubt on the need for a new prohibition of hate speech. In addition, South Africa already has hate speech legislation on the Statute Book, while the common law has long penalised speech which is defamatory or an affront to dignity. This too raises questions as to why new provisions should now be needed.

The Constitution and other existing laws

The Constitution

The 1996 Constitution guarantees equality before the law, and bars unfair discrimination by either the state or private persons on racial and 16 other listed grounds.[19] The Constitution also guarantees freedom of speech in trenchant terms, saying: 'Everyone has the right to freedom of expression, which includes (a) freedom of the press and other media; (b) freedom to receive or import information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research'.[20]

As an exception to this general principle, the Constitution does not protect speech which amounts 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'.[21] The meaning of Section 16(2) is further analysed in due course.

The Equality Act

When the Constitution came into force in February 1997, it required the enactment within three years of legislation giving further effect to the prohibition of unfair racial discrimination. To this end, the Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) was adopted in 2000 and generally brought into effect in June 2003. The Equality Act includes a broad prohibition of hate speech, saying: 'No one may publish…or communicate words based on [race or other] prohibited grounds…that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred'.[22]

To enforce the Equality Act, high courts and magistrates courts across the country have been designated and trained to function as equality courts, which are civil rather than criminal courts. In dealing with cases of hate speech, the equality courts may order the payment of damages for any 'impairment of dignity' or any 'emotional and psychological suffering'. They may also require 'an unconditional apology' and make any 'appropriate order of a deterrent nature'. An equality court may also direct that a hate speech matter be referred to the relevant provincial director of public prosecutions 'for the possible institution of criminal proceedings in terms of the common law or relevant legislation'.[23]

Equality Court judgment against Penny Sparrow

The ANC's complaint of hate speech against Penny Sparrow came before magistrate Irfaan Khalil in the Scottburgh Equality Court in June 2016. Ms Sparrow was not present. Her daughter, Charmaine Cowie, appeared before the court to say that her mother was a pensioner, who was ill with diabetes and stress and 'feared for her life' if she appeared in court. She had tried to get legal counsel 'but no one would represent her' and she did not know what to do. Ms Cowie asked for a postponement so her mother could apologise for her Facebook post and decide how best to respond to the case against her.[24] However, this request was denied by the court at the urging of Denzel Potgieter SC, advocate for the ANC.[25]

The court found that Ms Sparrow's repeated references to black people as monkeys 'conveyed the explicit message that black people are not worthy of being described as human beings' and had 'subhuman or low intelligence'. Ms Sparrow had thus 'directly invoked enmity and ill will towards black people simply because they belong to a particular race'. This 'amounted to the advocacy of hatred based on a prohibited ground'. She had communicated these words by posting them on her Facebook page and 'ought reasonably to have anticipated that her words…would be republished on social media and the press'. Hence, she should 'also be held responsible for the secondary publication of the words posted by her'.[26]

Her words had received 'unprecedented coverage nationally and internationally' and 'with this had come a great deal of hurt, suffering, shame, embarrassment, and anger for South Africans of all races'. Since her words were 'highly inflammatory', she should have realised that 'members of society would be enraged' by them, as 'memories of the humiliation, suffering and indignity endured by black people for so long would come flooding back'. Her words could thus have evoked violent 'retaliation by affected race groups', leading to 'racial conflict, strife and general chaos on a national scale in South Africa'.[27]

Based on this reasoning, the court found that Ms Sparrow's words constituted hate speech as defined in the Equality Act. The constitutional right to freedom of expression did not apply, the court added, as 'this did not extend to racist utterances' or to 'hate speech as prescribed by the Equality Act'.[28] (The court gave no reasons for discounting the constitutional right to free speech in this way. Instead, it simply ignored the limits to hate speech as set out in Section 16 of the Constitution. It also assumed that Section 10 of the Equality Act falls within the permitted parameters, when prima facie this is not so.)

Against this background, Magistrate Khalil ordered Ms Sparrow to pay R150 000 in damages to the Oliver and Adelaide Tambo Foundation, a civil society organisation which he described as 'promoting non-racialism' in South Africa. He also ordered her to pay the ANC's legal costs, which were likely to be considerable. In addition, he instructed that the matter be referred to the director of public prosecutions in KwaZulu-Natal with a view to criminal proceedings being brought.[29]

In September 2016 Ms Sparrow was convicted of *crimen injuria*, as further described below. However, this was not as a result of the Equality Court's instruction, but rather on charges brought against her at the start of 2016 by Herman Mashaba. Mr Mashaba is a prominent black businessman, who is now also the mayor of Johannesburg in the DA-led metropolitan administration.[30]

The common law of defamation

Liability for defamation under civil law

Also relevant is the common law of defamation, which can be invoked in both the civil and the criminal courts. In the civil sphere, the relevant rules protect people's reputations by allowing them to sue for damages for the publication of material that lowers their standing in the eyes of others. Traditional defences at common law are truth and fair comment on matters of public concern. Since 1994, however, the Constititutional Court has ruled that the crucial test is whether publication is 'reasonable' in all the circumstances.[31]

In adjudicating on defamation, the Constitutional Court has been careful to protect the free speech vital to South Africa's democracy. In 2011, for example, the court dismissed a defamation claim brought against *The Citizen* by Robert McBride, a former Umkhonto we Sizwe cadre who in 1986 had helped set off a bomb in Durban which had killed three civilians. Mr McBride brought the suit because the newspaper had repeatedly described him as a 'murderer', who was unfit for appointment to a senior police post. The High Court upheld his claim, but the Constitutional Court took a different view. In a majority ruling, the

court stressed that *The Citizen* had 'expressed an honestly held opinion on a matter of public interest on facts that were true'. This made its comment 'fair' in law, even if it was 'extreme, unjust, unbalanced, exaggerated, and prejudiced'.[32]

Notwithstanding the Constitutional Court's robust approach, the mere threat of defamation claims can help to promote self-censorship. This may explain why Mr Zuma in 2006, the year before the ANC's electoral conference at Polokwane, brought libel actions totalling R63m against cartoonist Jonathan Shapiro (Zapiro) and various newspapers. Though few of these claims seemed likely to proceed to trial – and though Mr Zuma was unlikely to win the damages he sought – all newspapers in the country were doubtless aware of how much it would cost to defend themselves against claims of this kind. All thus had an interest in toning down criticisms of Mr Zuma in a period critical to his future career, so as to avoid the risk of expensive litigation.[33]

Civil defamation rules thus provide a potent weapon against racial invective damaging to reputation. The common law has also evolved to deal with cases of defamation on Facebook or communicated via the Internet. This shows (in the words of legal expert Dario Milo, a partner in law firm Webber Wentzel) that it has already successfully 'adapted itself to modern circumstances and technology'.[34]

Criminal defamation at common law

South Africa also has common law rules making defamation a criminal offence in certain instances. The constitutionality of these provisions has been challenged, but was upheld by the Supreme Court of Appeal in 2008 in *Hoho* v *The State*. Here, a researcher employed by the Eastern Cape provincial legislature published several leaflets in 2001and 2002 in which he accused the provincial premier and various national ministers of corruption, embezzlement, fraud, and other crimes. He was charged with criminal defamation. The Bisho High Court convicted him on 22 charges and sentenced him to three years' imprisonment, suspended for five years, and three years' correctional supervision. Mr Hoho appealed against the judgment, arguing that South Africa's criminal defamation rules were unconstitutional. In 2008, however, the Supreme Court of Appeal (SCA) dismissed his appeal and found the law of criminal defamation to be consistent with the Constitution.[35]

Explaining its decision, the SCA stressed that the prosecution has to prove all the elements of the offence. It must thus prove that the communication is unlawful, which it can do only by proving that none of the standard justifications of truth, fair comment, and reasonableness is applicable. The prosecution must also prove that publication is 'intentional'. This requires 'proof that the accused knew he was acting unlawfully' or that he might be doing so. The degree of proof required is proof beyond a reasonable doubt. These requirements provide important safeguards against any abuse of the law, said the court. Hence, the crime of defamation is not inconsistent with the Constitution, but rather 'reasonably required to protect people's reputations', the SCA ruled.[36]

The SCA based its decision partly on the fact that 'many democratic societies, such as England, Canada, and Australia', have criminal defamation rules. It failed to acknowledge

that these laws might be more open to abuse in less stable democracies. The key risk in criminal defamation rules, as Mr Milo notes, is that they can be enforced by the government in the same way as other crimes. Writes Mr Milo: 'Criminal defamation is a crime in the same way that stealing a car is. A charge gets laid against you, the police investigate the charge, and you may be arrested. Then there may be a prosecution by the National Prosecuting Authority and, if a court convicts, the defamer is punished either by a fine or by imprisonment.'[37] Despite these risks, no appeal was lodged against the SCA's ruling to the Constitutional Court, which means the country's highest court has yet to decide on the issue.

