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Promoting human rights and democracy through the media since 1993

Attention: Theresa Ross

Department of Justice and Constitutional Development

Email: hatecrimes@justice.co.za

31 January 2017

Dear Ms Ross

WRITTEN SUBMISSIONS ON THE PREVENTION AND COMBATTING OF HATE CRIMES AND HATE SPEECH BILL BY MEDIA MONITORING AFRICA

1. INTRODUCTION

1.1. Media Monitoring Africa (“MMA”) is an NGO that has been monitoring the media since 1993. We aim to promote the development of a free, fair, ethical and critical media culture in South Africa and the rest of the continent. The three key areas that MMA seeks to address through a human rights-based approach are, media ethics, media quality and media freedom. In the last 24 years we have conducted over 200 different media monitoring projects – all of which relate to key human rights issues, and at the same time to issues of media quality. MMA has, and continues to challenge media on a range of issues always with the overt objective of promoting human rights and democracy through the media. In this time MMA has also been one of the few civil society organisations that has consistently sought to deepen democracy and hold media accountable through engagement in policy and law making processes. MMA has made submissions to the DJCD on matters relating to Public Broadcasting, as well as numerous presentations to Parliaments Portfolio Committee on Communication as well as the

National Council of Provinces. In addition, MMA has made submissions to Broadcasters, the Press Council, the South African Human Rights Commission and the Independent Communications Authority of South Africa (ICASA). MMA also actively seeks to encourage ordinary citizens to engage in the process of holding media accountable through the various means available – all of which can be found on MMA's website. (www.mediamonitoringafrica.org)

1.2. A further unique element of MMA's work is focused on improving the portrayal and participation of Children and the media. Children, i.e. Citizens under 18, account for 35% of our population, yet only 6%¹ of our news. We also know that children are afforded special protection under our constitutions where section 28(2) states,

"A child's best interests are of paramount importance in every matter concerning the child."

While other elements of our work with children deal with media ethics and monitoring, since 2013 we have been working with children to ensure that not only are their views taken into consideration in the media, but also that they are able to have a say in matters that impact them directly in policy matters. As we move into an increasingly digital reality, not only are more younger people dealing with, and at the coal face of, some of the biggest challenges and opportunities of being digital citizens, but equally importantly they are the ones who will have to deal with the impact of the policies we, as adults, decide on today. As a result, we have worked with children to make their own policy submissions on the Revised Press Code, but also the Draft Film and Publications Amendment Bill. On the 20th of January we hosted a workshop with 55 children to help them develop their own submission on the Draft Hate crimes bill. We respectfully submit that the submission provides a unique and invaluable perspective and would request that the issues raised are considered with the same weight as other key stakeholders. We also respectfully

¹ See <http://bonabana.co.za/presentation-2016/> Last Accessed 30 January 2017

submit that we concur with the children's perspectives on issues relating to punishment of hate speech.

1.3. MMA thanks the Department of Justice and Constitutional Development (the DJCD) for inviting members of the public to make submissions on this important Draft Bill, namely the Prevention and Combatting of Hate Crimes and Hate Speech Bill (the Bill) and for undertaking publicly to ensure that all issues are fully aired and debated.

1.4. MMA formally requests the opportunity of making oral submissions at any hearings that the DJCD may hold in respect of the Bill.

1.5. For your ease of reference, the overview of these written submissions is as follows:

1.5.1. MMA Welcomes Certain of the Provisions of the Bill

1.5.2. South Africa's Obligations under the South African Constitution

1.5.3. International Good Practise on Hate Speech Regulation

1.5.4. Problematic Provisions of the Bill Requiring Urgent Amendment by the DJCD

1.5.5. Conclusion

2. MMA WELCOMES CERTAIN OF THE PROVISIONS OF THE BILL

2.1. MMA welcomes certain provisions of the Bill.

2.2. MMA is of the view that South Africa is leading the way in demonstrating how post-Colonial countries need to deal with regressive anti-social practises such as hate crimes and hate speech. However, it is critically important that this be done in accordance with the South African Constitution and international good practise as well as in a manner that does not result in conflicting legislative obligations and penalties.

