

**SUBMISSIONS ON THE PREVENTION AND COMBATTING OF HATE
CRIMES AND HATE SPEECH BILL**

ON BEHALF OF:

A COALITION OF SOUTH AFRICAN COMEDIANS

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“What do you call 1000 lawyers chained together at the bottom of the ocean? A good start”

INTRODUCTION

- 1 On 24 October 2016, the Department of Justice and Constitutional Development published the Prevention and Combating of Hate Crimes and Hate Speech Bill for public comment (**“the Hate Crimes Bill”** or **“the Bill”**).¹
- 2 No person in an open and democratic society would seriously consider that the lawyer joke quoted above constitutes hate speech. Even less so, a hate crime. But under the broad definition proposed in the Bill, this well-known joke could arguably amount to both. Its utterance may be a crime. And the potential sentence that could be imposed is approximately 3 years in prison as well as a fine.²
- 3 This is just one example of constitutionally protected speech that could be criminalised under the Bill. This was clearly not the kind of speech targeted by the Bill – but it appears to be an unintended consequence. It is these unintended consequences that these submissions primarily seek to address.
- 4 These are the submissions of a coalition of well-known South African comedians and satirists, including: John Vlismas, Pieter-Dirk Uys, Jonathan Shapiro (also known as Zapiro), Joey Rasdien, Nina Hastie, Tumi Morake, David Kau, Nik Rabinowitz, Celeste Ntuli, Mark Banks, Kagiso Lediga, Jason Goliath, John Barker, Casper de Vries, Conrad Koch (and Chester Missing), Christopher Steenkamp and the creators of the satirical programme *ZA News* (**“the Comedians”**).

¹ Notice 698 of 2016, *Government Gazette* No. 40367, 24 October 2016.

² Section 6(3)(a) of the Bill.

- 5 We attach brief biographies of each artist to these submissions marked “**Annexure A**”.
- 6 These submissions do not comment on the entire Bill but deal with particular provisions that affect the creation and distribution of particular kinds of artistic speech and works.
- 7 In summary, the argument set out in these submissions is fivefold.
- 8 First, for the purpose of these submissions the Comedians are prepared to accept that, only in so far as this conforms with the Constitution, prohibiting certain forms of hate speech may arguably be reasonable and justifiable in an open and democratic society. However, two significant points need to be emphasised at the outset:
- 8.1 The manner in which these forms of hate speech are restricted should be narrowly tailored in order to ensure that legally protected speech is not stultified or accidentally captured in the net.
- 8.2 Criminal sanctions for hate speech should only be reserved for the most extreme forms of hate speech, which either:
- 8.2.1 incite imminent violence; or
- 8.2.2 advocate hatred based on a listed constitutional ground which also constitutes incitement to cause harm.
- 9 Second, we submit that hate speech is already sanctioned under section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (“**the Equality Act**”).³ This is particularly relevant to the present enquiry because as Dr Agnès Callamard, the Director of Columbia University Global Freedom of

³ 4 of 2000.

Expression,⁴ notes:

*“[c]onsideration of new hate speech legislation should always be preceded by an analysis of whether existing legislation is in line with these standards and whether it is already sufficient to tackle the problem” (Emphasis added).*⁵

10 Accordingly we submit that the provision of the criminal offence under the Bill is not required and should be completely removed.

11 Third, in the alternative, we submit that the definition in the Bill is overbroad and accordingly unconstitutional.

11.1 It is unconstitutional to set the threshold for the harm as low as “ridicule” or “insult”.

11.2 The definition of hate speech is also too broad at least insofar as it applies to speech relating to a person’s trade or occupation. As set out below, one of the distinctive characteristics of hate speech is that it targets inherent characteristics of a person as a member of a group (such as their race, sexual orientation or gender). A person’s trade or occupation is plainly not of the same kind.

12 Fourth, and in any event, we submit that criminal sanction should not attach to bona fide artistic or comedic expression. This proposition is supported by legislation that already regulates hate speech in South Africa, by foreign law and by the text of the Constitution itself.

