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Promoting human rights and democracy through the media since 1993

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TO: SELECT COMMITTEE ON SECURITY AND JUSTICE
C/O: Hon. S Shaikh
E-mail: HatecrimesBill9B-2018@parliament.gov.za

SUBMISSION BY MEDIA MONITORING AFRICA:

PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9B – 2018]

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INTRODUCTION

1. Media Monitoring Africa (“**MMA**”) welcomes the opportunity to provide this submission to the Select Committee on Security and Justice on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018] (“**the Bill**”). We recognise the Bill arises in the context of South Africa’s deep and lasting injustices, which cut along the contours of social difference, including racism, patriarchy, classism, ableism, xenophobia, homophobia, transphobia, and other ills. It is accordingly important for South Africa to have a clear and effective legal framework for addressing hate crimes and hate speech while ensuring appropriate protections for freedom of expression and other constitutional rights.
2. We made submissions on previous drafts of the Bill published in 2017¹ and 2021. We note a range of positive changes in the drafting to address the concerns that the Bill was overbroad, vague, and could have a chilling effect on legitimate speech that is vital to democratic exchange. However, we remain concerned that aspects of the Bill require further adjustment to ensure its constitutionality and to ensure the Bill is fit for purpose as an effective policy response to the scourge of hate crime and hate speech. We accordingly make this submission which is structured as follows:
 - 2.1. **First**, an overview of MMA.
 - 2.2. **Second**, an overview of the domestic and international legal framework.
 - 2.3. **Third**, our submissions on the Bill’s provisions on hate speech.
 - 2.4. **Fourth**, our submissions on the Bill’s provisions on hate crimes.
 - 2.5. **Fifth**, additional recommendations.
3. These are dealt with in turn below.

OVERVIEW OF MEDIA MONITORING AFRICA

4. MMA is a not-for-profit organisation, based in South Africa, which has been monitoring the media since 1993. MMA’s objectives are to promote the development of a free, fair, ethical, and critical media culture in South Africa and the rest of the continent. Through our work, we engage in a range of legislative, litigious, and advocacy processes relating to the triad of information rights, which include the right to privacy, freedom of expression and access to information.
5. In the last 30 years, MMA’s work has consistently related to key human rights issues with the objective of promoting democracy, and human rights, and encouraging a just and fair society. MMA has played and continues to play an active role in media monitoring and seeks

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

to proactively engage with media, civil society organisations, state institutions and citizens, and in doing so advocates for freedom of expression and the free flow of information to the public on matters of public interest, within responsible limits.

6. MMA has engaged in extensive work in navigating the appropriate balance between freedom of expression and other competing rights and interests, as is evidenced by our involvement in a range of policy, legislative, and advocacy processes. This includes participating as an amicus curiae in *Qwelane*,² and *Masuku*.³ In addition, and as noted above, MMA has been an active participant in the law reform process pertaining to this Bill, having prepared submissions both in its own name and on behalf of children from its Empowering Children and the Media Project.⁴ Through its various litigious and legislative submissions, MMA has promoted the constitutional rights to equality, dignity, freedom of expression, and access to information, as well as children's rights.
7. In addition, MMA is actively working to address online harms, such as disinformation, hate speech, harassment, and incitement to violence. MMA launched the Real411 platform, which is a publicly accessible platform that enables members of the public to report concerns of different online harms.⁵ The platform seeks to strike an appropriate balance between the right to freedom of expression and the need to tackle harmful content that is disseminated across online platforms. In addition, through its work with the Real411 platform, MMA is also working with the South African Human Rights Commission to help combat hate speech.
8. For more information about MMA, please visit [mediamonitoringafrica.org](https://www.mediamonitoringafrica.org).

THE LEGAL FRAMEWORK

Domestic Law

9. The Constitution of South Africa, 1996 provides the key obligations which this Bill must harmonise: the rights of everyone to equality, dignity, freedom from unfair discrimination, and freedom of expression.
10. While the right to freedom of expression is protected in section 16 of the Constitution, section 16(2) provides that this right does not extend to:
 - “(a) propaganda for war;
 - (b) incitement of imminent violence; or
 - (c) advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm.”