2.3. MMA is of the view that South Africa is playing a critically important leadership role in this regard. Far too many countries on the Continent still do not deal with hate crimes and hate speech. By taking the step of criminalising hate crimes and hate speech, South Africa is demonstrating how law-making is a vital component of a developmental-focused and democratic political agenda that respects the rights of people to be free of such crimes and hate speech. This is to be warmly welcomed.

2.4. Nevertheless, there is no doubt that certain of the current provisions of the Bill are not progressive, do not accord with the Constitution and are out of step with South Africa's commitments to freedom of expression as contained in ratified African Union ("AU") Treaties, Conventions and Declarations and more generally in terms of international good practise. MMA is of the view that the DJCD must ensure that South Africa's leadership role on the Continent is not undermined by a few provisions in the Bill which can, with relatively minor amendments, make the passage of this Bill something that the country can be justly proud of.

3. RELEVANT PROVISIONS OF THE SOUTH AFRICAN CONSTITUTION

3.1. Before considering specific provisions of the Bill that are of concern to it, MMA wishes respectfully to refer the DJCD to the Constitutional imperatives regarding freedom of expression, particularly with regard to the regulation of hate speech.

3.2. Section 16 of the Constitution of the Republic of South Africa² is found in Chapter Two of the Constitution which is headed The Bill of Rights. Section 16 is headed Freedom of Expression. Section 16(1) provides as follows:

(1) Everyone has the right to freedom of expression, which includes –

(a) freedom of the press and other media;

(b) freedom to receive or impart information and ideas;

(c) freedom of artistic creativity; and

(d) academic freedom and freedom of scientific research.

3.3. Section 16(2) of the Constitution is an extremely interesting provision in the Constitution in that it spells out particular kinds of expression which are not encompassed in the right to freedom of expression set out in section 16(1) of the Constitution. It is the only right in the Constitution which is subject to a so-called “internal limitation” in this way. Section 16(2) provides as follows:

² Act 108 of 1996.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;

(b) incitement of imminent violence; or

(c) advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.

3.4. In the Media Law Handbook for Southern Africa³, the provisions of section 16(2) are analysed as follows:

It is important to understand the nature of the provisions of section 16(2). There is a misconception that the Constitution outlaws or makes illegal this kind of expression. This is not correct: what the Constitution does say is that these three types of expression do not fall within the right to freedom of expression. In other words, they are simply not constitutionally protected.

The effect of this is that the government may prohibit this kind of expression without needing to meet any of the requirements contained in the general limitations clause: because there is no right to make these three types of expression, there is no need to justify limitations on them.

3.5. MMA is also of this view. The effect of this then is that any expression that does not fit within the narrow confines of the wording of section 16(2) is constitutionally protected and any limitation thereon would be required to meet the tests contained in the general

³ Limpitlaw, J. (2012). *Media Law Handbook for Southern Africa* (Volume 1), Konrad Adenauer Stiftung Regional Media Programme, Johannesburg. At pg 219/20.

limitations clause set out in section 36(1) of the Constitution (our emphasis). Section 36(1) of the Constitution reads as follows:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:**
- (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.**

3.6. MMA thinks it is important to note that the hate speech provision in section 16(2)(c) of the Constitution relates to only four grounds, namely: race, ethnicity, gender or religion. This is particularly noteworthy when the right to equality, section 9 of the Constitution, specifically enumerates a wider list of grounds of unfair discrimination, namely: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Further the wording of section 9(4) uses the word “including” which means that these grounds of “unfair discrimination” set out above are not a closed list for the purposes of the right to equality and constitutional protection against unfair discrimination.

3.7. The effect of this is that it was very clear to the drafters of the Constitution that the definition of hate speech contained in section 16(2)(c) had to be carefully and narrowly circumscribed to avoid undermining the right to freedom of expression contained in section 16 (1) of the Constitution. It was no accident that hate speech contains only four grounds: race, ethnicity, gender or religion.