⁴ The Columbia University Global Freedom of Expression was established in 2014 “*bringing together international experts and activists with the University’s faculty and students to survey, document, and strengthen free expression*”. The organisation “*seeks to advance understanding of the international and national norms and institutions that best protect the free flow of information and expression in an inter-connected global community with major common challenges to address*”. See: <https://globalfreedomofexpression.columbia.edu/about/>.

⁵ Paper written by Dr Agnès Callamard entitled ‘Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence’ UN HCHR, 2-3 October 2008, Geneva at p 24. Available at: <https://www.article19.org/data/files/pdfs/conferences/iccpr-links-between-articles-19-and-20.pdf>.

- 13 On this score we note that both the Equality Act and the Films and Publications Act 65 of 1996 exempt artistic expression from the operation of their hate speech provisions. Such an exemption plainly balances the constitutional rights and values involved. But there is presently no parallel exemption in the Bill. We suggest wording for such an exemption below in these submissions.
- 14 These submissions are structured as follows:
- 14.1 First, we provide an overview of the right to freedom of expression.
- 14.2 Second, we examine the definition of hate speech under the Constitution and demonstrate that the provisions under the Bill expand on this definition (and accordingly need to satisfy the limitations clause under the Constitution).
- 14.3 Third – we demonstrate that the hate speech provisions under the Bill fail to satisfy the limitations clause under the Constitution and accordingly are impermissible.
- 14.4 Fourth, we explain that there are less restrictive means of achieving the purposes of the Bill, including inserting an exemption clause for artistic and comedic expression into the Bill.
- 14.5 Finally, we provide suggested wording for an exemption for artistic and comedic expression from the Bill.

THE RIGHT TO FREEDOM OF EXPRESSION

- 15 Section 16 of the Constitution of South Africa, 1996 provides:

“(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;*
- (d) *academic freedom and freedom of scientific research.*
- (2) *The right in subsection (1) does not extend to -*
 - (a) *propaganda for war;*
 - (b) *incitement of imminent violence;*
 - (c) *advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."*

- 16 The significance of freedom of expression to an open and democratic society has been emphasised by our highest courts on numerous occasions.⁶ It is accepted as a right that "*lies at the heart of democracy*"⁷ and an "*indispensable element of a democratic society*"⁸ due to its importance in the development of society.
- 17 The Constitutional Court has also emphasised that these freedoms have amplified importance because we have "*recently emerged from a severely restrictive past where expression, especially political and artistic expression, was extensively circumscribed by various legislative enactments*".⁹ Langa DCJ, as he then was, referred to these restrictions as "*a denial of democracy itself*" and noted that those restrictions would be "*incompatible with South Africa's present commitment to a society based on a 'constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours'*".¹⁰
- 18 There is a wealth of jurisprudence on the importance of freedom of expression, not only as a self-standing right but also as a right, which supports

⁶ See, for example, **South African National Defence Union v Minister of Defence & Another** 1999 (4) SA 469 (CC) at para 7 ("**South African National Defence Union**"); **Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International** 2006 (1) SA 144 (CC) ("**Laugh It Off**") at para 7; **NM v Smith** 2007 (5) SA 250 (CC) at para 145 ("**NM v Smith**"); **Khumalo v Holomisa** 2002 (5) SA 401 (CC) at para 22.

⁷ **South African National Defence Union** at para 7.

⁸ **NM v Smith** at para 145.

⁹ **Islamic Unity Convention v Independent Broadcasting Authority and Others** 2002 (5) BCLR 433 (CC) ("**Islamic Unity Convention**") at para 25.

¹⁰ *Ibid* at para 25 (footnote omitted).

the right to freedom of conscience, religion, thought, belief and opinion.¹¹

19 The Constitutional Court has also acknowledged that these rights "*implicitly recognise the importance, both for a democratic society and for individuals personally, of the ability to form and express opinions... even where those views are controversial*"¹² (emphasis added).

