

# PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

ORAL PRESENTATION: PORTFOLIO COMMITTEE ON  
JUSTICE AND CORRECTIONAL SERVICES

MEDIA MONITORING AFRICA

18 MAY 2022

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# Introduction

- Overview of submission and MMA's approach
- Submissions on the provisions of Hate Speech
- Submissions on the offence of Hate Crimes
- Other provisions and recommendations
- Conclusion

# Overview: MMA

- 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.**

In the last 28 years, MMA's work has consistently related to key human rights issues, always with the objective of **promoting democracy, human rights, and encouraging a just and fair society**

# Overview: Our Approach

- MMA has engaged in extensive work in navigating the **appropriate balance** to be struck between freedom of expression and other competing rights and interests.
- 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.
- Through its various litigious and legal submissions, MMA has promoted the **constitutional rights** to equality, freedom of expression, and access to information.

# Overview: Our Approach

- In addition to the above, MMA is actively working to address online harms, such as disinformation, hate speech, harassment, and incitement to violence.
- MMA launched the Real411 platform, a public complaints platform that enables the public to report different online harms. MMA is partnering with the SAHRC to help address hate speech.
- 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.



**POSSIBLE RECOURSE REGARDING A COMPLAINT OF HATE SPEECH MAY INCLUDE ONE OR MORE OF THE FOLLOWING:**



Approach the Equality Court for relief.



Approach the South African Human Rights Commission for assistance.



Approach the online platforms for assistance; and/or



Publish counter-narratives in response to the hate speech.

# Hate Speech

- Section 4(1)(a) of the Bill provides for the offence of hate speech in the following terms:
  - Any person who intentionally publishes, propagates or advocates anything or communicates 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; or
    - (ii) promote or propagate hatred, based on one or more of the following grounds:

- (aa) age;
- (bb) albinism;
- (cc) birth;
- (dd) colour;
- (ee) culture;
- (ff) disability;
- (gg) ethnic or social origin;
- (hh) gender or gender identity;
- (ii) HIV status;
- (jj) language;
- (kk) nationality, migrant or refugee status;
- (ll) race;
- (mm) religion;
- (nn) sex, which includes intersex; or
- (oo) sexual orientation,

is guilty of an offence of hate speech.

# Hate Speech

MMA has **three main concerns** about the constitutionality of this provision

- One: 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.
- Two: If the above concern is unfounded, the **disjunctive approach** and the **objective test** employed disproportionately **limit the right to freedom of expression**.
- Three: The crime applies even to **private communications**, and disproportionately limits the right to privacy.

# Hate Speech

- The **need to combat hate speech** is **undeniable**. However, it is not clear that combating hate speech necessarily means criminalising hate speech.
- MMA reiterates 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.
- 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.

# Hate Speech

We therefore submit that section 4(1)(a) should be reworded as follows:

***Any person who intentionally engages in advocacy of hatred that constitutes incitement to cause harm, based on one or more of the following grounds:***

- (aa) age;
- (bb) albinism;
- (cc) birth;
- (dd) colour;
- (ee) culture;
- (ff) disability;
- (gg) ethnic or social origin;
- (hh) gender or gender identity;
- (ii) HIV status;
- (jj) language;
- (kk) nationality, migrant or refugee status;
- (ll) race;
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# Hate Crimes

Streamlining the legal framework for hate crimes

- 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

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.

We respectfully submit that the Bill should establish **hateful intent** as a compulsory aggravating factor in sentencing for existing offences, rather than separate offences.

# Hate Crimes

## Categories of hate crimes

- 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 persons with albinism.



While we welcome the listed groups, we note and reiterate our previous submissions, that all listed grounds of section 9(3) be included to ensure the protection.

We further note that certain categories, while important, could be narrowed more clearly to provide specific protection to vulnerable groups.

# Hate Crimes

- 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.
- We recommend that the ‘**Political affiliation or conviction**’ category be **removed**.

# Other Provisions

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:

- The Bill should provide for a **mechanism for monitoring and reporting** on the implementation of hate crimes and hate speech legislation, and trends in categories of offences prosecuted under the legislation.
- The Bill should provide for **education, training and awareness** for investigators, prosecutors and judicial officers in matters relating to hate crimes and hate speech to ensure effective implementation of its provisions and appropriate outcomes for victims of these offences.

# Other Provisions cont...

- We submit that the **definition of “victim”** should be **broadened** to allow other affected people, such as representatives of an affected community or group (who may not be direct victims of the offence), to provide impact statements.
- The Bill should therefore make provision for other affected parties to give evidence of how the crime has affected the wider group.
- We urge the Committee to explore opportunities to infuse the principles of **restorative justice** as part of the education and information campaigns.
- 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**.

# Conclusion

- MMA believes there is vital need for a legal framework to address hate crimes and hate speech.
- We remain concerned that aspects of the Bill require further amendment 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.
- 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.
- MMA thanks the Committee for the opportunity to comment on this Bill. We commend the Department for making significant improvements since receiving comment on the Draft Bill.

Thank you