3.8. Besides the grounds, it is also important to note two other aspects of the so-called hate speech provisions in section 16(2)(c), namely:

3.8.1. the expression must amount to “advocacy of hatred” on the one or more of the four grounds set out above; and

3.8.2. the advocacy of hatred on one of more of the above grounds must constitute “incitement to cause harm”.

3.9. The effect of this is that merely hateful expression, even if on one of the four grounds specified in section 16(2)(c) will, without more, be insufficient to constitute advocacy of hatred that constitutes incitement to cause harm. Consequently, hate speech, as provided for in section 16(2)(c) goes far beyond mere expression of hatred, it has two additional *active* elements, namely: advocacy of hatred and incitement to cause harm (our emphasis). Consequently. In requiring these two active elements to be present, the Constitution makes it clear that for hate speech to meet the kind of expression referred to in section 16(2)(c) it must be more akin to action than to speech. In this regard:

3.9.1. “advocacy” is defined in the online Oxforddictionaries.com as: “public support for or recommendation of a particular cause or policy”⁴; and

3.9.2. “incitement” is defined in the online Oxforddictionaries.com as: “the action of provoking unlawful behaviour or urging someone to behave unlawfully”⁵.

3.10. Ultimately any expression that does not amount to public support for or recommendation of hatred based on race, ethnicity, gender or religion that provokes someone to behave unlawfully in causing harm will not constitute hate speech for the purposes of section 16(2)(c) of the Constitution. And if it does not constitute hate speech or any other expression provided for in section 16(2), namely propaganda for war or incitement of imminent violence, then it is protected expression in terms of section 16(1) of the Constitution and any limitation thereof must meet the requirements of the limitations clause set out in section 36(1) of the Constitution.

4. INTERNATIONAL GOOD PRACTISE ON HATE SPEECH REGULATION

4.1. A number of International Treaties, Conventions and Declarations, emanating from, among others, the United Nations and international freedom of expression NGOs give guidance on regulating hate speech. These documents are extremely useful and relevant to the matters that the DJCD is considering because they shed light on where the line between the hate speech and freedom of expression needs to be drawn.

⁴ <https://en.oxforddictionaries.com/definition/advocacy> Last accessed 26 January 2017.

⁵ <https://en.oxforddictionaries.com/definition/incitement> Last accessed 26 January 2017.

4.2. MMA sets out below, references to the provisions of a number of relevant international Treaties, Conventions and Statements that give guidance as to what the DJCD’s approach to the Bill ought to be in ensuring its compliance with these provisions:

4.2.1. The International Covenant on Civil and Political Rights, 1966 (“the ICCPR”)

4.2.1.1. The ICCPR was originally adopted by the United Nations (UN) in 1966 and came into force in 1976⁶. South Africa ratified the ICCPR on 10 December 1998 and it came into force in terms of South African law on 10 March 1999⁷.

4.2.1.2. From the point of view of the Bill, MMA wishes to highlight Article 20(2) of the ICCPR which provides that: “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”⁸.

4.2.2. The International Convention on the Elimination of all Forms of Racial Discrimination, 1965 (“the Convention on the Elimination of Racial Discrimination”)

⁶ https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights#References Last Accessed 26 January 2017.

⁷ https://en.wikipedia.org/wiki/International_Covenant_on_Civil_and_Political_Rights#References Last Accessed 26 January 2017.

⁸ <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> Last Accessed 26 January 2017.

4.2.2.1. The Convention on the Elimination of Racial Discrimination was adopted by the UN in 1965 and came into force in 1969⁹. South Africa ratified the Convention on the Elimination of Racial Discrimination in 1998¹⁰.

4.2.2.2. Article 4(a) of the Convention on the Elimination of Racial Discrimination provides in its relevant part: “[s]tates parties condemn all propaganda...which...[is] based on ideas or series of superiority of one race or group of one colour or ethnic origin, or which attempt to justify promoting racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to... such discrimination and to this end...[s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin...”¹¹.