20 At the outset we also emphasise five further important constitutional principles relating to freedom of speech.

FIVE IMPORTANT CONSTITUTIONAL PRINCIPLES RELATING TO FREE SPEECH

First - Limitations on the right to freedom of expression must be interpreted narrowly

21 In order to withstand constitutional scrutiny – any statute that limits constitutionally-protected expression must be interpreted as narrowly as possible.¹³

Second - Freedom of expression cannot be limited on a speculative basis

22 The Constitutional Court has also endorsed the principle that the Courts will not allow freedom of expression to be restricted on a speculative basis or on the basis of conjecture.¹⁴

¹¹ Section 15(1) of the Constitution provides: "Everyone has the right to freedom of conscience, religion, thought, belief and opinion".

¹² ***Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others*** 1996 (3) SA 617 (CC).

¹³ ***Laugh It Off*** at para 59.

¹⁴ ***S v Mamabolo*** 2001 (3) SA 409 (CC) at para 45; ***Laugh It Off*** at para 59.

Third - Freedom of speech includes the freedom to engage in offensive speech

23 One may ask, ‘what is legitimate speech’? Guidance can be found in post-constitutional judicial authority in answering that question. Our courts have described legitimate speech as robust political speech,¹⁵ legitimate criticism,¹⁶ and public debate which does not amount to hate speech.¹⁷ Thus, legitimate speech is that which is thought provoking and can stimulate meaningful debate. But importantly under our Constitution “*legitimate speech*” goes much further. It is not only speech that is considered to be valuable and meritorious, it is also any speech that does not seek to incite imminent violence or advocate hatred (and which constitutes incitement to imminent harm). Put differently, any speech that is protected under our Constitution is permissible and therefore legitimate.

24 There is, therefore, only a limit on freedom of speech and utterances that cannot be justified and find protection under the Constitution.¹⁸

25 In this regard we emphasise the importance of the European Court of Human Rights’ decision in ***Handyside v The United Kingdom***.¹⁹ The Court set out one of the most critical principles of freedom of speech: freedom of expression extends not only to information or ideas that are favourably received or

¹⁵ ***Chairperson, National Council Of Provinces v Malema and Another*** 2016 (5) SA 335 (SCA) at para 22. In that case, Malema had criticised the government and its ruling party for the conduct of the police in Marikana.

¹⁶ ***Laugh it Off*** at para 86 where the Constitutional Court stated that “*there is a legitimate place for criticism of a particular trade mark*”.

¹⁷ ***The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone And Others, Amici Curiae)*** 2011 (4) SA 191 (CC) at para 100.

¹⁸ ***African National Congress v Harmse and Another: In Re Harmse v Vawda (Afriforum and Another Intervening)*** 2011 (5) SA 460 (GSJ) at para 79. See also ***Islamic Unity Convention*** at para 32.

¹⁹ (1974) 1 EHRR 737 at 754.

regarded as inoffensive, “*but also to those that offend, shock or disturb.*”

- 26 This proposition was endorsed by the Constitutional Court in ***Islamic Unity Convention***.²⁰ It has also been accepted by the Broadcasting Complaints Commission of South Africa²¹ and courts in various other jurisdictions have expressed similar views:

26.1 The Supreme Court of Sri Lanka has stated the following:

*“The unfettered interchange of ideas from diverse and antagonistic sources, however unorthodox or controversial, however shocking or offensive or disturbing they may be to the elected representatives of the people or any sector of the population, however hateful to the prevailing climate or opinion, even ideas which at the time a vast majority of people and their elected representatives believe to be false and fraught with evil consequences, so long as they are lawful, must not be abridged.”*²²

26.2 The Supreme Court of India has held that:

*“It is our belief, nay, a conviction which constitutes one of the basic values of a free society to which we are wedded under our Constitution, that there must be freedom not only for the thought we cherish but also for the thought we hate. As was pointed out by Mr Justice Holmes in *Abramson v United States* ... ‘The ultimate good desired is better reached by free trade in ideas ... the best truth is the power of the thought to get itself accepted in the competition of the market.’ (Emphasis added.)”*²³

- 27 It follows from the above authority that whether artistic works cause offence, shock or even disturb people is, with respect, legally irrelevant. That speech is still protected by the Constitution.

- 28 Thus it is not necessarily the case that all comedic expression or jokes that ridicule people with (for instance) medical conditions or poke fun at people on

²⁰ ***Islamic Unity Convention*** at paras 26 and 27.