² *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC).

³ *South African Human Rights Commission on behalf of South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC).

⁴ Above in 1 and MMA, 'Submission on behalf of children from its Empowering Children and the Media Project' (2017).

⁵ Accessible at <https://www.real411.org/>.

11. Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (“**the Equality Act**”) – as interpreted and amended by the Constitutional Court in *Qwelane* – places a civil prohibition on the publication, advocacy and communication of words (and other forms of expression) against any person, based on one or more of the prohibited grounds, which may reasonably be construed to demonstrate a clear intention to be harmful or to incite harm, and to promote or propagate hatred. The Equality Act provides for several civil remedies to be granted by special Equality Courts,⁶ and notes that the Court may refer a case to the Director of Public Prosecutions for the institution of criminal proceedings in terms of the common law or relevant legislation.
12. Certain kinds of speech that may overlap with hate speech are already criminalised, by for example:
 - 12.1. the common-law offences of *crimen injuria*, incitement of public violence, or incitement to commit any other common law crime;
 - 12.2. intimidation under the Intimidation Act 72 of 1982, and incitement to commit any serious offence under the Riotous Assemblies Act 17 of 1956 (as amended by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another*);⁷ and
 - 12.3. in addition, incitement to commit genocide or crimes against humanity, under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
13. More recently, and most significantly, hate speech, by that name, has been comprehensively criminalised in the Films and Publications Act 65 of 1996 (as amended by Act 11 of 2019, which came into force on 1 March 2022), in a variety of different ways:
 - 13.1. Section 24G provides (with our emphasis):

“Any person who knowingly distributes in any medium, including the internet and social media any film, game or publication which amounts to propaganda for war, incites imminent violence, or advocates hate speech, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150 000 or to imprisonment for a period not exceeding two years or to both a fine and such imprisonment.”⁸
 - 13.2. As to the definition of “hate speech” section 1 provides that:

“‘hate speech’ includes any speech, gesture, conduct, writing, display or publication, made using the internet, which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to

⁶ Section 21(2).

⁷ *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25.

⁸ In this regard, section defines “publication” very broadly: “

be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group.”⁹

13.3. Publishing “hate speech” is also criminalised by section 24A(2), which provides:

“Any person who knowingly broadcasts, distributes, exhibits in public, offers for sale or hire or advertises for exhibition, sale or hire any film, game or a publication referred to in section 16(2) which has, except with respect to broadcasters that are subject to regulation by the Independent Communication Authority of South Africa and except with regard to a publication contemplated in section 16(1)¹⁰—

- (a) not been classified by the Board;
- (b) been classified as a “refused classification”; or
- (c) been classified as “XX” or would have been so classified had it been submitted for classification,

shall be guilty of an offence and liable, upon conviction, to a fine not exceeding R500 000 or to imprisonment for a period not exceeding five years or to both a fine and such imprisonment.”

13.4. The referenced section 16(2) provides:

“Any person, except the publisher of a publication contemplated in subsection (1), who, for distribution or exhibition in the Republic creates, produces, publishes or advertises any publication that ... (d) advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm and imminent violence, shall submit, in the prescribed manner, such publication for examination and classification to the Board before such publication is distributed, exhibited, offered or advertised for distribution or exhibition.”

13.5. And section 16(4)(a) provides as follows:

“The classification committee shall ... (a) classify that publication as a “refused classification” if the publication contains ... (ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials.”

⁹ In turn, section 1 defines “identifiable group characteristic” as “a characteristic that identifies 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”.

¹⁰ “Any person may request, in the prescribed manner, that a publication, other than a publication that is published by a member of the Press Council of South Africa or an advertisement that falls under the jurisdiction of the Advertising Standards Authority of South Africa, which is being distributed in the Republic, be classified in terms of this section.”

14. Although these provisions are somewhat convoluted, they demonstrate that, as of 1 March 2022, South Africa has had a comprehensive criminal prohibition on hate speech.

