HELEN SUZMAN FOUNDATION

For attention : Mr V Ramaano
Per e-mail: vramaano@parliament.gov.za
Portfolio Committee: Justice and Correctional Services

14 February 2019

Submission in response to the Prevention and Combating of Hate Crimes and Hate Speech Bill
(Gazette No. 41543 of 29 March 2018)

Please find attached the submission by the Helen Suzman Foundation for your consideration.

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1. Introduction

The Helen Suzman Foundation ("HSF") welcomes the opportunity to make a submission on this Bill. We see this opportunity as a way of fostering critical, yet constructive, dialogue between civil society and government in terms of the legislative process.

Our mandate is to promote and defend South Africa's constitutional democracy. The HSF's interest in *The Prevention and Combatting of Hate Crimes and Hate Speech Bill* ('**the Bill**') centres on our commitment to our constitutional obligations of human dignity, the achievement of equality and the advancement of human rights and freedoms. Central to our work is the defence of the rule of law.

The HSF has previously made written submissions on this Bill to the Department of Justice and Constitutional Development ("**the Department**"). We would also like to make oral submissions during the public hearing phase of this Bill before the Portfolio Committee on Justice and Correctional Services ("**the Committee**").

The HSF strongly urges the Committee to reconsider the way in which the Bill seeks to define hate speech. The introduction of a new criminal offence with severe penalties creates uncertainty as to the role of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) and the Equality Courts, which favour civil remedies, save for exceptional circumstances where criminal prosecution or the common law could be invoked. This Bill positions criminal sanction as the first response to these infractions. Our view is that such an approach will not survive constitutional challenge.

2. How to read this submission

This submission deals with those concerns which have not been dealt with following our previous submission. In so far as new areas of concern arise from the current version of the Bill, we shall flag it appropriately. In our previous submission, we

provided an extensive analysis of the constitutional implications (particularly concerning the rule of law, and Sections 16 and 36 of the Constitution, PEPUDA, Crimen Injuria, and South Africa's international obligations. We do not repeat these inputs in this submission, but are willing to engage in a discussion on these issues at the public hearing phase. (*We annex our submission to the Department for ease of reference should the Committee wish to peruse these arguments beforehand. Certain arguments may be discounted in so far as they have been addressed in this iteration of the Bill.*)

3. The new iteration of the Bill

We commend the Department on its thorough re-examination of the Bill. Many of the concerns and recommendations made in our first submission have been adopted and incorporated in this new version of the Bill – especially concerning certain definitions and qualifiers in the previous iteration.

We see this preparedness to make such changes as evidence of the value of the public participation process. While we laud the positive steps taken by the Department to strengthen the Bill, several principle issues remain. Chief among these, is the creation of the criminal offence of hate speech and the attendant penalties. Our view is that the civil law and the Equality Court remain appropriate vehicles to adjudicate these matters.

4. Substantive comments on certain definitions and categories

4.1 '**harm**' as described makes reference to types of "harms" without defining the meaning of harm envisaged in application of the Bill. The definition as it stands is too vague and overly broad. The types of harm listed should be described as defined terms under this Section 1 of the Bill in order to create greater certainty and clarity.

We note the removal of "mental" harm as a category, and the inclusion of "emotional" and "social" harm. This amendment does not address our initial concern raised above. Moreover, the inclusion of two further categories only adds to the broadness of this definition, and compounds the uncertainty.

4.2 '**person**' should be included within Section 1 of the Bill. The definition should be inclusive of any individual, juristic persons, as well as the State. The omission of this defined term leaves room for ambiguity as to who can be held liable under Section 3 and Section 4 of the Bill.

4.3 '**victim**' as defined in the Bill is inclusive of juristic persons. The inclusion of juristic persons as victims, given the broad and vague phrasing used within the Bill, may be abused in such a way that critical or disapproving speech regarding the state, political parties and other such institutions may be stifled. The HSF maintains that such speech is vital in a democracy. The potential for abuse under this definition needs to be addressed.

The abovementioned concerns still stand as they have not been addressed in this iteration of the Bill.

4.4 **"Age"** is a new category introduced as a prohibited ground. Again, the intention to curb ageism and other forms of prejudice targeting either the elderly or youth is commendable. However, as category for the offence of hate speech, the opportunity for legal challenge on the basis of vagueness, broadness and unconstitutionality arises.

5. Comments on the offence of hate crime

5.1 Section 3(1) of the Bill should clarify the offence stipulated with the qualifier of **'criminal offence'**. The clause as currently worded creates ambiguity between civil and criminal offences.

5.2 We note the inclusion of several categories of hate crimes which we caution create onerous burdens of proof regarding motive. Moreover, they open the potential for abuse due to their lack of definition in the Bill, vagueness and broadness. These categories are: age, birth, colour, occupation or trade, political affiliation or conviction. We urge the Committee to consider whether some of these categories overlap with existing grounds, and if so, to remove them from Section 3(1).

6. Comments on the offence of hate speech

6.1 Our concern about the Bill stems from the manner in which it seeks to define 'hate speech' as a criminal offence in ways which go beyond the Constitution and PEPUDA. It sidesteps civil remedies in favour of criminal sanction. We acknowledge that while PEPUDA and even the common law may still be imperfect mechanisms to address prejudice and intolerance, they are still preferred to this Bill. We believe that civil remedies provide a more appropriate response to the regulation of hate speech – and advise that criminal prosecution should be the exception, and even then, only where incitement to commit violence can be proven.