²¹ See, for example, ***SABC v Blem and Others*** [2012] JOL 28941 at para 7 where Dr Venter held: “One of the demands of living in a democratic society is that one should be tolerant of material that offends, shocks, or disturbs”.

²² ***Lerins Peiris v Neil Rupasinghe, Member of Parliament and Others*** [1999] LKSC 27.

²³ ***S. Rangarajan etc. v. P. Jagjivan Ram*** 1989 (2) SCR 204 at 224.

the basis of their culture or sexual orientation are automatically regarded as an abuse of free speech. This is so even where one might rightly be offended by the particular expression – and even where one might rightly despise it.

Fourth - The meaning and legal effect of speech must be interpreted in context

29 The House of Lords famously said that "*in law context is everything*".²⁴ This proposition applies with particular force in the context of freedom of expression. In ***De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others***,²⁵ for instance, the Constitutional Court held that it is not possible even to determine whether an image amounted to child pornography without having regard to the context of the expression.²⁶

30 Jokes – like cartoons – are generally not to be interpreted literally. As Justice Hinkson held in ***Vander Zalm v Times Publishers et al.***²⁷

"In my view, it was not intended that the cartoon be taken literally by the readers of the newspaper nor do I believe that the average reader would do so. Political cartoons are familiar to readers of newspapers and are known to employ both caricature and symbolism to convey their message."

31 The British Columbia Court of Appeal found that a reasonable person of ordinary intelligence understood that a cartoon is to be considered as rhetorically making a point by symbolism, allegory, satire and exaggeration.

32 The United States Supreme Court provided the following definition of a

²⁴ ***R v Secretary of State for the Home Department, ex parte Daly*** [2001] UKHL 26; [2001] 3 All ER 433 (HL) 433 at para 28. This proposition was cited with approval (albeit in a different context) by the Constitutional Court in ***First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance*** 2002 (4) SA 768 at para 63.

²⁵ 2004 (1) SA 406 (CC).

²⁶ At para 33.

²⁷ 1980 CanLii 389 (BC CA):
<https://www.canlii.org/en/bc/bcca/doc/1980/1980canlii389/1980canlii389.html>

political cartoon or caricature, in *Hustler Magazine v Falwell*.²⁸

“Webster’s defines a caricature as ‘the deliberately distorted picturing or imitating of a person, literary style, etc. by exaggerating features or mannerisms for satirical effect.’ Webster’s New Unabridged Twentieth Century Dictionary of the English Language 275 (2d ed. 1979). The appeal of the political cartoon or caricature is often based on exploitation of unfortunate physical traits or politically embarrassing events — an exploitation often calculated to injure the feelings of the subject of the portrayal. The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided. One cartoonist expressed the nature of the art in these words:

‘The political cartoon is a weapon of attack, of scorn and ridicule and satire; it is least effective when it tries to pat some politician on the back. It is usually as welcome as a bee sting and is always controversial in some quarters. Long, The Political Cartoon: Journalism’s Strongest Weapon, The Quill, 56, 57 (Nov. 1962).’”

- 33 In *Ross v Beutel*²⁹ the Court found that to accept the literal meaning of a cartoon “*as the natural and ordinary meaning of the cartoon is to ignore the very nature and essence of editorial cartoons and the fact that they are based on allegory, caricature, analogy and ludicrous juxtaposition.*”³⁰
- 34 We submit that the same definition and approach is applicable to jokes. A good illustration is provided by litigation and complaints concerning Scottish comedian Frankie Boyle, who is famous for using his offensive brand of humour in order to create emphasis.
- 35 In October 2008 the British Broadcasting Corporation broadcast a repeat of the television programme *Mock of the Week* in which the theme was “things you wouldn’t hear the Queen say during her Christmas broadcast”. Boyle’s answer was: “*I’m now so old that my p*ssy is haunted.*” The BBC Trust dismissed various complaints about the joke, which it accepted was sexist and ageist.

²⁸ 485 U.S. 46 at pp 53-54.

²⁹ 2001 NBCA 62 (CanLII) (“the *Beutel* case”).