In other African countries, criminal defamation has at times been used to stifle criticism and protect the ruling party. In Burkino Faso, for instance, some years ago, a journalist was charged with criminal defamation for his comments about the state prosecutor. He was convicted and sentenced to 12 months' imprisonment. He was also ordered to pay a significant fine and his weekly publication was banned for six months. However, he successfully appealed to the African Court on Human and Peoples' Rights, which set aside these penalties. The court also ruled that criminal defamation should not be punished by imprisonment, except in 'extreme' cases.[38]

A similar case recently arose in Zimbabwe, where criminal defamation laws have long been used to stifle criticism of President Robert Mugabe's government. In this instance, Nevanji Madanhire, editor of *The Standard* newspaper, together with journalist Nqaba Matshazi, published an article critical of the chairman of a medical aid society. Mr Madanhire had been arrested many times in the past for criminal defamation, usually for stories criticising the government. In response to the article, both he and the journalist were arrested and charged. In their defence, they argued that Zimbabwe's criminal defamation rules were unconstitutional under the country's bill of rights.

In June 2014, in a decision praised by many for its bravery, Zimbabwe's Constitutional Court agreed, saying 'the very existence of the crime creates a stifling or chilling effect on reportage'. Even if people were eventually acquitted, they would still have 'undergone the traumatising gamut of arrest, detention, remand, and trial'. They would also have incurred considerable legal costs. Said the court: 'The overhanging effect of the offence is to stifle and silence the free flow of information in the public domain. This in turn may result in the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices.' The court ruled that the alternative remedy of civil defamation was enough to provide redress to those who were defamed.[39]

In 2010 the African Commission of Human and Peoples' Rights resolved that criminal defamation laws should be repealed across the continent. Explaining its resolution, the commission said: 'Criminal defamation laws constitute a serious interference with freedom of expression and impede the role of the media as a watchdog, preventing journalists and media practitioners from practising their profession without fear and in good faith.' Despite the commission's resolution, however, little has been done to bring about the necessary reforms.

In September 2015, some months before the Penny Sparrow post, the minister in the presidency, Jeff Radebe, speaking in his capacity as head of policy for the ANC, stated that the ruling party planned to rid South Africa of criminal defamation rules, which it regarded as unconstitutional. Said Mr Radebe: 'No responsible citizen and journalist should be inhibited or have the shackles of criminal sanction looming over him or her.'[40]

Mr Radebe also stressed that 'a growing democracy needs to be nourished by the principles of free speech and the free circulation of ideas and information. Criminal defamation detracts from these freedoms'.[41] However, the ruling party has since reneged on this commitment. No legislation putting an end to criminal defamation has been prepared. Instead, the hate speech provisions in the Bill – which will be far more chilling to free speech than criminal defamation rules – are to be enacted into law. Yet 'the shackles of criminal sanction' (to cite Mr Radebe's words once again) are unnecessary when effective civil remedies against hate speech already exist under the Equality Act, the common law of defamation, and relevant legislation and/or codes of conduct for the print and electronic media.

Crimen injuria

Also important is the common law of *crimen injuria*, under which Penny Sparrow has also been convicted and punished. *Crimen injuria* is the unlawful, intentional, and serious violation of the dignity of another. For successful prosecution, the victim must be aware of the offending behaviour and must feel degraded or humiliated by it. In addition, the behaviour in question must be serious enough as to offend the feelings of a reasonable person.[42]

Some legal writers have suggested that the insult in issue must be directed at an individual, rather than a group, before liability can arise. However, this overstates the key judgment on the matter, which was handed down by the Transvaal Provincial Division in 1975. Here, the court was primarily concerned with whether the dignity of the victim had been affected by an insult against the Afrikaans language. Within this context, the judge commented: 'There may, of course, be cases in which an insult to a person's language, or race, or religious persuasion, or national group may, in the circumstances, constitute also an impairment of his *dignitas*.'[43]

That the insult was directed at a 'national group' is presumably the basis on which Penny Sparrow was convicted of *crimen injuria* in September last year. The judgment of the Scottsburgh Magistrate's Court has seemingly not been reported, but press coverage indicates that she pleaded guilty to the charge and was ordered to make a public apology. Magistrate Vincent Hlatshwayo also sentenced her to a fine of R5 000 or 12 months' imprisonment, plus an additional two years' imprisonment. However, this further prison term was suspended for five years on condition that she was not again convicted of *crimen injuria* in this period.[44]

Ms Sparrow broke down and cried in court as she read out her 'heartfelt' apology for her 'thoughtless behaviour'. This had 'hurt the feelings of her fellow South Africans' and 'impaired the dignity of African people', she acknowledged.[45] The ANC in KwaZulu-Natal criticised the sentence handed down as insufficient, saying: 'A prison sentence without the

option of a fine would have afforded her an opportunity, in isolation, to deeply reflect and repent from her disgraceful conduct.'[46]

As this brief review shows, South Africa already has many laws under which racial utterances are prohibited and can effectively be punished. The hate speech provisions in the Bill are thus unnecessary. They are also prima facie in conflict with the Constitution and must thus be abandoned, rather than enacted into law.

Unconstitutionality of the hate speech provisions in the Bill

What section 16 says

As earlier noted, the Constitution generally guarantees free speech, including freedom of the media. However, it does not protect 'the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'.[47] This exception to the general right is carefully phrased, which means that speech is protected unless it:

- advocates hatred,
- does so on one of the four grounds expressly listed, and
- 'constitutes incitement to cause harm'.

Advocating hatred

To count as hate speech, the communication must advocate or encourage hatred. Hatred, according to the Canadian Supreme Court in *R* v *Keegstra*, means 'emotion of an intense and extreme nature that is clearly associated with vilification and detestation'.[48] The hatred expressed must thus be intentional, for it is not possible to have 'an emotion of an intense and extreme nature' on a negligent, accidental, or subconscious basis.

Four listed grounds

The hatred that is advocated must be based on one of four listed grounds, these being race, ethnicity, gender, and religion. This list is a closed one. It is also deliberately different from Section 9 of the Constitution, which bars unfair racial discrimination not only on these four grounds but on 13 others besides. That the recognised grounds in Section 16(2) are limited to four is deliberate and cannot be ignored.

Incitement to cause harm

The advocacy must amount to incitement to cause harm. The mere advocacy of hatred is thus still protected expression, and it is only when this is accompanied by a call to action – an incitement to cause harm – that it loses its constitutional protection. Incitement has a specific legal meaning. It must also be intentional, as it cannot happen negligently, accidentally, or subconsciously.

Harm need not necessarily be confined to physical harm and may include harm to people's dignity. However, it must involve a serious violation of dignity, as the common law of *crimen injuria* also requires. There is thus an objective element in this test, for it must be shown that the reasonable person would identify the violation of dignity as serious.

What the Bill says

The hate speech provisions in the Bill go far beyond these limits. Under the Bill, speech is criminalised even if it is merely 'insulting' and shows an intent to bring someone into 'ridicule' on any one of 20 listed grounds. This long list is inconsistent with Section 16(2) of the Constitution. It also includes 'trade' and 'occupation'. Yet these grounds are not intrinsic to individual dignity or identity and cannot be seen as analogous to 'race, ethnicity, gender, or religion' – the four grounds recognised in Section 16(2).

Contrary to what the Constitution provides, the Bill allows speech to be prohibited and punished simply, for example, because it 'insults' Mr Zuma and brings him into 'ridicule' for what he has done as part of his 'occupation'. This would include the president's much-criticised dismissal in December 2015 of finance minister Nhlanhla Nene. The Bill also effectively bars cartoons which insult the president or other people holding particular occupations. Such individuals would include cabinet ministers, members of Parliament (MPs), directors general in national government departments (DGs), other bureaucrats, and the ANC cadres (Hlaudi Motsoeneng and Brian Molefe, for instance) who have been deployed to run the South African Broadcasting Corporation (SABC), Eskom, Transnet, and other state-owned enterprises. Yet there is no 'advocacy of hatred' in such satire. Neither is there any incitement to cause harm. Nor is such criticism based on race, gender, ethnicity, or religion, which are the only grounds on which speech may be limited under Section 16(2) of the Constitution.