4.2.3. World Summit on the information Society: Geneva principles, 2003 (“the WSIS Geneva Principles”)

4.2.3.1. The WSIS Geneva Principles¹² were adopted in 2003 at the world Summit on the information Society held by the UN in conjunction with the International Telecommunications Union.

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https://en.wikipedia.org/wiki/International_Convention_on_the_Elimination_of_All_Forms_of_Racial_Discrimination Last Accessed 26 January 2017.

¹⁰ <http://indicators.ohchr.org/> Last Accessed 26 January 2017.

¹¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> Last Accessed 26 January 2017.

¹² <http://www.itu.int/net/wsis/docs/geneva/official/dop.html> Last Accessed 26 January 2017.

4.2.3.2. Article 59 of the WSIS Geneva Principles provides: “[a]ll actors in the Information Society should take appropriate actions and preventive measures, as determined by law, against abusive uses of ICT’s, such as illegal and other acts motivated by racism, racial discrimination, xenophobia and related intolerance, hatred, violence...”¹³.

4.2.4. UNESCO Media Development Indicators, 2008:

4.2.4.1. UNESCO’s International Programme for the Development of Communications published, in 2008, “Media Development Indicators: A Framework for Assessing Media Development”¹⁴ (the UNESCO Media Development Indicators).

4.2.4.2. The UNESCO Media Development Indicators specify that “restrictions upon freedom of expression... based on... hate speech... should be clear and narrowly defined in law and justifiable as necessary in a democratic society in accordance with international law and that such laws should be subject to a public interest override where appropriate”.

¹³ Ibid.

¹⁴ <http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/media-development-indicators-a-framework-for-assessing-media-development//>
Last Accessed 26 January 2017.

4.2.5. Camden Principles On Freedom of Expression and Equality, 2009:

4.2.5.1. The Camden Principles on Freedom and Expression and Equality (“the Camden Principles”)¹⁵ were prepared by Article 19 on the basis of an international consultative conference held in 2009 to discuss freedom of expression and equality issues. They aim to promote greater consensus about the proper relationship between freedom of expression and the promotion of equality.

4.2.5.2. Principle 12 of the Camden Principles provides that states “should adopt legislation prohibiting any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

4.3. MMA is of the view that the key principles that emerge from the above International Treaties, or good practice guidelines and which accord with the South African Constitution are as follows, namely that:

4.3.1. hate speech ought to be defined as the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence;

4.3.2. dissemination of hate speech should be an offence, subject to a public interest override; and

¹⁵ <https://www.article19.org/data/files/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf> Last Accessed 26 January 2017

4.3.3. preventing hate speech is a legitimate ground for regulating or even prohibiting expression by the media, subject to a public interest override.

5. PROBLEMATIC PROVISIONS OF THE BILL REQUIRING URGENT AMENDMENT BY THE DJCD

5.1. As MMA has stated previously, we are generally excited by and welcoming of many of the provisions of the Bill as they are in line with international good practice and, in particular, with UN recommendations as expressed in its Conventions, Covenants and Declarations. We have no doubt that this Bill could herald a decisive break from our terrible history of hate speech and hate crimes, including the international crime against humanity, Apartheid. In this regard we think it instructive to note the following remarks of Chief Justice Mogoeng in the case of *SARS vs the CCMA and Others*¹⁶:

My observation is that very serious racial incidents hardly ever trigger a fitting the firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies.

It is clear that the DJCD is taking the lead in trying to rid South Africa of the scourge of hate crimes and hate speech and for that we welcome the Bill.

¹⁶ 2017 (1) SA 549 (CC) at paragraph [9].

5.2. However, where MMA does have concerns about the Bill, these concerns are not trifling. They are serious concerns which unaddressed could result in the passage of legislation which is:

5.2.1. unconstitutional; and

5.2.2. out of step with international good practise requirements.