³⁰ The *Beutel* case at para 41.

- 36 The BBC Trust's editorial standards committee concluded that although the joke was "*in poor taste and clearly was offensive to some of the audience, it would not have gone beyond audience expectations for the programme*".³¹
- 37 In 2011, the comedian appeared on a television-programme and pretended to be someone with racist views. The comedian impersonated a British newsreader and said: "*A bomb went off in Kandahar today, killing two British servicemen, three UN relief workers and a whole bunch of Pakis*".
- 38 Boyle explained that what irks him is the callousness of Britain "*as a society when we read out our dead on the news first, because our lives are more important. Other people's aren't worth as much*."³² His point was to illustrate and critique this attitude. *The Daily Mirror* ran an article stating that he was a "*racist comedian*" and that he had been forced to quit the BBC2 show *Mock of the Week*.
- 39 Boyle sued the *Daily Mirror* for defamation and during the five-day trial jurors were shown various jokes of Boyle's from *Mock of the Week* and *Tramadol Nights*. Boyle's advocate argued that Boyle's jokes were an extreme brand of humour, that some of his jokes are "*vile*" and "*offensive*" but not racist.³³ He said he had actively campaigned against racism and he thought it was "*important to highlight the issue in his routines by mocking the attitudes of racists, whom he 'despised'*".³⁴ Boyle testified that he used racial language as a tool in his jokes to highlight and ostracise other people's racist attitudes and make a point about society. The jury awarded him £54,650 in damages as

³¹ Tara Conlan "Frankie Boyle's 'sexist' joke about Queen cleared by BBC Trust" (19 October 2009) available at: <https://www.theguardian.com/media/2009/oct/19/frankie-boyle-mock-the-week>

³² Siobhain Butterworth "Frankie Boyle, free speech and legal jokes" (23 October 2012) available at: <https://www.theguardian.com/law/guardian-law-blog/2012/oct/23/frankie-boyle-libel-action-free-speech-jokes>.

³³ Jennifer O'Mahony "Frankie Boyle: 'Vile but not racist'" (15 October 2012) available at: <http://www.telegraph.co.uk/news/9609953/Frankie-Boyle-Vile-but-not-racist.html>.

³⁴ BBC News, "Boyle wins £54,650 in 'racism' libel case" (22 October 2012) available at: <http://www.bbc.com/news/entertainment-arts-20033097>; Josh Halliday "Frankie Boyle wins more than £50,000 libel damages from Daily Mirror" (22 October 2012) available at: <https://www.theguardian.com/media/2012/oct/22/frankie-boyle-libel-damages-daily-mirror>.

well as an undisclosed figure of legal costs.

- 40 Significantly, as set out above, the question is not whether one finds a particular joke offensive, even vile, even abhorrent. Even where this is so, the comedian or artist concerned should still be protected.

Fifth – there is express, additional protection for artistic expression

- 41 The Constitution does not simply protect artistic expression as an implied instance of freedom of expression. It expressly protects this form of expression.³⁵ Moreover, the protection of artistic expression extends not only to the expressive act but also to the artist's act of creativity itself. This is a peculiar feature of the protection of artistic expression.
- 42 The conception of artistic freedom under the Constitution is accordingly a particularly broad one. Expressive acts which might not otherwise be justifiable in an open and democratic society, or which might not be justifiable in certain contexts, are justifiable in an artistic context. This has been recognised by the Constitutional Court, which has held that whether an expressive act represents a “*serious work of art*” is relevant to assessing the overbreadth of a proposed restriction.³⁶
- 43 A particularly apt example arises from a complaint to the Broadcasting Complaints Commission of South Africa (in the context of the Free-to-Air Code) is the **Blem** matter. In the **Blem** matter, Gareth Cliff, the former 5FM DJ, made an offensive remark concerning persons suffering from epilepsy on air. He stated that he had been to a function and played “dub-step” music and that no one on the dance floor could dance to it. He stated on air that “they looked like a bunch of epileptics”.

³⁵ Section 16(1)(c) of the Constitution.

³⁶ **Phillips v DPP, WLD** 2003 (3) SA 345 (CC).

