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

SYNOPSIS

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.

Overview

The deputy minister of justice and constitutional development, John Jeffery, has indicated that the Bill is urgently required to counter a 'plethora' of racial incidents in 2016.

However, a comprehensive survey of public opinion on racial issues (commissioned by the IRR and carried out in September last year) shows that only 3.2% of South Africans – and

2.4% of blacks – identify racism as a serious unresolved problem. If problems of inequality and xenophobia are factored in as well, then 6.4% of all respondents and 5.9% of blacks list racism, in this broader sense, as a serious problem. Far more public concern is evident regarding joblessness, service delivery failures, corruption, poor education, and inadequate housing.

Responses to various other questions in the IRR field survey further confirm that race relations in the country are still generally sound. There is thus no looming racial crisis that could justify the Bill.

Moreover, the hate speech provisions in the Bill are wide enough to cover cartoons and other criticisms of the president and his cabinet, which 'insult' them 'bring them into ridicule'. Penalties for such 'offences' will include fines and lengthy jail terms: up to three years on a first conviction, up to ten years on a second.

In addition, journalists and other commentators who electronically distribute such cartoons or critical comments will face precisely the same penalties – even though they are not the authors and their aim is to inform the public.

These provisions are clearly in breach of the guarantee of free expression in Section 16 of the Constitution. This primarily identifies hate speech as that which 'incites violence'. Also included is speech which 'advocates hatred' on the basis of 'race, ethnicity, gender, or religion', provided that it also 'constitutes incitement to cause harm'.

The Bill's hate speech provisions go far beyond these parameters. Nor can they be justified under Section 36 of the Constitution, which allows guaranteed rights to be limited if various criteria are met. One such criterion is whether 'less restrictive' means can be found to fulfil the relevant societal objective. The Bill clearly does not satisfy this test. It could easily be more narrowly written, while South Africa already has a number of laws that can be used to curb hate speech.

As for the hate crime provisions in the Bill, these are too vaguely phrased to pass constitutional muster. They are also unnecessary. As the deputy minister himself has stressed, the courts already regard a racial motive as an aggravating factor in deciding on sentence for murder and other crimes. Perversely, the Bill could make it harder to sustain this approach.

Under the Bill, racial motivation will be an essential element in all hate crimes. This means the prosecution will have to prove such motive beyond a reasonable doubt before a court can convict. In practice, this will often be difficult to do. By contrast, a racial motive as an aggravating factor relevant to sentence has to be proved only on a balance of probabilities, which is an easier test.

Double standards in enforcement are also likely to apply. In the past year, existing hate speech rules have been strongly enforced against Penny Sparrow, who insultingly compared

black beach-goers to monkeys, and various whites who have used the 'k' word against blacks. By contrast, virtually no action has been taken against Velaphi Khumalo and other black South Africans for inciting violence against whites. (Mr Khumalo, for example, called in January 2016 whites to be 'hacked and killed like Jews' and for their children to be 'used as garden fertiliser'.)

The hate speech provisions will primarily be used against white South Africans, to help focus public attention on white racism and strengthen outrage against it. This, of course, will help lend credence to ANC assertions that white racism is the key reason for persistent poverty and inequality, rather than more salient factors such as low growth, bad schooling, and pervasive unemployment. At the same time, calls by black South Africans for whites to be attacked and killed are unlikely to evoke either prosecution or punishment under the Bill. This differential treatment could add to racial polarisation and raise the risk of racial confrontation.

In addition, much of the racial invective emanating from the ruling party, the Economic Freedom Fighters (EFF), 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. Yet this will cripple the economy, rather than provide effective redress for past injustice. The ideologues appear careless of the economic suffering this will cause, 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.

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. In doing so, it will help these ideologues to build perceptions that such abhorrent conduct is representative of whites in general.

The Bill is thus likely to be deeply damaging. It is also unconstitutional and unnecessary – and should be withdrawn and replaced by a very different approach.