As earlier described, Mr Zuma has previously tried to silence Zapiro by threatening him with civil defamation suits for large amounts of damages over cartoons the president regards as insulting to himself. Mr Zuma also seeks an end to such satire in the future. In March 2016, when South Africa was still smarting from the aftermath of Nenegate and troubled by a criminal investigation into finance minister Pravin Gordhan, Mr Zuma urged South Africans to concentrate their attention on racism instead. He urged people 'openly to discuss white supremacy and how it manifests itself', help raise awareness of racial discrimination, and 'eliminate denialism' about the extent of the racism 'scourge'. He also said: 'Be aware of the fact that some racists use art as a form of expression… We should be alert to subtle and disguised racism perpetuated through the stereotyping of individuals or groups of people in the media, through cartoons and satire.'[49]

The hate speech provisions in the Bill have thus been crafted to ensure that 'cartoons' and 'satire' targeting the president (and many others) can be punished via heavy fines and/or lengthy prison terms. This will, of course, have an enormously chilling effect on free speech. It will also allow the ruling party to silence many of the merited criticisms now being made against it. In addition, by making the intentional electronic distribution of hate speech a crime in itself, the Bill seeks to ensure that neither the media, nor civil society, nor opposition political parties can easily report on the 'insulting' criticisms that have been made by others.

A key Constitutional Court judgment

The Constitutional Court has already stressed that the state must respect the limits on hate speech that are set out in Section 16(2). In *Islamic Unity Convention* v *Independent Broadcasting Authority and others*, the court said:[50]

> 'What is not protected by the Constitution is expression or speech that amounts to "advocacy of hatred" that is based on one or other of the listed grounds: namely race, ethnicity, gender or religion, and which amounts to "incitement to cause harm"…. Any regulation of expression that falls within the categories enumerated in s 16(2) would not be a limitation on the right in s 16. [However,] where the state extends the scope of regulation beyond expression envisaged in s 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in s 36(1) of the Constitution.'

The limitations allowed under Section 36

Section 36(1) of the Constitution says that guaranteed rights may be limited only if 'the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. In making this determination, all relevant factors must be taken into account. These include (a) the nature of the right, (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.[51]

The nature of the right

In assessing whether a limitation on a guaranteed right is justified under Section 36(1), one of the key considerations (as the Constitutional Court emphasised in *State* v *Makwanyane*) is 'the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality'.[52]

The right which is limited by the Bill is, of course, the right to freedom of expression, which the Constitutional Court has previously described as 'the lifeblood of an open and democratic society'. [53] The importance of the right to free expression has also been emphasised on many other occasions by both the Constitutional Court and the High Court. As these courts have stressed:

- 'Under the new constitutional dispensation in this country, expressive activity is prima facie protected, no matter how repulsive, degrading, offensive, or unacceptable society, or the majority of society, might consider it to be.'[54]

- 'Freedom of expression lies at the heart of a 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. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'[55]

- ‘Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity,…it could actually be contended with much force that the public interest in the open market place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore, we should be particularly astute to outlaw any form of thought control, however respectably dressed.’[56]

- ‘The corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.’[57]

The importance of the purpose of the limitation

There is clearly a societal interest in prohibiting harmful speech which falls within the parameters set by Section 16(2) of the Constitution. However, there is no such interest in curtailing artistic expression, satire, public debate, or media commentary and reporting on a wide range of important political issues, as the Bill will do.

The nature and extent of the limitation

Various issues must be taken into account in assessing the extent to which the Bill limits the key right to freedom of expression:

<u>An overly broad definition</u>

The Bill’s limitation on the right to freedom of expression is inordinately far-reaching. In seeking to punish speech that is ‘insulting’ and intends to bring a person into ‘ridicule’ on the basis of his or her ‘occupation’, the Bill sets the threshold for what constitutes hate speech far too low. As earlier discussed, the Bill’s list of 20 grounds on which speech may be prohibited is also far too extensive, particularly since Section 16(2) lists only four such grounds.

<u>Draconian penalties</u>

The penalties set out in the Bill – with their emphasis on lengthy prison terms lasting as long ten years for a second offence – are unnecessarily draconian. This is especially so when more suitable remedies are readily available. Such remedies would include apologies, community service, and the payment of appropriate compensation. Such penalties would also be more in keeping with the principles of restorative justice.

<u>Extensive criminal liability for the media, civil society, and others</u>

The Bill criminalises the fair and accurate reporting of hate speech by journalists, civil society organisations, and other commentators. It also makes them punishable in the same way as the authors of hate speech. All that is needed for liability is that they should have:[58]

- ‘intentionally distributed’ or otherwise ‘made available an electronic communication which constitutes hate speech’; and done so
- through ‘an electronic communications system’ which is ‘accessible by any member of the public’, or simply by ‘a specific person’ who ‘could be considered a victim of hate speech’.

If the Bill had been law at the time, the many journalists and other commentators who reproduced Penny Sparrow’s insulting words and distributed them via electronic media accessible to the public would have been punishable by fines and/or prison terms of up to three years for a first such ‘offence’. If any of them had distributed her words in this way more than once, they would have been punishable by further fines and/or prison terms of up to ten years.

Under the Bill, a journalist who e-mailed a cabinet member an insulting cartoon and asked for comment on it would be vulnerable to the same penalties as the cartoonist himself. It would not matter that the journalist had not distributed the cartoon to any member of the public. That the journalist had sent it to the person who could be considered the victim of hate speech would in itself constitute an offence punishable in these harsh ways.

The chilling effect of these overly broad provisions is likely to be enormous. The impact will be particularly severe because the Bill (unlike hate speech provisions in Australia and Canada, see below) contains no relevant exceptions allowing the media to comment or report on hate speech in the public interest. In addition, because the definition of hate speech is so broad, journalists and other commentators will battle to assess what utterances might fall within this category. Their safest approach will be to avoid distributing any words that might come within the definition.

The Bill thus undermines the media and their role in strengthening South Africa’s democracy. Yet the importance of that role was emphasised by the Constitutional Court in the *Khumalo* case, when it said: ‘The print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected.’ The Constitutional Court also cited with approval a judgment by the High Court of Australia, saying that ‘the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media’.[59]

In South Africa’s free, open and democratic society, the media must be free to engage in robust discussions of political and current events and those who play a role in them. They must not be deterred from doing so by the threat of major fines and prison terms simply for reporting on what others have said or done. As long as they face such threats, the chilling effect of the Bill is likely to be enormous.

'Less restrictive means of achieving the purpose'

Hate speech is already prohibited under both the Equality Act and the common law rules on defamation and *crimen injuria*, as earlier described. Under these laws, significant penalties have already been imposed on Penny Sparrow, and also on other white South Africans who have used the 'k' word or engaged in other racially offensive speech, as described below. 'Less restrictive' means to achieve the purpose are thus already available. It follows that there is no need for the Bill at all – let alone for a measure that is so very broadly framed.

Mia Swart, professor of international law at the University of Johannesburg, has also questioned the need for any additional legislation. Writing in *Business Day* in January 2016, soon after the Penny Sparrow post, Professor Swart stated: 'Freedom of speech means nothing if it does not include the freedom to engage in unpopular, controversial, and even offensive speech. Freedom of speech would not be necessary if it covered and protected only correct and innocuous speech… The remedy for hateful or "wrong" speech is more speech. The debates [on the Penny Sparrow issue] show that South Africans are sufficiently vocal to remedy speech with speech.'[60]

Denise Meyerson, in a paper on the risks in suppressing racial speech, also warns against further prohibitions on hate speech, saying: 'To drive an evil view underground can actually increase its strength, whereas to debate it out in the open is more likely to bring home its abhorrent nature…. To the extent that racial animosities continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more serious kind of discharge.'[61]

No constitutional justification for the hate speech provisions

The Bill goes far beyond the hate speech parameters set out in Section 16(2) of the Constitution. It also fails to comply with the proportionality test set out in the limitation clause in Section 36(1). This test is not met by a Bill that so greatly limits the vital right to freedom of expression and overlooks the fact that 'less restrictive' means of curtailing hate speech (in the true sense of the term) are readily available. The hate speech provisions in the Bill are thus inconsistent with the Constitution, and cannot be endorsed by Parliament for this reason alone.

Contrary to what Mr Jeffery has suggested, the hate speech provisions in the Bill are also very different from those found in Australia, Canada, and Kenya.