5.3. Problematic Provisions of the Bill: Offence of Hate Crime

5.3.1. The Bill contains a proposed section 3(1) which purports to set out a list of characteristics or perceived characteristics which form the basis of a hate crime. While these are extensive (there are seventeen characteristics set out in section 3(1)(a) – (q), certain of the grounds listed in respect of unfair discrimination in section 9(3) of the Constitution are not provided for.

5.3.2. MMA is of the respectful view that all of the grounds listed in section 9(3) Constitution in respect of unfair discrimination ought to be included in the list of characteristics that could form the basis of a hate crime.

5.3.3. Consequently, MMA would suggest including the following sub-sections as additional characteristics that could form the basis of a hate crime in proposed section 3(1) of the Bill.

(r) pregnancy;

(s) marital status;

(t) age; or

(u) conscience.

This would require the consequential deletion of the word **[or]** which is currently positioned at the end of Section 3(1)(p) of the Bill.

5.4. Problematic Provisions of the Bill: Offence of Hate Speech

5.4.1. The Bill contains a proposed section 4(1) which purports to create a new criminal offence of hate speech.

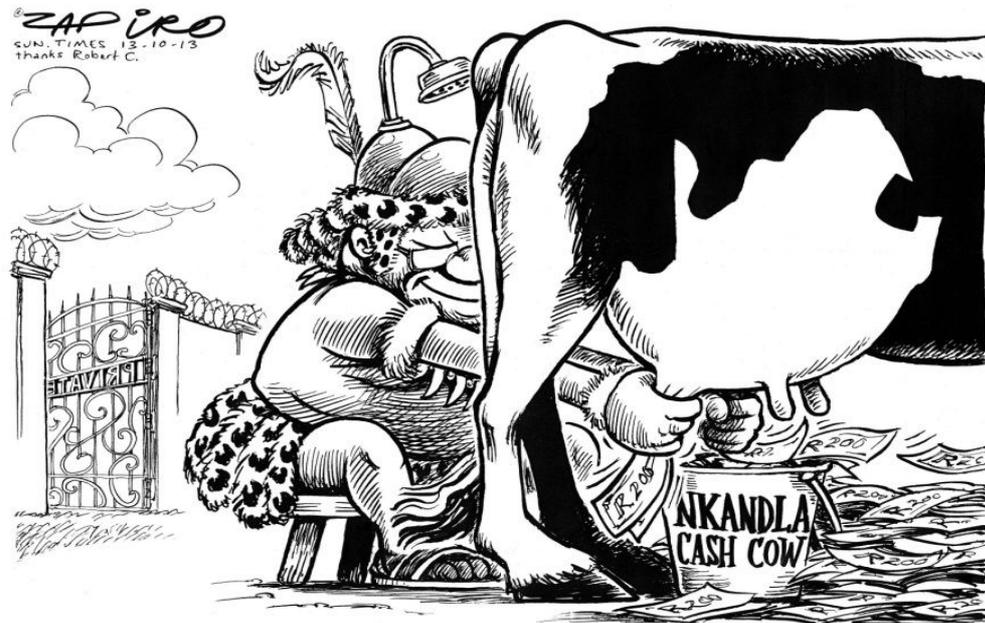
5.4.2. MMA is of the respectful view that this entire section needs to be completely re-thought revised and re-worked as is set out below.

5.4.3. It is clear that the definition of hate speech in proposed section 4(1)(a) is broad, indeed sprawling, and goes far beyond the narrowly-tailored definition contained in section 16(1)(c) of the Constitution. Consequently, the criminalisation of hate speech as provided for in this proposed section 4(1)(a) of the Bill constitutes a significant limitation on the right to freedom of expression which is protected under section 16(1) of the Constitution. Further consequently, section 4(1)(a)

would therefore have to meet all of the requirements of the limitations clause contained in section 36(1) of the Constitution.

5.4.4. It is also clear that the definition is so broad that it could easily cover extremely benign indeed even important speech in the public interest. MMA is of the view that the following illustration of the over-breadth of the definition of hate speech contained in section 4(1) might be instructive to the DJCD.