The best way to reduce racial awareness and racial hostility is for the ANC unambiguously to embrace the Constitution's founding value of non-racialism. The ruling party should abandon its own racial invective, jettison policies that depend on racial classification and racial preferencing – and set about promoting the growth, investment, and employment most needed to help the poor and disadvantaged get ahead.

The 'hate speech' provisions in the Bill

The Bill's definition of 'the offence of hate speech' is extraordinarily wide. It covers any speech, song, cartoon, tweet, Facebook post, or e-mail which is intentionally 'insulting' to a

single person and shows a clear intention to 'ridicule' that person based on his or her 'occupation'. Other prohibited grounds range from race, gender, sex, inter-sex and sexual orientation to 'ethnic and social origin', religion, belief, language, disability, HIV status, and 'trade'.[1]

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'.[2] Hence, anyone who re-tweets a racist message will himself be guilty of hate speech and punishable by the same penalties as the author. So too will any journalist who electronically distributes an article that reproduces a racist message. That the journalist did not herself intend to 'insult' any person and thereby bring that person into 'into contempt or ridicule' will not be a defence.

Any person convicted of hate speech or the intentional electronic distribution of hate speech (among other things) will be liable on conviction for a first such 'offence' 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.[3] These penalties are extraordinarily severe, especially for offences which are so very broadly defined.

Stated rationale for these provisions

The stated rationale for the hate-speech provisions lies in the offensive racial comments made in 2016 by Penny Sparrow (who insultingly compared black beach-goers to monkeys) and a small number of other white South Africans. The Department claims that urgent intervention is thus needed against what the deputy minister of justice and constitutional development, John Jeffery, has described as 'the plethora of racial incidents happening on social media'.[4]

However, two recent opinion 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. These two surveys (together with a third which was conducted in 2001) canvassed the views of comprehensive and 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, a mere 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 as well, then 6.4% of all respondents and 5.9% of blacks listed racism, understood in this broad sense, as a serious problem. This is a small increase on the 4.5% of South Africans and 3.9% of blacks who had identified racism (again viewed in this broad way) as a key problem in September 2015. Far more concern was expressed about unemployment, inefficient service delivery, corruption, poor education, and inadequate housing.

The small increase in public concern about racism, as broadly viewed, that was evident in 2016 was probably a response to the heightened media 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%.[5]

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 expressed this view. 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.[6]

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 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 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%.[7]

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 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.[8] The Constitution also guarantees freedom of speech, 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'.[9]

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'.[10]

The Promotion of Equality and Prevention of Unfair Discrimination Act (the Equality Act) of 2000 already includes a general prohibition of hate speech. This states: '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'.[11] (Since this wording prima facie goes beyond what Section 16 allows, the way in which Section 10 should be revised is briefly outlined in due course.)

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, the Constitutional Court has ruled that the crucial test is whether publication is 'reasonable' in all the circumstances.[12]

Civil defamation rules already 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 its capacity (in the words of legal expert Dario Milo) to 'adapt itself to modern circumstances and technology'.[13]

South Africa also has common law rules making defamation a criminal offence in certain instances. Here, the prosecution must prove all elements of the offence, including the 'unlawfulness' of the communication. The degree of proof required, in keeping with general principles of criminal justice, is proof beyond a reasonable doubt.[14]

Also relevant is the common law of *crimen injuria*, which prohibits the unlawful, intentional, and serious violation of the dignity of another. The victim must be aware of the offending behaviour and must feel degraded or humiliated by it. In addition, the conduct in question must be serious enough as to offend the feelings of a reasonable person.[15]

Major penalties have already been imposed under these rules on those responsible for hurtful racial speech. Section 10 of the Equality Act has already been used, for example, to impose a R150 000 fine on Penny Sparrow. It has also been used to fine Wayne Swanepoel R100 000 for using the 'k' word during an argument.[16] *Crimen injuria* rules have also been used to convict:[17]

- Ms Sparrow, who was sentenced to a fine of R5 000 or 12 months' imprisonment, plus a further two years in jail suspended for five years; and
- Bruce Allen, who was sentenced to six months' of house arrest (among other things) and ordered to pay R8 000 to the woman he insulted by using the 'k' word.