Hate speech laws in Australia, Canada, and Kenya

Australia

The Racial Discrimination Act of 1975, a federal statute, was amended in 1995 to make it unlawful publicly (otherwise than in private) to insult, humiliate, offend or intimidate another person or group on racial grounds. The act must be 'reasonably likely' to insult or intimidate, and must have been done because of the 'race, colour, or national or ethnic origin' of the target individual or group. The Australian statute thus requires an objective test. It also avoids the long list of prohibited grounds contained in the Bill. In addition, liability is civil, rather

than criminal, as Australia regards criminal punishment as a risk to free speech and disproportionate to the harm caused by hate speech.[62]

Moreover, to ensure proper protection for freedom of expression, the legislation sets out various circumstances in which the prohibition does not apply. Hence, if the communication is part of an artistic work, it is not unlawful. Also excepted are academic and scientific works, and debates or comments on matters of public interest. A third exception permits fair and accurate reporting and commenting by the media on any matter of public interest. Offensive and racially-based material is thus permitted in these spheres provided the person communicating it has acted 'reasonably and in good faith'. A lack of good faith requires a deliberate intention to mislead, or a culpably reckless and callous indifference to the harm resulting from the communication. Carelessness or indifference of a lesser degree is not enough to show a lack of good faith. Wide latitude is also generally permitted in deciding what is 'reasonable' because of the importance of free speech in a democracy.[63]

Australia's component states have legislation similar to the federal statute, but these are not uniform. In 1989 New South Wales amended its anti-discrimination legislation by making it a criminal offence to incite hatred, serious contempt, or severe ridicule towards a person or group on racial grounds. However, the criminal prohibition applies only where such incitement threatens physical harm or urges others to threaten such harm. Prosecution requires the consent of the Attorney General, and the offence is generally punishable by a maximum fine of AU$10 000 or six months' imprisonment. No prosecution under this law has yet been brought. [64]

Canada

The Criminal Code of Canada of 1985 (in Section 318) prohibits 'hate propaganda' and makes this a criminal offence punishable by imprisonment for up to five years. It defines 'hate propaganda' narrowly as any communication that 'advocates or promotes genocide'. Genocide, in turn, is defined as either the 'killing' of members of 'an identifiable group', or acts 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction'. An identifiable group means 'any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, or mental or physical disability'.[65]

Also relevant is section 319 of the Criminal Code, which prohibits the public incitement of hatred or the wilful promotion of hatred against an identifiable group. In both instances, however, the incitement or promotion of hatred must be 'likely to lead to a breach of the peace'. Various free speech defences are also available. Hence, an accused is not guilty if the statements are true, or if they are relevant to any subject of public interest and he or she reasonably believed them to be true. Expressing in good faith an opinion on a religious subject is not punishable. Nor are literary devices such as sarcasm and irony.[66] In addition, no prosecutions (under either Section 318 or 319) may proceed without the approval of the attorney general, who is a cabinet minister. This makes for an important element of political accountability.[67]

The Canadian Human Rights Act of 1977 is a federal statute which prohibits discrimination on the basis of race, colour, sex, sexual orientation, and national or ethnic origin, among other things. Section 13 of the statute also prohibited hate speech in broad terms, making it discriminatory to communicate by phone or Internet any material 'that is likely to expose a person or persons to hatred or contempt'. However, this provision was repealed in 2013, after growing objections to its wide reach and lack of free speech defences.[68]

Prior to the repeal of Section 13, the Canadian Human Rights Commission, which was primarily responsible for enforcing it, was criticised for double standards and its willingness to bypass normal evidentiary rules. In 2008, for instance, Mary Agnes Welch, president of the Canadian Association of Journalists, stated that the human rights commissions at federal and provincial levels had 'never been meant to act as language nannies. The current system allows complainants to chill the speech of those they disagree with by entangling targets in a human rights bureaucracy that doesn't operate under the same strict rules of defence as a court'. Fred Henry, Catholic Bishop of Alberta, added that the commissions were being used to 'stifle debate on important issues'.[69]

Also in 2008, University of Windsor law professor Richard Moon, having been commissioned by the Canadian Human Rights Commission to prepare a report on its mandate under Section 13, recommended that the section should be repealed. Wrote Professor Moon: 'The use of censorship by the government should be confined to a narrow category of extreme expression – that which threatens, advocates or justifies violence against the members of an identifiable group.'[70]

Criticism of Section 13 came to a head after the Canadian Islamic Congress filed complaints of hate speech against Maclean's magazine in December 2007. The nub of the complaints was that MacLean's had published a series of articles by author Mark Steyn, which warned against a growing threat to the West from Islam and so insulted Muslims. The main target was Mr Steyn's article, 'The Future Belongs to Islam', an excerpt from his best-selling book *America Alone*. This book warned that the United States would find it difficult to retain its secular democracy if Muslims in European countries used their increasing demographic preponderance to win political control of these nations.[71]

The Ontario Human Rights Commission found it lacked jurisdiction to deal with the complaint lodged with it, but the British Columbia Human Rights Tribunal heard the complaint in June 2008. Handing down its ruling in October 2008, the tribunal stated that the article 'contained historical, religious, and factual inaccuracies, relied on common Muslim stereotypes, and tried to "rally public opinion by exaggeration and causing the reader to fear Muslims"'. Having criticised the article in these ways, the tribunal ultimately concluded that it was not likely to expose Muslims to hatred or contempt. This meant that the complaint against it had to be dismissed.[72]

The Canadian Human Rights Tribunal dismissed the federal complaint in June 2008 without referring the matter to a tribunal. The federal commission said Mr Steyn's article was 'polemical, colourful and emphatic and was obviously designed to excite discussion and even

offend certain readers, Muslim and non-Muslim alike'. However, 'the views expressed in it were not of an extreme nature', as required by Canadian law.[73]

Though all three complaints were ultimately dismissed, Maclean's incurred some $2m in legal costs in defending itself. Mr Steyn commented that a lesser-known writer without a media conglomerate to support him would probably have been convicted. He added: '[The case] has made me understand just how easily and incrementally free societies, often for the most fluffy reasons, slip into a kind of soft, beguiling totalitarianism.'[74]

The controversy around the Mark Steyn matter gave impetus to the subsequent repeal of Section 13. Similar hate speech rules in Canada's provinces still remain in force, but have seldom resulted in liability. Alberta, for example, forbids the publication of material that 'is likely to expose a person or class of persons to hatred or contempt' and gives the responsibility for enforcing this prohibition to the Alberta Human Rights and Citizenship Commission. In 2006 the Muslim Council of Edmonton and Supreme Islamic Council of Canada complained to the commission when Ezra Levant published cartoons featuring the prophet Muhammad, which had first been published in Denmark in the magazine *Jyllands-Posten*. The commission dismissed the complaint in August 2008, but the two-year process cost Mr Levant some $100 000 in legal costs.[75]

The Saskatchewan Human Rights Code, as initially enacted, sought to prohibit any publication that exposed any person or class of persons to 'hatred' or which 'ridiculed, belittled or otherwise affronted the dignity' of any person or class. In June 1997 the Saskatchewan Human Rights Tribunal held that Hugh Owens had breached the Human Rights Code by placing in a newspaper an advertisement which cited passages from the Bible in condemning homosexual behaviour. The decision was reversed on appeal.[76]

In 2005, however, the tribunal fined Bill Whatcott, leader of a small group called the Christian Truth Activists, $17 500 for distributing flyers with controversial comments about homosexuals. This matter ultimately went to the Supreme Court of Canada. This court found the code's prohibition of 'ridicule, belittlement and affront to dignity' was unconstitutional. It also overturned the tribunal's ban on two of the flyers as 'unreasonable', as these documents did not 'subject homosexuals to "detestation" and "vilification"' and it was 'not hateful expression' to quote salient passages from the Bible. However, the ban on the other two flyers was upheld, as these 'portrayed the targeted group as child-abusers or predators, and called for discrimination against it'.[77]

Kenya

The current Constitution of Kenya was promulgated in 2010, in the aftermath of the ethnic conflict which broke out in December 2007 after disputed presidential elections. This upsurge in violence cost the lives of some 1 300 people, displaced more than 600 000, and resulted in major destruction of property.[78] Against this background, the Constitution limits the guaranteed right to free expression by saying this does not extend to 'propaganda for war, incitement to violence, hate speech, or advocacy of hatred that constitutions ethnic incitement, vilification of others, or incitement to cause harm'.[79]

Relevant too is the National Cohesion and Integration (NCI) Act of 2008. This statute establishes the National Cohesion and Integration (NCI) Commission. It also seeks to promote tolerance and outlaw discrimination on ethnic grounds. Section 13 of the Act prohibits 'threatening, abusive, or insulting words or behaviour' which are 'intended to stir up ethnic hatred' or are likely to do so in all the circumstances. Ethnic hatred is defined as hatred against a group identified by 'colour, race, nationality, or ethnic or national origins'. Acts in breach of Section 13 are punishable on conviction by a fine of up to one million shillings and/or imprisonment for up to three years.[80]

The NCI Act, in Section 62, also makes it an offence to 'utter words intended to incite feelings of contempt, hatred, hostility, violence, or discrimination against any person, group, or community on the basis of ethnicity or race'. The penalty here is a fine of up to one million shillings and/or a prison term of up to five years.[81] To help prevent such words being spread by the media, Section 62 of the NCI Act makes it an offence for 'a newspaper, radio station or media enterprise to publish such utterances'. This offence is likewise punishable by a fine of up to one million shillings, but no prison term may be imposed.[82]

Though these hate speech rules are much narrower than those found in the Bill, the Kenyan provisions are nevertheless broad enough to contradict international covenants on the prohibition of hate speech.[83] Kenya's laws have also been criticised for ambiguity and double standards in their enforcement.