6.2 Freedom of expression is a cornerstone right of our constitutional democracy. It is important to recognise the distinction between prohibited grounds and unprotected grounds of expression. The Constitution does not create offences in section 16(2), instead it sets out the limitation of freedoms described in section 16(1). Just as we have developed strong legislation, policies and jurisprudence to deal with unfair discrimination, so too can existing instruments be refined to confront hate speech.

6.3 In the previous iteration of the Bill, we sought clarity as to whether the required intention must be to commit hate speech itself, or if the required intention must merely be to distribute, display or make available material considered to constitute hate speech. In this iteration, we note the inclusion of the qualifier "that person knows" in sections 4(1)(b) and 4(1)(c) which we understand as the creation of a burden of proof. Notwithstanding our principle opposition to section 4 of the Bill, we welcome a clearer conception of intent.

6.4 We note the inclusion of defences contained within the new section 4(2). We view this as an appropriate application of Section 12 of PEPUDA.

7. Victim Impact Statement

7.1 In section 5(1) is unclear who is to be seen as an "associate" of a victim, and why such a person should form part of a victim impact statement.

7.2 We note that section 5(3) mandates a court to admit the victim impact statement as evidence, and should a court decide otherwise, it must show "good cause". This clause is likely to encounter legal challenge. The Constitutional Court in *Wayne Anthony Wickham v Magistrate, Stellenbosch and Others*[1] has held that the since the onus of proof in criminal matters rests on the state and not the victim, the victim may not dictate how a prosecutor may conduct the trial. Importantly, the Court opined at para 31 of the judgment:

> *What is clear from this text is that the exercise of the victim's right to place evidence before the court (either through a statement or by oral evidence) is wholly within the court's discretion.*

8. Penalties

8.1 We note the reduction in the period of imprisonment for subsequent conviction from 10 to 5 years. The HSF believes that imprisonment is an inappropriate sanction. The HSF favours the model in Section 21 of PEPUDA which sets out a variety of alternative civil remedies enabling the court to apply sanctions or make orders that would be appropriate to the specific set of facts before it.

9. Prevention of hate crimes and hate speech

9.1 While we support the State taking positive steps to initiate dialogue, promote awareness and drive education around issues of prejudice, intolerance and discrimination, the focus in sections 9(1) and 9(2)(a) are misplaced. This duty centres on prohibition instead of prevention. Chapter 5 of PEPUDA (to be proclaimed) provides a better model of the role of the State in the promotion of equality.

[1] [2016] ZACC 36

9.2 Sections 9(2)(d) and 9(3) mention "social context training" as mandatory components of the training of public officials as well as judicial officers. However, it is unclear what is meant by this term or envisaged through such training.

9. Conclusion

The relationship between law, morality and virtue is complicated. Laws are often seen as the answer to a real or perceived breakdown in the ideal social order. Expediency must not trump careful consideration of the impact of laws as their very creation can become inimical to their purported remedy.[2]

However well-intentioned the severity of such a sanction may be, the suppression of speech through the criminal law will not address the underlying causes of why such prejudices continue to stain the social fabric of our country. Remnants of South Africa's deeply painful past will not be undone through criminal sanction.

The Truth and Reconciliation Commission spoke to our need as a nation to find a way to move forward as a collective, and recognised that retribution would not be a salve to the emotional, psychological and physical suffering of those who had lost the most.

We sum up our objections to this Bill as follows:

1. Sections of the Bill are unconstitutional in so far as they seek to restrict freedom of expression to a greater extent than the Constitution does. If passed, these clauses would be vulnerable to legal challenge on this ground.

2. The Bill is so vaguely and broadly worded that any court would face considerable difficulties in applying it. Moreover, since the prohibitions created are incapable of general application, this creates the potential for specific victimisation.

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[2] See Hart, H.L.A, *Punishment and Responsibility*, 1968

3. The Bill remains insensitive to the distinction between harmful behaviour and offensive behaviour as it does not incorporate reasonable views on what should or should not be subject to legal sanction in either case.

4. The Bill is draconian in that it criminalizes much behaviour which, in our view, should not be criminalized.

5. The Bill cuts across existing legislation and institutions (PEPUDA, and the Equality Courts) and the common law (*crimen injuria*), and it fails to consider the relationships of its provisions to existing legislation and the common law.

South Africa has an existing legal framework for dealing with harmful and offensive behaviour. This Bill, if enacted, would damage this framework rather than improve it. The aim of this submission is not to, in any way, downplay the harmful impact that words, ideas – and indeed hate – can have on our collective journey towards a socially cohesive nation. Instead, its purpose is to encourage another way forward.

Legislating virtue will fail, and addressing an inherently social problem through criminal sanction will not achieve the goals sought in the Bill. We urge the Committee to reconsider the introduction of separate legislation over and above PEPUDA. In addition, we strongly oppose the penalty of criminal sanction as a means of dealing with the ills of prejudice, intolerance and hate.

Francis Antonie (Director)

Kimera Chetty (Legal Researcher)

We thank former researchers Chelsea Ramsden and Richard Griffin for their earlier work on the HSF's previous submission, the content of which informed the drafting of this submission.