International law

15. South Africa is bound by several international and regional instruments which guide freedom of expression and the prohibition of hate speech.

15.1. The International Covenant on Civil and Political Rights

- 15.1.1. The United Nations adopted the International Covenant on Civil and Political Rights (“**the ICCPR**”) in 1966,¹¹ and South Africa ratified it in 1998.¹² Article 20(2) of the ICCPR provides that “[a]ny advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence shall be prohibited by law.”
- 15.1.2. It is important to note that although states are obliged to prohibit these forms of expression, they are not obliged to *criminalise* them.
- 15.1.3. Article 19(3) of the ICCPR states that free expression may “be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.” The UN Special Rapporteur on freedom of expression has interpreted this provision to mean that any limitations on freedom of expression must meet three conditions: legality, legitimacy, and necessity and proportionality.¹³ Of relevance here is necessity and proportionality, which requires that a limitation on speech must be “the least restrictive means” to achieve the intended legitimate purpose.

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

- 15.2.1. The United Nations adopted the Convention on the Elimination of Racial Discrimination in 1965, and South Africa ratified the Convention in 1998.
- 15.2.2. Article 4(a) of the Convention provides that states shall “declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”

¹¹ Office of the High Commissioner for Human Rights (OHCHR), ‘International Covenant on Civil and Political Rights’, (accessible [here](#)).

¹² United Nations Human Rights Treaty Bodies, ‘UN Treaty Body Database’, (accessible [here](#)).

¹³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Seventy-fourth session of the United Nations General Assembly (2019) at para 6 (accessible [here](#)).

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

15.3. Special rapporteurs and other bodies

- 15.3.1. A range of international bodies have offered further guidance on the balance between freedom of expression and combating hate speech.

15.3.2. The Rabat Plan of Action

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

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

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

15.3.3. UN Special Rapporteur on freedom of expression

15.3.3.1. In 2019, the UN Special Rapporteur on the right to freedom of opinion and expression released a report on states’ efforts to regulate online hate speech. The Special Rapporteur noted the risks of states using disproportionate means and excessive criminalisation of speech and urged states to find the least restrictive means to regulate freedom of expression. The Special Rapporteur also highlighted that: “[s]ome States have taken steps to address illegal hate speech through other creative and

seemingly proportionate means” by creating platforms for dialogue, multistakeholder engagement, and citizen reporting of online hate.¹⁴

15.3.4. UNESCO

15.3.4.1. The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) has emphasised that non-legal methods of countering hate speech should be given equal footing to criminal sanction, such as promoting greater media and information literacy.¹⁵

16. We submit that, in line with the international legal principles detailed above, it is necessary for the Bill to strike an appropriate balance between freedom of expression and the protection of human dignity and equality. The Bill should “foster an environment that allows a free and open exchange of ideas, free from censorship no matter how offensive, shocking or disturbing these ideas may be,” as required by the “dictates of pluralism, tolerance and open-mindedness,”¹⁶ while preventing hate speech that subverts the “dignity and self-worth of human beings.”¹⁷

SUBMISSIONS ON THE PROVISIONS ON HATE SPEECH

The offence of hate speech

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

“Any person who intentionally publishes propagates, advocates, makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

(i) be harmful or to incite harm; and

(ii) promote or propagate hatred

based on one or more of the grounds, is guilty of the offence of hate speech.”

18. The grounds are defined in section 1 to include:

“(a) albinism;

(b) ethnic or social origin;

(c) gender;

(d) HIV or AIDS status;

(e) nationality, migrant or refugee status or asylum seekers;

(f) race;

¹⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Seventy-fourth session of the United Nations General Assembly (9 October 2019) (accessible [here](#)).

¹⁵ UNESCO, Iginio Gagliardone et al, ‘Countering online hate speech’ at p 58 (accessible [here](#)).

¹⁶ *Qwelane* at para. 74, referencing the commonly cited case of *Handyside v the United Kingdom*, no 5493/72, 49, ECHR, 1976.