In 2015, for instance, Umati, a group that monitors online hate speech, noted that no politicians had yet been convicted under Section 62 of the NCI Act, despite significant evidence of their having made utterances 'intended to incite feelings of contempt or hatred' against coastal Arabs, the Luo, and the Maasai people, respectively. Most of these cases had simply been quashed after apologies had been made to the NCI Commission. By contrast, a university student, Allan Wadiwas, had been convicted of hate speech over a Facebook post critiquing President Uhuru Kenyatta and saying a particular ethnic group should be deported from Kenya. Mr Wadiwas had also been sentenced to two years in prison.[84]

Umati warns that the hate speech provisions in the NCI Act are broad enough to 'stifle potentially fruitful political discourse'. It suggests that that the focus should instead be placed on 'dangerous' speech with 'a high potential to catalyse violence'. Speech would count as 'dangerous' if it:[85]

- targeted ethnic groups, rather than individuals;
- compared this group to vermin, insects, or animals;
- suggested that this group posed such a serious threat that others should arm themselves or attack first; or
- contained any other call to violent action, whether by looting, beating, forcefully evicting, or killing members of the group.

Such a revised definition, Umati suggests, would help distinguish political speech, which needs to be protected, from utterances which truly amount to hate speech. A clear definition would also make it easier for ordinary people to understand 'the kind of speech that has a high potential to cause harm' to ethnic groups. This in turn would help to 'counter ambiguity and facilitate harmony'.[86]

By contrast, Umati adds, 'the current unspecific definition of hate speech in Kenya has only made things worse; the unabashed political class use it to promote mass violence but escape through the cracks, while the less affluent…are punished'. This happens because the present definition is 'vague, or malleable depending on the accused's bank account and political influence'. To prevent this, there is 'a real need for consistency in defining, prosecuting and curbing the "hate speech crime", especially among the political class'. The first step towards this goal is to develop 'a clear, workable framework for identifying and responding to hate speech, in order that peace and harmony can be upheld'.[87]

As yet, however, no changes have been made to the country's hate speech rules. In June 2016 Kenyan journalist Njeri Kimani noted that seven members of the Kenyan parliament – three from the ruling party and four from the opposition coalition – had been summoned by the police to discuss controversial statements. According to the police, these utterances were 'laced with ethnic hatred…and bordered on incitement'. One lawmaker was caught on camera saying he would 'forcefully eject the Luo community' from Nakuru, Kenya's fourth largest city. Another said opposition leader Raila Odinga should eat 'maize', local slang for bullets. Increasingly, commentators are worried that 'loose tongues will lead Kenya into a repeat of the devastating 2007/2008 post-election violence'. In response, the chairman of the NCI Commission has pledged to 'stamp out hate speech', but experience suggests that this will not be easy.[88]

South Africa's Bill is very different

Contrary to what Mr Jeffery has suggested, hate speech laws in Australia, Canada, and Kenya are very different from what the Bill proposes. Australia's hate speech rules generally involve civil, rather than criminal, liability. They also include a number of important defences to protect artistic expression and allow media and other debate on issues of public importance. Canada has repealed its civil hate speech rules at the federal level, and allows criminal liability primarily for communications aimed at inciting genocide or the destruction of identified groups. It also bars the incitement or promotion of hatred against such groups where this is 'likely to lead to a breach of the peace', but expressly includes a number of free speech defences. Kenya's emphasis, against a background of ethnic conflict, is on utterances that are 'intended to stir up ethnic hatred' or to 'incite feelings of contempt, hatred or hostility' on the basis of 'ethnicity or race'.

The 'hate crimes' provisions in the Bill

A hate crime is defined in the Bill as 'an offence recognised under any law, the commission of which is motivated…[by] prejudice, bias, or intolerance towards the victim', based on the victim's race or other 'characteristics'. Essentially the same list of 20 characteristics is provided as in the hate speech clauses. Listed characteristics thus range from race, gender,

sex, and inter-sex to sexual orientation, religion, belief, disability, HIV status, and gender identity, along with 'occupation' or 'trade'.[89]

Any person 'who commits a hate crime' is guilty of an offence and liable on conviction to the penalties set out in the Bill. On conviction, the perpetrator of a hate crime may thus be sentenced to any fine, prison term, or period of correctional supervision which the trial court considers appropriate and is authorised (within the limits of its jurisdiction) to hand down.[90]

In addition, if Section 51 of the Criminal Law Amendment Act of 1997 does *not* apply – in other words, if the trial court is *not* bound by discretionary minimum sentences for serious offences such as murder and rape – then the commission of the hate crime must be regarded as 'an aggravating circumstance' in deciding on sentence. However, this obligation will apply solely where the victim's property has been lost or damaged, or the victim has suffered 'physical or other injury' or has lost 'money,…income, or support'.[91] This wording is distinctly odd, for it suggests that racial hatred will no longer count as an aggravating factor for murder, rape, and other particularly serious crimes once the Bill has been enacted into law.

Why these hate crime provisions are needed at all remains unexplained. The courts already have an obligation to take into account all the circumstances surrounding the commission of a crime in deciding on an appropriate sentence. They also have the capacity to treat a racial motive for murder, rape, robbery, and other crimes as an aggravating factor that justifies an increased punishment. Hence, as Mr Jeffery told a meeting of the Hate Crimes Working Group in February 2015: 'Our courts are handing down appropriate sentences and where prejudice, hatred or bias is established, this is often found to be an aggravating factor, used to impose a harsher sentence.'[92]

Mr Jeffery also said it was 'a misconception' to think that, 'in the absence of specific hate crimes legislation, those who commit hate crimes will get away it. They do not get away with it – they still face the full might of the law', including the likelihood of a harsher penalty.[93] This was evident, the deputy minister added, in the outcome of the Duduzile Zozo case.

Ms Zozo was a young lesbian from Thokoza (east Rand), who was murdered because of her sexual orientation. In handing down sentence, as Mr Jeffery told the hate crimes working group, 'Judge Tshifiwa Maumela acknowledged the problem of hate crimes in South Africa… He said he wanted to make a difference to all vulnerable groups "in his own small way". He said a harsh sentence…would serve as a warning to those who threatened the vulnerable… He [thus] sentenced [the perpetrator] to an effective 30 years in prison…and told [him] to reconsider his attitude towards gay people while he served his sentence. "Lead your life and let gays and lesbians be," he stressed.'[94]

Since hate motivations already count as aggravating factors warranting harsher punishments, there is no need for additional legislation to be introduced. In particular, there is no justification for a Bill which (as earlier described) in fact *bars* the courts from regarding a

hate motive as an aggravating factor in deciding on sentences for murder and other particularly serious crimes.

Requiring the prosecution to prove the commission of hate crimes may also add to the length and complexity of criminal trials. Take for example the recent notorious 'coffin assault' case. In November 2016 Theo Martins Jackson, the foreman at an Mpumalanga farm, and his colleague Willem Oosthuizen appeared in the Middelburg Magistrate's Court for allegedly assaulting a black man and forcing him inside a coffin. The incident apparently took place some three months earlier, but came to light in November last year when a 20-second video clip of the assault went viral. The victim of the attack was Victor Mlotshwa, who said he was walking near the farm when the two white men approached him and accused him of being a thief. 'They beat me up and forced me into a coffin,' said Mr Mlotshwa. The video shows him being pushed down into a coffin. It also features one of the perpetrators saying in Afrikaans 'Get in, I want to throw some petrol.'[95]

Said EFF national spokesman Mbuyiseni Ndlozi in response: 'This humiliation is based on his blackness, which means it is in actual fact a humiliation of black people as a whole… There is no way that a black man would have been treated like that, except for the colour his skin.' DA leader Musi Maimane strongly criticised the two accused for 'acting in a despicable manner against the South Africa we want to build'. He also stressed that 'racism must be destroyed'. Mr Zuma condemned the act as 'shocking, painful, and despicable in the extreme'. The case has been postponed for trial early in 2017. The accused have been denied bail, as their release (in the view of the presiding magistrate) could give rise to 'bloodshed' and the two men fear for their lives.[96]

If the Bill had already been enacted, it might be easy in this instance, with the help of the video, for the prosecution to prove the new 'hate crimes' of racially motivated kidnapping and racially motivated assault with intent to do grievous bodily harm. All elements of these new crimes – including the 'prejudice, bias or intolerance', based on the race of the victim, that 'motivated' the perpetrators – would then have to be proved beyond a reasonable doubt. But this standard of proof might in practice be difficult to meet if the accused were to claim, for example, that they were motivated not by racial prejudice but rather by fear stemming from the high number of farm murders in the country. Requiring the prosecution to prove their racial motivation beyond a reasonable doubt could also make their trial longer and more complicated, so putting even more of a burden on the already struggling criminal justice system. By contrast, under current law, the existence of aggravating (or mitigating) factors relevant to sentence needs to be proved only on the lower standard of a balance of probabilities.