As this brief review shows, South Africa already has various laws under which racial utterances are unlawful 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.

Unconstitutionality of the hate speech provisions

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'.[18] Speech is thus protected unless it:

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

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'.[19] The hatred expressed must be intentional, as it is not possible to have 'an emotion of an intense and extreme nature' on a negligent, accidental, or subconscious basis.

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 also on 13 others. That the recognised grounds in Section 16(2) are limited to four is not an oversight and cannot be ignored.

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, similar to what the common law of *crimen injuria* 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 provides

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 and identity and cannot be seen as analogous to 'race, ethnicity, gender or religion'.

Contrary to what the Constitution says, the Bill will thus allow speech to be prohibited and punished simply because, for example, 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. However, 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.

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:[20]

> '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 'justification criteria' in 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'.[21]

When these criteria are applied to the Bill, it does not meet the requirements for a valid limitation. First, the right which it limits is the right to free expression. This is a particularly important right, which the Constitutional Court has previously described as 'the lifeblood of an open and democratic society'.[22]

Second, the 'nature and extent' of Bill's provision are problematic, for the definition of hate speech is too wide while the penalties laid down are too severe. The Bill also criminalises the fair and accurate reporting of hate speech by journalists, civil society organisations, and other commentators. It 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.'[23]

Third, 'less restrictive' means to achieve the purpose of curtailing hate speech are readily available. Hate speech is already prohibited under the Equality Act and the common law rules on defamation and *crimen injuria*, as earlier described. Hence, there is no need for the Bill at all – and certainly not for a measure that strays so far from what Section 16 of the Constitution permits.

Hate speech laws in Australia, Canada and Kenya

The deputy minister has suggested that the Bill is modelled on hate speech rules in Australia, Canada, and Kenya. However, analysis of the relevant rules in these countries shows that the Bill is in fact very different from these laws.

In ***Australia***, the Racial Discrimination Act of 1975 makes it unlawful publicly to insult, humiliate, offend, or intimidate people or groups on the basis of their 'race, colour, or national or ethnic origin'. The list of prohibited grounds is short, while liability is civil rather than criminal. In addition, to ensure proper protection for freedom of expression, the Act sets out various circumstances in which the prohibition does not apply.[24]

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'.[25]

In ***Canada***, the Criminal Code of 1985 (in Section 318) makes the public dissemination of 'hate propaganda' a criminal offence punishable by imprisonment for up to five years. But it defines 'hate propaganda' narrowly as any communication that 'advocates or promotes genocide' against 'an identifiable group' distinguished by race, ethnicity, gender, religion, and a limited number of other characteristics.[26]

The Criminal Code (in Section 319) also prohibits the 'public incitement' or 'wilful promotion' of hatred against such groups, but only where this is 'likely to lead to breach of the peace' or public violence. Various free speech defences are also available. In addition,

prosecution under either section requires the consent of the Attorney-General, who is a cabinet minister. This ensures political accountability in the use of the law.[27]

The Canadian Human Rights Act of 1977 used to include a broad prohibition of hate speech in Section 13, but this provision was repealed in 2013. This came about after the Canadian Islamic Congress had used the provision to lay three complaints (in three separate forums) against MacLean's magazine for publishing articles warning against a growing threat from Islam to the West. The articles were based on Mark Steyn's best-selling book *America Alone*.