5.4.5. This is a cartoon by the cartoonist Zapiro¹⁷: [See next page]



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https://www.google.co.za/search?q=Zapiro+cash+cow+cartoon&espv=2&biw=775&bih=429&tbm=isch&imgil=p5_8CvZ- -9TBM%253A%253BFh2-GJtHvTiPeM%253Bhttp%25253A%25252F%25252Fmg.co.za%25252Fcartoon%25252F2013-10-14-zumas-nkandla-cash-cow%25252F&source=iu&pf=m&fir=p5_8CvZ- -9TBM%253A%252CFh2-GJtHvTiPeM%252C_&usg=__mdbG20XwFQpVj4GNefW8E2u7k0c%3D&ved=0ahUKEwif6sPH9N_RAhVLIcAKHXhyAxEQyicllw&ei=0fiJWN-9N8vCgAb45I2IAQ#imgrc=p5_8CvZ- -9TBM%3A Last Accessed 26 January 2017.

5.4.6. Unbelievably, the communication of the above cartoon would fall within the definition of the criminal offence of hate speech in terms of the proposed section 4(1)(a) of the Bill. In this regard:

5.4.6.1. Zapiro is *intentionally*, by means of *communication*, *communicating to one or more persons in a manner that*¹⁸...

5.4.6.2. is *insulting towards a person*¹⁹ (President Zuma);

and which

5.4.6.3. *demonstrates a clear intention, having regard to all the circumstances to...bring into contempt or ridicule, a person* (in this instance Mr Zuma) *based on... occupation or trade*²⁰ (his job as President). **[The italicized words are taken directly from the wording of the offence of Hate Speech in section 4(1) of the Bill];** and

5.4.6.4. section 4(1)(a) of the Bill is fatally defective because it contains no exceptions, such as, for example, for *bona fide* scientific, literary and artistic expression, *bona fide* documentaries or deals with matters in the public interest, a number of which exceptions (namely artistic expression and the public interest exception) would apply to the above cartoon.

¹⁸ Section 4(1)(a) of the Bill.

¹⁹ Section 4(1)(a)(ii) of the Bill.

²⁰ Section 4(1)(a)(bb) of the Bill.

5.4.7. The penalty facing Zapiro for a cartoon such as this would be a fine, imprisonment for a period not exceeding three years, or to both such fine and imprisonment for a first offence in terms of section 6(3)(a) of the Bill. Further, should Zapiro produce similar cartoons then the penalty for any subsequent conviction is a fine, a period of imprisonment for a period not exceeding 10 years, or to both such fine and imprisonment in terms of section 6(3)(b) of the Bill. Theoretically, a week (7 days) of Zapiro cartoons such as this could land Zapiro in jail for 63 years.

5.4.8. It goes without saying that no court in the land would countenance such a sentence.

5.4.9. Besides the lack of congruency between the definitions of hate speech contained in section 16(2)(c) of the Constitution and section 4(1)(a) of the Hate Speech Bill, there is also a lack of congruency between the provisions of section 4(1)(a) of the Bill and other hate-speech related provisions in existing legislation. In this regard:

5.4.9.1. The Films and Publications Act²¹ (“the FPA”) makes it an offence to distribute a publication, game a film that has been classified as having been “refused classification” by a classification committee²². The punishment is a fine, up to five years imprisonment or both such fine and imprisonment²³.

²¹ Act 65 of 1996.

²² Section 24A(2)(b) of the FPA.

²³ Section 24A(2) of the FPA.