Perversely, the new provisions may in practice make it more difficult to punish those with racial motivations more severely for their crimes. This is especially so where no video footage is available and motive is more difficult to show. Prosecutors will doubtless then fall back on the existing common law, which requires proof of aggravating factors only on a balance of probabilities. But why then introduce the hate crimes provisions in the Bill at all?

South Africa's obligations under international law

The preamble to the Bill recalls that South Africa is a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). As the preamble notes, this requires all states party to its terms to make 'all dissemination of ideas based on racial superiority or hatred' an 'offence punishable by law'.[97] ICERD also requires the prohibition of:[98]

- 'propaganda [and other organised] activities which promote and incite racial discrimination';
- 'acts of violence against any race or group of another colour or ethnic origin'; and
- any incitement to such violence.

The Bill makes no reference to the International Covenant on Civil and Political Rights of 1966 (ICCPR), which South Africa has also ratified.[99] The ICCPR, in Article 20, requires the prohibition of 'any propaganda for war'. It also states that 'any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'.[100]

South Africa's obligations under these international treaties have already been more than met under the Constitution and the Equality Act. The Equality Act, as earlier noted, states in Section 10: 'No one may publish…or communicate words based on [race or other] prohibited grounds…that could reasonably be construed to demonstrate a clear intention to (a) be hurtful; (b) be harmful or to incite harm; or (c) promote or propagate hatred.'[101]

The hate speech provisions in Section 10 of the Equality Act prima facie extend beyond what these international treaties mandate. The ICERD convention speaks only of incitement to racial discrimination or to racial/ethnic violence, not of barring speech which is 'hurtful' or 'harmful' on at least 15 further grounds. Section 10 also goes beyond what the ICCPR mandates, for this treaty bars only the 'advocacy' of 'national, racial, or religious hatred' that 'constitutes incitement to discrimination, hostility or violence'.

If South Africa is to comply with its international obligations, its focus should be on narrowing the Equality Act to bring it into line with ICERD and the ICCPR – not on adopting new provisions that go far beyond what is permitted by these international agreements.

Ramifications of the Bill

There is a real risk that double standards will apply in the enforcement of both the hate speech and hate crimes provisions in the Bill.

As regards hate speech, double standards in the treatment of white and black South Africans are already evident. Penny Sparrow has been severely fined (perhaps into bankruptcy) and convicted of *crimen injuria*. Significant penalties have also been imposed on several other white South Africans for hurtful and insulting comments. However, no such penalties have thus far been imposed on black South Africans for inciting violence against whites.

In April 2016, for instance, Matthew Theunissen used the 'k' word against the government after the sports minister banned cricket and rugby from hosting international tournaments because they had failed to meet his 60% racial quotas for black players. The HRC took up the matter, after which Mr Theunissen not only apologised but also agreed to embark on three to six months of community service in poor areas of Cape Town. He further undertook to conduct research on anti-racism and tolerance, and to undergo anger management, both in his own time and at his own expense.[102]

In February 2016, Vicki Momberg, a white estate agent from KwaZulu-Natal, was so angered by a smash-and-grab incident in Johannesburg – and the allegedly poor level of service she received from black police officers – that she began shouting at them, saying: 'One k***** is bad enough. This happens all the time, all the time. The k******* here in Johannesburg are terrible, I'm so sick of it.' Video footage of this insulting outburst was recorded on a mobile device and uploaded on to YouTube, where it went viral. The HRC has again intervened, and Ms Momberg currently faces eight counts of *crimen injuria* in the Randburg Magistrate's Court.[103] If convicted, she could well be punished by a fine and/or a prison term.

A considerable fine of R100 000 has recently been imposed on Wayne Swanepoel (by the Mthatha Equality Court) for using the 'k' word against Bulelani Thembani during an argument.[104] In June 2016, Bruce Allen, who had hurled verbal abuse, including the 'k' word, at a black woman in a shop in Pinelands (Cape Town), was found guilty of *crimen injuria* and ordered to pay her R8 000 in compensation. He was also sentenced to nine months' correctional supervision, including six months' house arrest, and nine months' community service (to be performed by cleaning and maintaining the Parow police station). His punishment also included a course in anger management, to be completed at his own expense.[105]

Jacobus Kruger, who in 2007 used the 'k' word against his team leader at the South African Revenue Service (SARS), pleaded guilty at a subsequent disciplinary hearing and was given a written warning and a fine. But Pravin Gordhan, then SARS commissioner, decided this penalty was insufficient and dismissed him without a hearing. The Commission for Conciliation, Mediation, and Arbitration (CCMA) found this to be procedurally unfair and reinstated him. However, on appeal to the Constitutional Court, Chief Justice Mogoeng Mogoeng overturned the CCMA decision, saying it would be intolerable for Mr Kruger to continue working at SARS, given what he had said. The chief justice said it was conceivable that there might be exceptional circumstances in which the use of the k-word would not warrant dismissal, but this was not one of them.[106]

By contrast, Velaphi Khumalo, who called in January 2016 for whites to be 'hacked and killed like Jews' and for their children to be 'used as garden fertiliser', has not been dismissed. Instead, his employer, the Gauteng Department of Sport, Arts, Culture and Recreation, suspended him and charged him with 'serious misconduct'. At an internal disciplinary hearing, Mr Khumalo pleaded guilty and undertook to undergo counselling. The disciplinary panel issued him with a final written warning, after which his suspension was lifted and he was allowed to return to work.[107]

The HRC said in November 2016 that it still planned to take Mr Khumalo before a Gauteng equality court under Section 10 of the Equality Act. However, it will not be seeking an award of damages against him. Instead, it wants him to 'apologise unconditionally in public and be interdicted from communicating hate speech in the future'.[108] This is different from the relief that was sought against Penny Sparrow. It also remains uncertain when the case will in fact be heard. Thus far, moreover, the HRC seems to have overlooked the 45 social media postings inciting extreme violence against white South Africans which were referred to it by the F W de Klerk Foundation in January 2016, as earlier described.[109]

In addition, the HRC has seemingly failed to act against a student at the University of Pretoria who, at the time, was also a member of the students' representative council (SRC). Writing on social media in August 2016, Luvuyo Menziwa identified 'white previllage (sic), white dominance, and white monopoly capital' as some of his reasons for 'hating white people'. Added Mr Menziwa: 'F*** White People, just get me a bazooka or AK47 so I can do the right thing and kill these demon possed (sic) humans'.[110] The HRC has seemingly yet to act against Mr Menziwa, though the university has intervened by suspending him from the SRC, pending a hearing.[111]

In similar vein, the HRC has apparently failed to act against a Unisa law lecturer, Benny Morota, who wrote on his Facebook page in June 2016 that he 'hated white people' and wanted them to 'go back to where they came from or alternatively to hell'. Asked by another Facebook user if he was serious about this, he responded: 'I don't entertain white cockroaches like yourself… F*** you pink white murderer… Enjoy the blood wealth of our people, your time to pay with your white skin is emmement' (sic).[112] According to a spokesman from Unisa, Mr Morota has 'received a serious warning' from the university, which 'will not hesitate to take strong action against him if he transgresses again'.[113]

The HRC has also done little to bring Mr Zuma to book for saying in January 2016 that the arrival of Jan van Riebeeck at the Cape was 'the beginning of all South Africa's problems'. Said Mr Zuma: 'A man with the name of Jan van Riebeeck arrived in the Cape on April 6 1652. What followed were numerous struggles and wars and deaths and the seizure of land and the deprivation of the indigenous people's political and economic power.' Though the Freedom Front Plus laid a complaint with the HRC, the commission has been slow to act or to bring the matter before the equality courts.[114]