44 The Tribunal ultimately found as follows:

“The complainants state that they were offended and disgusted by the rude remark. However, in considering dignity complaints the current contemporary mores of society, and more specifically, the mores of the target audience of a particular programme, are taken into consideration. 5FM’s target market is young, trendy and mature adults residing in the metropolitan areas. Contrary to what the complainants argue, in my opinion the remark did not go beyond the contemporary South African standard of tolerance. Regular listeners to Gareth Cliff’s programme would have understood the bantering in the correct context, that it was a remark that slipped out, that it should not be taken seriously and that it was not intended to hurt or offend any section of the community.”

45 The Tribunal continued that “[o]ne of the demands of living in a democratic society is that one should be tolerant to material that offends, shocks, or disturbs”. The Tribunal noted that the constitutional guarantee of freedom of expression includes “the right to offend within reasonable limits”.

46 Significantly, then, the general approach from the **Handyside** decision of allowing speech which causes offence is given even more latitude in relation to speech of an artistic nature. In dealing with humour in the context of freedom of expression, Sachs J in the **Laugh it Off** case³⁷ emphasised that:

“We are not called upon to be arbiters of the taste displayed or judges of the humour offered. Nor are we required to say how successful Laugh It Off has been in hitting its parodic mark. Whatever our individual sensibilities or personal opinions about the T-shirts might be, we are obliged to interpret the law in a manner which protects the right of bodies such as Laugh It Off to advance subversive humour. The protection must be there whether the humour is expressed by mimicry in drag, or cartooning in the press, or the production of lampoons on T-shirts.” (Emphasis added.)

47 Indeed – in some instances – artists and comedians are permitted to engage in expression that might arguably be prohibited. For example, even though the sale and purchase of Adolf Hitler’s book *Mein Kampf* is prohibited in Germany, Austria and Switzerland, German comedian Serdar Somuncu recites excerpts of the book in his comedic show *The Legacy of a Mass Murderer* in order to

³⁷ **Laugh it Off** at paras 108 to 109.

highlight the absurdity of Hitler's propaganda.³⁸

48 We note that the approach of permitting artistic expression even more leeway and freedom is not unique to our Constitution. For instance, in ***Karatas v Turkey***³⁹ the European Court of Human Rights emphasised precisely the same sentiment.

49 In that case the applicant had been convicted by the Turkish courts for publishing poetry that allegedly condoned and glorified acts of terrorism. The Court accepted as a fact that violent terrorist attacks frequently occurred in Turkey and, further, that some of the passages of the poems call for the use of violence. Nevertheless the Court overturned the applicant's conviction and held:

"[E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation". (Emphasis added.)

50 This additional leeway is not at all surprising – without it artists and comedians might well be reluctant or fearful to engage in artistic expression, particularly where this could be offensive.

HATE SPEECH UNDER THE CONSTITUTION

51 Section 16(1) of the Constitution provides that everyone has the right to freedom of expression. Section 16(2) of the Constitution, however, provides that the right to freedom of expression does not extend to:

*"(a) propaganda for war;
(b) incitement of imminent violence; or*

³⁸ See 'Hitler's Mein Kampf as satire'; Available at: <http://freespeechdebate.com/en/case/hitlers-mein-kampf-as-satire/> (accessed on 20 January 2017).

³⁹ Application No. 23168/94 at paras 50-52.

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

52 Thus under the Constitution for expression to amount to hate speech it must satisfy three requirements.

52.1 First, the expression must advocate hatred. In the matter of **R v Keegstra**,⁴⁰ the Canadian Supreme Court explained that the term hatred “*connotes emotion of an intense and extreme nature that is clearly associated with vilification and detestation*”.

52.2 For instance, in **Freedom Front v South African Human Rights Commission**⁴¹ the Human Rights Commission found that “*calling for the killing of people because they belong to a particular community or race must amount to the advocacy of hatred unless the context clearly indicates otherwise.*”

52.3 Second, the “*advocacy of hatred*” must be based on one of four listed grounds:

52.3.1 Race;

52.3.2 Ethnicity;

52.3.3 Gender; or

52.3.4 Religion.

52.4 Moreover, the advocacy of hatred cannot “*simply advocate hatred of a specific person*” but must instead advocate hatred based on “*group characteristics*”.⁴²

⁴⁰ [1990] 3 SCR 697 at 777.