- 5.4.9.2. Section 16(4)(a)(ii) read with section 18(3)(a)(ii) of the FPA requires a classification committee to refuse classification to any public or film that “advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm”. Significantly however, the FPA contains a number of exceptions, namely: “unless the publication, film or game is “judged within context... a bona fide documentary or is a publication[, game or film] of scientific, literary or artistic merit or is on a matter of public interest”²⁴.
- 5.4.9.3. The definition of an “identifiable group characteristic” contain in section 1 of the FPA is: “a characteristic that defines an individual as a member of a group identified by race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and nationality”. It is noteworthy that except for the inclusion of “nationality”, this FPA list of identifiable group characteristics is identical to the listed grounds in respect of unfair discrimination contained in section 9(3) of the Constitution.
- 5.4.9.4. If one puts the two definitions of the offence of distributing hate speech together, that is that of the FPA and the Bill, it is clear that if one was wanting to classify a publication, film or game which advocated hatred towards a person with the demonstrable intention to incite others to harm that person on the basis of HIV Status, albinism or his or her occupation or trade, such a publication, film or game could be classified under section 16 or 18 of the PFA and it would not be an offence to distribute same. However, the publication thereof (even as classified by a classification

²⁴ Section 16(4)(a)(ii) and section 18(3)(a)(ii) of the FPA.

committee) would be a criminal offence in terms of proposed section 4(1) the Bill. Conversely, if one was wanting to classify a publication, film or game which advocated hatred towards a person with the demonstrable intention to incite others to harm that person on the basis of pregnancy, marital status, age or conscience, such a publication, film or game could not be classified under section 16 or 18 of the PFA and it would be an offence to distribute same under section 24(2)(b) of the FPA. However, the publication thereof would not be a criminal offence in terms of the hate speech provisions contained in proposed section 4(1)(a) of the Bill.

5.4.10. We are of the view that the absurdities and very real public confusion that would arise as a result of the application of the criminal offences provisions of these two pieces of incongruent legislation would give rise to endless litigation and are clearly not in the public interest.

5.4.11. In MMA's respectful view, what is required in respect of hate speech is to criminalise only that kind of expression that falls squarely within section 16(2)(c) of the Constitution, as that expression is not protected under the right to freedom of expression and can be limited by the state without it needing to meeting the limitations clause requirements of section 36(1) of the Constitution.

5.4.12. We are also of the view that section 4(1)(a) of the Bill is inherently problematic because it is so broad that vast amounts of expression could potentially be criminalised. Besides the damage that is done to the Constitutional right to freedom of expression by this, it would also put the criminal justice system under intolerable strain. In this regard:

5.4.12.1. As the DJCD already knows, South Africa has a serious crime problem and our National Prosecuting Authority already struggles successfully to prosecute physical crimes such as: assault, murder, rape, etc. We are of the view that the crime of hate speech, if the definition thereof is left as overbroad as it currently is, will simply be ignored by the criminal justice system because it will be overwhelmed. This in turn, invites contempt by the public of the criminal justice system and of the criminalisation of such expression as it is likely that vast amounts of such expression will never even be investigated let alone actually prosecuted.

5.4.12.2. And this is the nub of the problem: racism, patriarchy, ethnic and religious bigotry are, at root, learnt behaviours – inculcated patterns of discrimination, prejudice and antagonism. Inculcated and learnt in families, among friends and in broader social networks. These are social problems. Very few social problems are dealt with effectively by criminalisation and so it is here.

5.4.12.3. What will happen if we have an overbroad definition of the crime of hate speech (as is proposed in section 4(1)(a) of the Bill) is that those who are bigoted will hide their identities to avoid detection. This has a number of social implications:

1. First, it reduces responsibility for the expression. If people know that their Facebook posts, tweets, blogs etc. are hidden behind an

anonymous “person” they are likely to express themselves more recklessly, thoughtlessly, aggressively.