The HRC has also done little about a complaint of hate speech brought against Mr Zuma after he sang the 'Shoot the Boer' song at the ANC's centenary celebrations in Bloemfontein in January 2012. The words he sang, to a stadium full of ANC supporters, were: 'We are going to shoot them; they are going to run; we are going to shoot them with the machine gun. You are a white man – we are going to hit them and you are going to run! Shoot the Boer! We are going to hit them – they are going to run! The cabinet will shoot them with the machine gun! The cabinet will shoot them with the machine gun! Shoot the Boer!'[115] Many years have elapsed since this complaint was laid. According to the HRC, since a number of complaints

have now been made against Mr Zuma, it has to 'consolidate' them all before it can begin to 'assess them'.[116]

At the same time, the ANC has frequently sought to stigmatise the DA through racial invective. In July 2016, for instance, Mr Zuma said the DA had 'the same hatred' of black people as the National Party and was 'a snake, a poisonous snake'.[117] The ruling party has also drawn political capital from the skewed racism debate in other ways. In January 2016, for example, with media outrage over the Penny Sparrow post growing, a massive wall poster in Cape Town saying 'Zuma Must Fall' was derided as racist and unlawfully ripped down by ANC supporters. A DA billboard in Johannesburg stating that 1.8 million people had lost their jobs since Mr Zuma became president was treated the same way. Growing public concern over a host of ANC 'own goals' – ranging from Nkandla to Nenegate and general economic malaise – were drowned out by a new emphasis on racism as the key problem confronting the country. The DA premier of the Western Cape, Helen Zille, tweeted that 'a troll unit' was busy 'manufacturing racist tweets to divide South Africans' and keep the pot on the boil.[118]

The double standards already evident suggest the ANC is unlikely to be punished under the Bill's hate speech provisions either for its own racial invective or for its supporters illegally pulling down allegedly 'racist' DA and other posters. By contrast, the DA could well face prosecution under the Bill if its merited criticisms of ANC corruption and service delivery failures are seen as 'insulting' to the president and others in government positions. This risk will be particularly acute because the Bill, unlike its (supposed) counterparts in other countries, has no free speech defences.

Critical journalists and civil society organisations could also face prosecution under the Bill if the approach so often taken by former president Thabo Mbeki were to be resuscitated by the ANC. During his period as president (from 1999 to 2008), Mr Mbeki often used the race card to attack critics of his administration's failures on crime, AIDS, and Zimbabwe. He also suggested that those critical of declining efficiency and poor financial management in the public service were coming close to saying that 'the Bantus are not yet ready to govern'. In similar vein, Mr Mbeki charged that those who spoke out against corruption in the 1999 arms deal and elsewhere were implicitly expressing 'the racist conviction that Africans…are naturally prone to corruption, mismanagement, and venality'.[119]

If the ANC once again starts to portray merited criticisms as racist and insulting hate speech, the Bill will allow such critiques to be prohibited and punished by fines and/or jail terms. Moreover, even if commentators succeed in avoiding conviction, they will still face the anxiety of criminal prosecution and perhaps hostile commentary as well. They will also incur substantial legal costs in defending themselves, whereas the National Prosecuting Authority (NPA) will be able to rely on tax revenues in bringing cases to court. These factors in themselves create a risk that political parties, the media, and civil society organisations will resort to self censorship on important issues, so as to protect themselves from potential prosecution. This could have a chilling impact on the vigorous free speech that is vital to democracy and which the Constitution is supposed to safeguard.

There is also a risk that the hate crimes provisions will not be applied even-handedly. Some commentators see the high number of farm murders in the country as evidence of a mounting campaign of genocide against whites.[120] Others see farm attacks as motivated at minimum by racial hatred, especially given the degree of gratuitous violence that sometimes accompanies these incidents. (In January 2017, for instance, Hannes Kidson and his wife Ester, both 69 years old, were killed on their Gauteng farm. Ester, who was in a wheelchair, had her throat cut. Hannes was found in his work-shed, also with his throat slit.)[121] However, the government has long resisted any such interpretation of farm murders, saying that robbery is the primary motive for farm attacks and that farms are a particularly tempting target in the midst of rural poverty.[122]

How willing then will the NPA be to prosecute the alleged perpetrators of farm attacks for the new hate crimes of racially motivated robbery, assault, and/or murder? Yet if the hate crimes provisions are used primarily against white perpetrators and rarely against black ones, this will add to racial tensions, foster racial polarisation, and make it more difficult to uphold the Constitution's founding value of non-racialism.

The Bill should be scrapped in its entirety

The hate speech provisions in the Bill are clearly unconstitutional. This is a fatal defect, which means they cannot lawfully be adopted by Parliament. They will also undermine the vigorous debate that is vital to South Africa's democracy. If unevenly applied, they are likely to add to racial polarisation and racial hostility, rather than reducing these ills. In addition, insofar as the country needs hate speech provisions, the key requirement is to narrow those already contained in the Equality Act – not enact new provisions which are even more in breach of the Constitution and inconsistent with the country's international obligations.

The hate crimes provisions in the Bill are poorly worded and profoundly confusing. They are also unnecessary, as the courts already have the capacity to take racial motivation into account as an aggravating factor in deciding sentence. Perversely, on its current wording, the Bill will in fact make it more difficult for the courts to do this in cases of murder, rape, and other serious crimes, where discretionary minimum sentences apply.

In addition, where an accused is charged with the commission of a hate crime, the prosecution will have to prove that his conduct was motivated by racial or other prejudice. This will be a key element of the offence and will have to be proved beyond a reasonable doubt – which may often be difficult to do. Having to prove a prejudiced motivation in this way is likely to add greatly to the complexity and the length of many criminal trials. It will thus further over-burden an already struggling criminal justice system.

By contrast, under existing law, racial prejudice as an aggravating factor needs to be proved only on a balance of probabilities. It is also relevant as an aggravating factor in all crimes, including the most serious ones, where discretionary minimum sentences apply. The Bill may be intended to punish hate crimes more severely, but in fact it will make this more difficult to do.

Overall, the Bill is unconstitutional and unnecessary and should thus be abandoned. A fundamentally different approach is also required. The best way to reduce racial awareness, racial invective, and racial hostility is for the government itself to embrace the non-racialism which the Constitution identifies as a founding value of the country's democratic order. The government cannot act effectively against racial tensions when its own policies require not only a pervasive system of racial classification but also an increasing level of racial preferencing through racial targets in employment, equity ownership, procurement, and elsewhere.

In addition, much of the racial invective emanating from the ruling party, the EFF, and a small minority of students belonging to the EFF Student Command and the amorphous #FeesMustFall movement is rooted in the ideology of the national democratic revolution (NDR), to which the ANC and its communist allies have long been committed.

This racial invective is intended to stigmatise whites, deny their contribution to the development of the country, and make it easier for the government to embark on a major programme of expropriation and nationalisation. However, this will cripple the economy, rather than provide effective redress for past injustice. The ideologues appear careless of the economic suffering that will result, for they seem to believe that it is only after the free market economy has been destroyed that a socialist and then communist system will be able to rise, phoenix-like, from the ashes.[123] The Bill will aid in this destructive process by focusing yet more public attention on the racist utterances or actions of a tiny minority of whites – and helping the ideologues to build perceptions that such abhorrent conduct is representative of whites in general.

Instead of pushing ahead with this unconstitutional, unnecessary, and damaging Bill, the Department should abandon it. The government should then concentrate its efforts on bringing the hate speech provisions in the Equality Act into line with the Constitution. Section 10 of that Act should be recast so that it falls squarely within the parameters permitted by Section 16(2). 'Free speech' defences modelled on those in Australian law should also be included in the Equality Act. These would expressly allow artistic expression, academic and scientific works, comments on matters of public interest, and fair and accurate reporting by the media. Liability should remain civil, rather than criminal, and penalties should focus on public apologies, community service, and the payment of damages in appropriate instances.

The government should also seek to build on the racial goodwill that is already so strongly evident across the country, as the IRR's field surveys have repeatedly shown. It should abandon its own ideological commitment to the national democratic revolution, for it has no mandate from the people of South Africa to destroy the current free market economy in order to take the country to a socialist and then communist future.

It should stop pretending that the reprehensible racial utterances and conduct of the view are representative of the many, when clearly this is not so. It should abandon its own racial

rhetoric, commit itself clearly to the constitutional value of non-racialism, jettison policies that depend on racial classification and racial preferencing – and set about promoting the growth, investment, and employment that are most needed to help the poor and disadvantaged get ahead.