¹⁷ *Id* at para. 1.

- (g) religion;
- (h) sex;
- (i) sexual orientation, gender identity or expression of sex characteristics; or
- (j) skin colour”

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

19.1. There must have been a subjective intention to *express* the expression in question, but (like under the Equality Act) there does not have to be a subjective intention for that expression to be harmful or hateful (per *Qwelane*, that is tested objectively with reference to the impact or effect of the expression).

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

20. MMA has two main concerns about the constitutionality of this provision:

20.1. First, it is unnecessary and thus disproportionate to impose a criminal prohibition, at all, for substantially the same conduct that is already subject to a civil prohibition under the Equality Act, especially where hate speech is comprehensively criminalised in the Films and Publications Act, 1996.

20.2. Second, the crime appears to apply even to private communications and thus disproportionately limits the right to privacy.

Criminalising the same speech prohibited by the Equality Act

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

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

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

24. A useful analogy is the anachronistic common law offence of criminal defamation. Although the Supreme Court of Appeal held in *S v Hoho* that the offence was not unconstitutional, this

was never confirmed by the Constitutional Court, and subsequent developments in international and foreign law have rendered this judgment outdated.¹⁸ See in particular the judgments of the Constitutional Courts of Lesotho and Zimbabwe which expressly rejected the reasoning in *S v Hoho*, and struck down the common law offence of criminal defamation, because it was excessive to criminalise that which was already the subject of the civil delict of defamation.¹⁹

25. In addition to the above, MMA notes again that certain kinds of speech that may overlap with hate speech are already criminalised, by for example:
 - 25.1. the common law offences of *crimen injuria*, incitement of public violence, or incitement to commit any other common law crime;
 - 25.2. intimidation under the Intimidation Act 72 of 1982;
 - 25.3. incitement to commit any serious offence under the Riotous Assemblies Act 17 of 1956 (as amended by the Constitutional Court in *Economic Freedom Fighters and Another v Minister of Justice and Correctional Services and Another* [2020] ZACC 25; 2021 (2) BCLR 118 (CC); 2021 (2) SA 1 (CC); and
 - 25.4. incitement to commit genocide or crimes against humanity, under the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.
26. Most significantly, hate speech is thoroughly criminalised in the Films and Publications Act, 1996, as amended with effect from 1 March 2022. We have concerns about the constitutionality of the Films and Publications Act which fall outside the scope of this submission.
27. While we hold some reservations about aspects of the recently passed Cybercrimes Act 19 of 2020, it also contains relevant penalties: it criminalises electronic messages that advocate for violence or property damage against a person or group of people.²⁰
28. We also point out that criminalising hate speech too broadly carries with it the risk of stifling expression that is aimed at *promoting* the achievement of equality, by exposing anti-racist and anti-sexist activists to the risk of arrest and prosecution for challenging white supremacy and patriarchy.
29. A cautionary tale in this regard is the case of a (black female) editor who was found guilty of hate speech by the (white male) Press Ombud after a complaint by Afriforum because she had published an article and written an editorial critical of white supremacy and patriarchy. The Press Appeals Panel (agreeing with submissions made by MMA as amicus

¹⁸ *S v Hoho* [2008] ZASCA 98; [2009] 1 All SA 103 (SCA).

¹⁹ *Peta v Minister of Law, Constitutional Affairs and Human Rights* [2018] LSHC 3 (18 May 2018) (accessible [here](#)) and *Madanhire and Another v Attorney General* [2014] ZWCC 2 (12 June 2014) (accessible [here](#)), both citing Bhardwaj & Winks, "The Dangers of Criminalising Defamation", *Mail & Guardian*, 31 October 2013 (accessible [here](#)).