⁴¹ 2003 (11) BCLR 1283 (SAHRC).

⁴² Milo D, Penfold G and Stein, A, ‘Freedom of Expression’ in Woolman S, Roux T and Bishop M (eds), *Constitutional Law of South Africa* (2008) at 42–80 to 42–81.

52.5 Third, the expression must also amount to “*incitement to cause harm*”. That is, the expression must “*instigate or actively persuade others to cause harm*”.⁴³

53 It follows that where legislation prohibits expression based on an expanded definition this will plainly limit the right to freedom of expression. Accordingly, such limitation will only be constitutionally permissible if it satisfies the provisions of the limitations clause under section 36 of the Constitution.

The definition under the Hate Crimes Bill is broader than the Constitution

54 Section 4 of the Bill defines hate speech as follows:

“4. (1) (a) Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that –

(i) advocates hatred towards any other person or group of persons; or

(ii) is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to –

(aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or

(bb) stir up violence against, or bring into contempt or ridicule, any person or group of persons, based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade, is guilty of the offence of hate speech.

(b) Any person who intentionally distributes or makes available an electronic communication which 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.

(c) Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which constitutes hate speech

⁴³ Ibid at 42–80.

as contemplated in paragraph (a), which is accessible by or directed at a specific person who can be considered to be a victim of hate speech, is guilty of an offence.”

55 The definition includes any person who intentionally communicates to one or more persons: in a manner that is “insulting towards any other person or group of persons” and which demonstrates a clear intention “to ridicule any person or group of persons” based on the listed grounds in the Bill.

56 The definition under the Bill is broader than the exclusion under section 16(2) of the Constitution in at least two respects:

56.1 First the grounds have been extended. The grounds under the Bill extend to race, gender, religion, or ethnicity (the four constitutional grounds). But also to:

“sex, which includes intersex, ethnic or social origin, colour, sexual orientation, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade.”

56.2 Second – the threshold of harm has been lowered significantly. Under the Constitution, the trigger for the provision is:

56.2.1 Advocacy of hatred that also constitutes incitement to cause harm.

56.3 The threshold has been lowered to speech that: is “*abusive or insulting*” towards any other person or group of persons, and which demonstrates a clear intention to “bring into contempt or ridicule any person”.

56.4 The term “*harm*” has also been given a wide definition to include not only physical harm but also mental, psychological or economic harm.

Broad definition under the Hate Crimes Bill applies to artistic works and cartoons

57 The term “*communication*” is broadly defined and includes any –

- “(a) gesture;*
- (b) display;*
- (c) expression;*
- (d) written, illustrated, visual or other descriptive matter;*
- (e) oral statement;*
- (f) representation or reference; or*
- (g) an electronic communication”*

58 The provisions of the Bill thus plainly apply to performances by stand-up comedians or plays, broadcasts and mediums such as cartoons, or websites that produce and collect comical videos which have been altered to create humour (for example, Zanews.co.za), or even paintings. The Bill would, accordingly, prevent and prohibit artistic works, which depict racism or sexism and depict ridicule of a particular race or gender. This is startling. There are, for instance, numerous works of such description in the collection of artistic works in the Constitutional Court.

59 There can no debate, therefore, that the Bill limits the right to freedom of expression. The central question of the enquiry is accordingly whether these limitations of the right to freedom of expression are justified under our Constitution.

THE BILL FAILS THE LIMITATIONS ANALYSIS

60 Section 36 of the Constitution sets out the circumstances under which rights in the Bill of Rights may be limited. It provides:

“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.”*

61 We demonstrate below that the manner in which the provision has been drafted fails to meet the requirements of section 36. It follows that the Bill in its present form is unconstitutional.

62 In legal proceedings where the applicant is relying on rights in the Bill of Rights there is an important shift that occurs when proving one's case. Once an applicant has demonstrated that legislative provisions limit constitutional rights, the onus shifts onto the government to demonstrate that the limitations are justifiable under section 36 of the Constitution.⁴⁴

63 The key question is whether the piece of legislation strikes an appropriate balance between the purpose it seeks to achieve (for instance, combatting hate speech), on the one hand, and the right that is being limited, on the other (for example, the right to free speech).