South African Institute of Race Relations NPC **31st January 2017**

References

[1] Section 4(1)(a), Prevention and Combating of Hate Crimes and Hate Speech Bill of 2016
[2] Sections 1 and 4(1), Bill
[3] Section 4(1)(a)(i) and (ii), Bill
[4] Section 4(1)(a)(aa) and (bb)
[5] Section 4 (1), Bill
[6] Section 4(1)(b) and (c), Bill
[7] Section 4(2)(a) and (b), Bill
[8] Section 6(3), Bill
[9] *The New Age* 5 Jan 2016
[10] *Business Day* 6 January, *Sunday Independent* 19 January 2016
[11] James Myburgh, A descent into racial madness, Politicsweb.co.za, 14 January 2016; *The Star* 7, 8 January 2016
[12] *News24.com*, 6, 8 January, *The New Age* 18 January 2016
[13] *The Citizen* 13 January, *News24.com*, 5 January, *The Times* 6 January 2016; Statement issued by the Office of the ANC Chief Whip, 5 January 2016; Statements by Zizi Kodwa, ANC national spokesman, 5, 21 January 2016; *Sunday Times* 10 January 2016
[14] *The Citizen* 17 August 2016
[15] *Legalbrief* 15 June 2016
[16] 'Race Relations in South Africa, Reasons for Hope 2017', IRR, forthcoming in February 2017; 'Race Relations in South Africa: Reasons for Hope', IRR, March 2016; 'Race relations and racism in everyday life', *Fast Facts*, IRR, September 2001
[17] Ibid
[18] Ibid
[19] Section 9, Constitution
[20] Section 16(1), Constitution
[21] Section 16(2), Constitution
[22] Section 10, Equality Act
[23] Section 21, Equality Act
[24] *Saturday Star* 11 June 2016
[25] *ANC* v *Sparrow*, Equality Court, Umzinto district, Case No 01/16, 10 June 2016, p17
[26] Ibid, pp44, 46, 47
[27] Ibid, p47-p48
[28] Ibid, p53
[29] Ibid
[30] *The Citizen* 13 September 2016
[31] *Khumalo and others* v *Holomisa*, 2002 (8) BCLR 771 (CC)
[32] Anthea Jeffery, *The Rainbow Index*, 2010-2011, IRR, 2012, pp16-17
[33] Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, IRR, Johannesburg, 2010, p119
[34] Dario Milo, The timely demise of criminal defamation law', http://blogs.webberwentzel.com/2015/10/the-timely-demise-of-criminal-defamation-law
[35] *Hoho* v *The State* (493/05) 2008 ZASCA 98 17 September 2008
[36] Ibid, paras 26, 36
[37] Milo, op cit n34

[38] Ibid
[39] Ibid
[40] Dario Milo, The case against criminal defamation, http://mg.co.za/articles/2015-09-23-the-case-against-criminal-defamation
[41] *Mail &Guardian* 23 September 2015
[42] Snyman, Kallie, *Criminal Law*, 6th edition, LexisNexis South Africa, 2014, p463; Burchell, Jonathan, *Principles of Criminal Law*, Cape Town, Juta & Co. Ltd, 2013, 4ed, p632
[43] *State* v *Tanteli* 1975 2 SA 772 (T), at p775
[44] *The Citizen*, *The New Age*, *The Times* 13 September 2016
[45] *The New Age* 13 September 2016
[46] Mdumiseni Ntuli, Penny Sparrow judgment not proportional to harm she caused, Politicsweb.co.za, 13 September 2016
[47] Section 16(2), Constitution
[48] *R* v *Keegstra*, [1990] 3 SCR 697 (Canada)
[49] *The Times* 22 March 2016
[50] *Islamic Unity Convention* v *Independent Broadcasting Authority and others*, 2002 (4) SA 294 (CC), at paras 33-34
[51] Section 36(1), Constitution
[52] *State* v *Makwanyane*, 1995 (3) SA 391 (CC) at para 149
[53] *Dikoko* v *Mokhatla* 2006 (6) SA 235 (CC), at para 92
[54] *Phillips and another* v *Director Public Prosecutions*, 2002 (5) SA 549 (W) at p554
[55] *South African National Defence Union* v *Minister of Defence and another*, 1999 (4) SA 469 (CC), at para 7
[56] *State* v *Mamabolo*, 2001 (3) SA 409 (CC) at para 37
[57] *South African National Defence Union* v *Minister of Defence and another*, 1999 (4) SA 469 (CC) at para 8
[58] Section 4(1)(b), Bill
[59] *Khumalo and others* v *Holomisa*, 2002 (5) SA 401 (CC) at paras 22-24
[60] *Business Day* 15 January 2016
[61] D Meyerson, '"No Platform for Racists", What Should the View of Those on the Left Be?' (1990) 6 *South African Journal of Human Rights* 394, at 397
[62] Australian Human Rights Commission, *Racial Vilification law in Australia*, Race Discrimination Unit, 2002; Brooke Murphy, 'Nova Peris' case highlights shortcomings of Australian hate speech laws', 7 June 2016
[63] Australian Human Rights Commission, *Racial Vilification law in Australia*
[64] Ibid; Murphy, 'Nova Peris' case'
[65] Wikipedia; Sections 318, Criminal Code of Canada of 1985
[66] Section 319, Criminal Code of Canada of 1985
[67] Wikipedia
[68] Wikipedia
[69] Wikipedia
[70] Wikipedia
[71] Wikipedia; Voice Voix, America Alone
[72] Wikipedia, British Columbia Human Rights Tribunal
[73] Wikipedia, Canadian Human Rights Commission
[74] Wikipedia
[75] Wikipedia
[76] Wikipedia
[77] Wikipedia
[78] Milly Lwanga, 'Freedom of expression and harmful speech: the Kenyan situation', 2 September 2012
[79] Article 33(2), Constitution; Lwanga, ibid
[80] Section 13(1)(2), National Cohesion and Integration Act; Lwanga, ibid
[81] Section 62(1), NCI Act
[82] Section 62(2), NCI Act; Lwanga, ibid
[83] Article 19, 'Commentary on the Regulation of "Hate Speech" in Kenya', June 2010, at p17
[84] Nanjira Sambuli, *Defining the Hate Speech Crime*, Umati, http://ihub.co.ke/blogs/26327
[85] Ibid
[86] Ibid
[87] Ibid

[88] Njeri Kimani, 'Kenya: Hate speech as a political tool risks inciting more violence', *Daily Maverick*, 15 June 2016
[89] Section 3, Bill
[90] Sections 6(1), (2), Bill; see also Sections 276 and 297 of the Criminal Procure Act of 1977
[91] Section 6(2)(a)(b), Bill
[92] Hon John Jeffery MP (ANC), Address by the Deputy Minister of Justice and Constitutional Development at the Annual General Meeting of the Hate Crimes Working Group, Scalabrini Centre, Cape Town, 11 February 2015, p4
[93] Ibid
[94] Ibid
[95] *The Citizen* 16, 17 November 2016
[96] *The Citizen* 16 November, 9 December, *The Times* 17, 24 November 2016
[97] Preamble, Bill
[98] Article 4 (a)(b), International Convention on the Elimination of All Forms of Racial Discrimination
[99] University of Minnesota, Human Rights Library, Ratification of International Human Rights Treaties – South Africa
[100] Article 20, International Covenant on Civil and Political Rights of 1966
[101] Section 10, Equality Act
[102] *The Citizen* 23 June 2016
[103] *The Citizen* 23 June 2016, 17 January 2017
[104] *Legalbrief* 15 September 2016
[105] *Legalbrief* 27 June 2016
[106] *Business Day* 9 November 2016
[107] Velapi Khumalo gets final written warning, Gauteng government, Politicsweb.co.za, 21 June 2016
[108] *News24.com*, 5 November 2016
[109] *The Citizen* 16 January 2016
[110] *Legalbrief* 31 August 2016
[111] http://southafricatoday.net/south-africa-news, 24 October 2016
[112] *Legalbrief* 27 June 2016
[113] http://southafricatoday.net/south-africa-news, 24 October 2016
[114] Dave Steward, 'Excoriating whites not the way to go', www.iol.co.za, 17 January 2016; Zuma given till July 4 to respond to allegations of hate speech, *News24.com*, 16 June 2016
[115] Steward, 'Excoriating whites'
[116] *News24.com*, 16 June 2016
[117] Jacob Zuma, The DA's a poisonous snake, Politicsweb.co.za, 24 July 2016
[118] *The Citizen* 26 January 2016
[119] *Sunday Independent* 18 November 2001; Jeffery, *Chasing the Rainbow*, p174
[120] http://www.genocidewatch.org/images/The_Gruesome_Reality_of_Racist_South_Africa.pdf
[121] *The Citizen* 16 January 2017
[122] Jeffery, *Chasing the Rainbow*, pp289-290
[123] 'We need rand to fall': Is ANCYL's Collen Maine about to play games with the rand? *BizNews* 22 December 2016