²⁰ Cybercrimes Act No 19 of 2020 at section 14.

curiae) ultimately found that the complaint was unfounded, but the Press Ombud's ruling resulted in the editor being fired from her position and leaving her career in journalism for several years.²¹

30. Another conceivable example would be a queer rights activist who speaks out against "conversion therapy" practices at a homophobic church, who could then face a criminal complaint of hate speech at the instance of the church.
31. For these reasons, we do not believe that criminalising the same or substantially the same speech as that already prohibited by section 10 of the Equality Act, will pass constitutional muster. It is not necessary and is thus an excessive or disproportionate limitation of the right to freedom of expression.

Inclusion of private communications

32. Section 4(1)(a) is broad enough to include private communications (for example, conversations among family members).
33. Section 4(1)(b) of the Bill is similarly broad. In this regard it provides as follows:

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

34. We submit that the extension of the prohibition to the private sphere is an excessive limitation on the right to privacy that is incongruent with its purpose. The Constitutional Court has remarked in *Qwelane* on the public nature of hate speech:²²

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

35. Our courts have repeatedly remarked on the private and personal nature of communications and recognised them as part of the "inner sanctum of the person."²³ We submit that the hate speech prohibition must be restricted to the public sphere. The Constitutional Court has recently affirmed this position in *Qwelane* wherein it held:²⁴

Hate speech prohibitions, even those that attach civil liability, should not extend to private communications, because that would be incongruent with the very purpose of

²¹ *Pillay v Afriforum*, Press Appeals Panel, Case No 3239/04/2017, 21 August 2017 (accessible [here](#)).

²² *Qwelane* at para 119.

²³ *Bernstein v Bester N.N.O* 1996 (2) SA 751 (CC) para 67.

²⁴ *Qwelane* at para 118.

regulating hate speech – that *public* hateful expression undermines the target group’s dignity, social standing and assurance against exclusion, hostility, discrimination, and violence.

36. We submit that criminalising private communications will unconstitutionally invade the right to privacy.
37. We, therefore, submit that the Bill should include a proviso to section 4(1) which makes clear that the prohibition of hate speech does not apply to private communications.

OFFENCE OF HATE CRIMES

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

Streamlining the legal framework for hate crimes

39. We believe it is crucial and long overdue for there to be a clear legal framework for the state to properly address the scourge of hate crimes.
40. In its current formulation, the Bill would effectively establish hate crimes as a new category of offences for actions that are already offences under existing law – for example, where an offender could either be charged for murder and/or for murder with a hateful motive, or for assault GBH and/or for assault GBH with a hateful motive.
41. We respectfully submit that the Bill should establish hateful intent as a compulsory aggravating factor in sentencing for existing offences, rather than separate offences. This would allow the state to pursue its existing criminal remedies for violent acts while ensuring that the hateful intent at the heart of a hate crime is considered in sentencing an offender. We believe this solution would ensure appropriate consequences for these very serious offences, but also greatly simplify the legal framework, bring the Bill in line with international best practices, and minimise the additional burden on the criminal justice system by streamlining investigations and prosecutions.

Categories of hate crimes

42. Section 3(1) of the Bill provides that a hate crime is committed by a person who is motivated by their prejudice or intolerance towards actual or perceived *characteristics* of a victim. The characteristics are defined in section 1 of the Bill to include:
 - a) age;
 - b) albinism;
 - c) culture;
 - d) disability;
 - e) ethnic or social origin;
 - f) gender;

- g) HIV or AIDS status;
- h) Language;
- i) nationality, migrant or refugee status or asylum seekers;
- j) occupation or trade;
- k) political affiliation or conviction;
- l) race;
- m) religion;
- n) sex;
- o) sexual orientation; gender identity or expression or sex characteristics;
- p) or skin colour.