2. Secondly, this severely undermines the ability of law enforcement agencies to actually investigate particularly online expression. Having to determine the genuine identity of someone hiding behind anonymous names, pictures etc. makes it extremely difficult to uncover a person’s genuine identity.
3. Third, it undermines the process of talking, of communicating frankly, of genuinely sharing ideas and concerns over particular expression. It inhibits our ability to learn from each other. The Penny Sparrow case is a good example. The social opprobrium that Penny Sparrow’s racist diatribe brought down upon her was, undoubtedly, a much more effective “punishment” than the paltry fine (which remains unpaid, we understand) she was given. It was only effective because society knew who she was... we could, because we knew her real name, job etc., find her address, her phone number, her place of work and her family members. The outpouring of anger and grief was, clearly, a learning lesson not just for her, her relatives and friends but also for the South Africa nation as a whole.
4. Given the legacy of apartheid, it is imperative for us as a country to be able to engage openly with each other. We have to be able to challenge and confront our bigotry personally, and face to face. Criminalising expression, like criminalising thought, simply does not work. It just drives bigotry underground, it hides it behind fake social

media handles and, ultimately, it shuts down learning opportunities and opportunities for racist frameworks to be genuinely challenged and changed. The personal transformational possibilities become severely curtailed.

5.4.13. As a result of all of the above arguments, MMA is of the respectful view that the definition of the crime of hate speech contained in section 4(1)(a) ought to be significantly amended to tailor it to the wording of our supreme law, the Constitution. In our view only a narrow definition of hate speech is an appropriate vehicle for the criminal sanction that the Bill aims to achieve. Consequently, MMA is of the view that section 4(1)(a) must be amended to read as follows:

Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that advocates hatred toward any other person or group of persons and which demonstrates a clear intention, having regard to all the circumstances, to incite others to harm any person or group of persons, whether or not such person or group of persons is harmed, based on race, ethnicity, gender or religion, is guilty of the offence of hate speech, unless the communication is, judged within context, a *bona fide* documentary or is a communication of scientific, literary or artistic merit or is on a matter of public interest.

5.4.14. If the above amendment to proposed section 4(1)(a) of the Bill was to be effected, then MMA would have no problems with the existing provisions of section 4(1)(b) and (c), and section 4(2). Further, MMA would see no need then for the provisions of section 4(3) as the crime would be sufficiently limited to warrant prosecution

without the authorisation of the Director of Public Prosecutions, something that would contribute to the smooth running of the criminal justice system.

6. CONCLUSION:

6.1. MMA thanks the DJCD for this opportunity to submit written representations on the Bill and reiterates its request that it be allowed to present oral submissions at any DJCD hearings on the Bill which the DJCD may hold.

6.2. MMA is of the view that the Bill is an excellent step on the long road to ridding ourselves of the scourge of hate crimes and hate speech that has bedevilled our country given its history of Colonialism and Apartheid. However, there is no doubt that the Bill, as it currently stands, is fundamentally and fatally flawed. It is out of step with international good practise, is not in accordance with South Africa's constitutional provisions and will not withstand Constitutional scrutiny by our courts.

6.3. In these submissions, MMA has proposed expanding the grounds for designating a crime to be a hate crime in terms of section 3(1) of the Bill. It does so because this is where bigotry ends up... designating people as "other", as "lesser" and as deserving of violence and hateful action. In our view all grounds of unlawful and unfair discrimination provided for in section 9(3) of the Constitution must be included in the definition of a hate crime and we agree with all the other additional grounds that the DJCD has seen fit to include in the Bill.

6.4. On the other hand, MMA has proposed a new definition of hate speech to significantly narrow the proposed definition of definition of hate speech in section 4(1)(a) of the Bill. It does this because of the need to strike the appropriate, Constitutionally-endorsed, balance between hate speech and freedom of expression.

6.5. MMA's proposed changes require no major policy reconsiderations and do no damage to coherence of the Bill, and would transform the Bill into one that South Africa can be justly proud of. If the DJCD makes the amendments suggested by MMA herein, MMA is of the view that the Bill will find that illusive balance between protecting the public from crimes inspired by hatred and protecting its interest in freedom of expression the need to balance this with the public interest in ensuring that people are free from hate speech as defined in the Constitution.

6.6. Please do not hesitate to contact us should you have any queries or require any further information.

Yours Faithfully

A handwritten signature in black ink, appearing to read 'W. Bird', with a large, sweeping underline that extends across the width of the signature.

William Bird

Director

Media Monitoring Africa