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. The matter stirred up so much public controversy about the wide reach and uneven enforcement of Section 13 that the provision was subsequently repealed.[28]

In ***Kenya***, against the background of the 2007/08 ethnic conflict which cost some 1 300 lives, the 2010 Constitution's guarantee of freedom of expression 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'. In addition, Section 13 of the National Cohesion and Integration (NCI) Act of 2008 prohibits 'threatening, abusing, or insulting words' that are 'intended to stir up ethnic hatred' or are likely to do so in all the circumstances.[29]

Section 62 of the NCI Act also makes it a criminal 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'. 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'. [30]

These provisions are much narrower than those in the Bill, especially as the prohibited grounds are confined to 'ethnicity or race'. Kenya's hate speech laws have nevertheless been criticised for going well beyond what binding international treaties allow. They have also been unevenly applied: a university student was recently jailed for two years for criticising the president and saying a particular ethnic group should be deported, whereas politicians have repeatedly escaped any such punishment for more inflammatory speech aimed at various ethnic groups.[31]

South Africa's international obligations

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which South Africa has ratified, requires the prohibition of 'propaganda…activities which promote and incite racial discrimination'. It also requires the prohibition of 'acts of violence against any race or group of another colour or ethnic origin', along with any incitement to such violence.[32]

The International Covenant on Civil and Political Rights of 1966 (ICCPR), which South Africa has also ratified, 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'.[33]

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, bars words that are 'hurtful' or 'harmful' on the basis of race and some 15 other grounds. These provisions are so broad that they in fact conflict with what these international treaties permit. Hence, 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. It should certainly not adopt this Bill, which strays even further from what these international agreements allow.

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' which is based the victim's race or other 'characteristics'. Essentially the same list of 20 characteristics is provided as in the hate speech clause. 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' and 'trade'.[34]

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 which it is authorised (within the limits of its jurisdiction) to hand down.[35]

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'.[36] This wording is distinctly odd, for it suggests that racial hatred may 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 the deputy justice minister 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'. 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.[37]

Requiring the prosecution to prove the commission of hate crimes will also pose various problems. All elements of the new crimes, including the racial (or other) 'prejudice, bias or intolerance' that 'motivated' the perpetrators, will then have to be proved beyond a reasonable doubt. But this standard of proof might in practice be difficult to meet, especially if the accused were to claim a different motivation. This might prevent harsher penalties from being handed down where the necessary motive cannot adequately be shown. By contrast, under current law, the existence of aggravating factors relevant to sentence needs to be proved only on the lower standard of a balance of probabilities.

Requiring the prosecution to prove the relevant motive beyond a reasonable doubt could also make trials longer and more complicated. This would put even more of a burden on the already struggling criminal justice system.

Ramifications of the Bill

There is a real risk that double standards will apply in the enforcement of both the hate speech and the hate crime 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 under the Equality Act and convicted of *crimen injuria*. Significant penalties have also been imposed on several other white South Africans for using the 'k' word or otherwise insulting black people. However, no such penalties have thus far been imposed on black South Africans for inciting violence against whites.

Velaphi Khumalo, who in January 2016 called for whites to be 'hacked and killed like Jews', has been given a final written warning by his employer, the Gauteng provincial administration, and has yet to be brought before an equality court. Little action has been taken against a University of Pretoria student, Luvuyo Menziwa, who called for 'a bazooka or AK47' so that he could kill white people. The HRC has also failed to act against President Jacob Zuma, who publicly sang the 'Kill the Boer' song in January 2012 and called on his cabinet to 'shoot them [whites] with the machine gun'.[38]

There is also a risk that the hate crimes provisions will not be applied even-handedly. Some commentators see farm attacks as motivated 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.)[39] 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.[40]

How willing then will the National Prosecuting Authority 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 rigorous 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 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 may 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. Yet this may often be difficult to do. Having to prove such motivation will also increase the complexity of many criminal trials and could further over-burden an already struggling criminal justice system.

The Bill is both unconstitutional and unnecessary, and should be abandoned rather than pursued. A fundamentally different approach is also required.

Instead of pushing ahead with the Bill, the Department should withdraw 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 on any matter of public interest. Liability should remain civil, rather than criminal. Enforcement should be even-handed, 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 shown. It should abandon its own ideological commitment to a national democratic revolution aimed at ushering in a socialist and then communist future. It should stop pretending that the reprehensible racial utterances and conduct of the few are representative of the many, when clearly this is not so. It should also abandon its own racial rhetoric, commit itself unambiguously 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

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[2] Section 4(1)(b) and (c), Bill
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