43. The rationale for the inclusion of most of these categories is clear, in that they are in line with the grounds for equality protections in the Bill of Rights, or they are associated with groups of people and communities who have faced appalling persecution and violence in South Africa, such as persons living with HIV or AIDS or persons with albinism.
44. While we welcome the listed groups, we submit that all listed grounds in section 9(3) of the Constitution should be included to ensure the protection of all those recognised by our Constitution. Notably, the Bill does not currently include the following grounds: pregnancy, marital status, conscience, belief, and birth.
45. We further note that certain categories, while important, could be narrowed more clearly to provide specific protection to vulnerable groups. In this regard, we refer the Committee to the category of “Occupation or trade.” We understand from departmental briefings on this Bill that this category is intended in part to protect sex workers, who are undeniably a vulnerable group facing extreme discrimination, marginalisation, and risk of violence.²⁵ It is vital that such communities get legal protection from hate crimes.
46. We, therefore, submit that the intent and purpose of the Bill must be to protect those who have been systematically and historically subjugated because of protected characteristics in an ongoing pattern of disadvantage and harm. We submit that in fulfilling this objective, the Bill may benefit from further specificity. Accordingly, MMA supports the inclusion of “sex worker” as a specific category in this provision. If there are other specific groupings of people or communities who face similar risks of being targeted for hate crimes and a similar history of unfair subjugation, the Committee should consider introducing specific terms to protect these groups.
47. In addition, we fear that the inclusion of “Political affiliation or conviction” as a category could result in powerful political groupings or professional politicians seeking protection against fair criticism under this provision. We reiterate and submit that the Bill should protect those who have been systematically and historically subjugated because of protected characteristics in an ongoing pattern of disadvantage and harm, and not to protect those who are politically, socially, and economically privileged. Accordingly, we recommend that the “Political affiliation or conviction” category be removed.

²⁵ Briefing by Deputy Minister to Portfolio Committee on Justice and Correctional Services, 18 August 2021 (accessible [here](#)).

OTHER PROVISIONS

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

48.1. The Bill should provide for monitoring and reporting mechanisms that are specifically aimed at informing future policy responses on the implementation of hate crimes and hate speech legislation, and trends in categories of offences prosecuted under the legislation.

48.2. Finally, we note that the Bill provides, in section 9(1) that the state, the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities have a duty to promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences. Section 9(2) further provides for education and information campaigns to inform the public about the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences.

48.2.1. While we welcome these inclusions and view them as important, we submit that the principles of restorative and alternative justice form part of the education and information campaigns. This we submit, will assist in fostering a society founded on human dignity, the achievement of equality, and the advancement of human rights and freedoms.

48.2.2. To this end, we urge the Committee to explore opportunities to infuse the principles of restorative justice as part of the education and information campaigns. Further, we submit that restorative and alternative justice measures should be included alongside criminal penalties. We note that our Constitutional Court has, on several occasions, applied restorative justice approaches. In *Dikoko*, restorative justice was linked to dignity and ubuntu.²⁶ More recently, the Constitutional Court explained that “restorative justice is understood to be both ‘backward-looking’ as it deals with the ‘aftermath of the offence,’ and ‘forward-looking,’ since it takes into account the implications for the future. Restorative justice encourages rehabilitation and reintegration.”²⁷

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

²⁶ *Dikoko v Mokhatla* [2006] ZACC 10 at para 114.

²⁷ *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46 at para 77.

- 48.2.4. In this regard, we wish to highlight the matter of *Chinese Association Gauteng*²⁸ which suggested novel remedies that focused on educating the Respondent on racial intolerance and techniques to remove hate speech from the internet. It further included mandatory hours to be spent searching the internet and removing hate speech.

CONCLUSION

49. MMA thanks the Committee for the opportunity to comment on this Bill. We commend the Department for making significant improvements since receiving comments on the previous versions of the Bill.
50. MMA believes there is a vital need for a legal framework to address hate crimes and hate speech. However, we remain concerned that aspects of the Bill require further adjustment to bring the legislation in line with the Constitution and best practice, and to ensure it will be an effective tool in combating these very serious social ills.
51. We, therefore, urge the Committee to take all necessary steps to ensure this Bill is narrowly focused and carefully drafted to deepen efforts to protect the marginalised and promote equality, justice, and social cohesion.
52. MMA is available at the Committee's request to make further submissions or participate in oral hearings on this Bill.

**Media Monitoring Africa
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²⁸ *Chinese Association Gauteng (TCA) v Henning and Others* [2022] ZAGPJHC 590.