64 We submit that if the Bill were to be tested for its constitutionality it would plainly fail the limitations analysis. That is so because it is clear from what we have set out above that the right to freedom of expression is of fundamental importance in a democratic society. It is also clear that the restrictions the Bill places on that right are significant; that the extent of those restrictions are not all rationally related to achieving the purposes of the Bill; and, lastly, that there

⁴⁴ ***Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening*** 2001 (4) SA 491 (CC) at para 31; ***Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others*** 2005 (3) SA 280 (CC) at paras 33-7; ***Phillips and Another v Director of Public Prosecutions, Witwatersrand Local Division, and Others*** 2003 (3) SA 345 (CC) at para 20.

are less-restrictive means to achieve the purposes of the Bill.

- 65 Indeed, Pieter-Dirk Uys has noted in his submission on the Bill that if the hate speech provisions in the Bill seem strikingly familiar that is because they eerily reflect similar notions to the restrictive and oppressive regime under the apartheid system.

“As a child hate speech that was used against me at school probably helped me defend myself with humour. Because my mother was German I was called a Nazi. Because my father was an Afrikaner, I was called a Boer. Because I spoke English, I was called a Rooinek. Because I was probably obvious, I was called a Moffie.

Once I started my career as a playwright, focusing on the trials and tribulations of my society living under the restraints of separate development, I focused my onslaught on the system by the use of humour as opposed to comedy. It was not necessary to make jokes. All I had to do was reflect the truth. Inevitably it was funnier.

The Nationalist Government (1948-1994) used their system of censorship, spearheaded by the Publications Control Board, to declare all critical references to their policies of legalised racism 'hate speech'. This included promotion of democracy and the support of anti-apartheid freedom fighters. The words of Nelson Mandela were regarded as hate speech and therefore banned. All criticism of government and Afrikaner culture was deemed negative and therefore punishable by law.

Among the weapons one had to use to illuminate the details of that evil system was to ridicule the acts of government with the contempt it deserved.

When my dramas were banned by the Publications Control Board (Selle Ou Story, Karnaval, Die van Aardes van Grootoor) the following justifications of censorship were officially tabled:

‘The publication is deemed to be undesirable within the meaning of section 47(2)(a), (b) and (c) of the Publications Act 1974 because of:

- (i) the manner in which the theme is handled and portrayed;*
- (ii) the use of the dialogue of words, phrases, and sentences deemed to be indecent, obscene, offensive or harmful to public morals;*
- (iii) the frequency with which God's name is taken in vain;*
- (iv) the bringing of certain sections of the inhabitants of the Republic into ridicule or contempt.’*

Compare them to provisions of the proposed Bill:

‘4. (1) (a) Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons

in a manner that ... is insulting towards any other person or group of persons, and - which demonstrates a clear intention, having regard to all the circumstances, to ... bring into contempt or ridicule ... is guilty of the offence of hate speech'."

- 66 We underscore that even the provision Mr Uys cites – from the height of apartheid – was not one that imposed a criminal sanction. Thus, while the hate speech provisions in the present Bill bear resemblance to the provisions in apartheid they are arguably even more restrictive.

(A) THE NATURE OF THE RIGHT

- 67 The nature of the right to freedom of expression has already been canvassed above. What is clear is that it is fiercely protected and that artistic and comedic expression are given even further leeway. This additional leeway is not surprising because of the value of humour and artistic and comedic expression in a democratic society.

The value of humour and comedic expression in a democratic society

- 68 First, humour is a good in itself. On this score, the remarks of Sachs J in the ***Laugh it Off*** case are apt:

*"A society that takes itself too seriously risks bottling up its tensions and treating every example of irreverence as a threat to its existence. Humour is one of the great solvents of democracy. It permits the ambiguities and contradictions of public life to be articulated in non-violent forms. It promotes diversity. It enables a multitude of discontents to be expressed in a myriad of spontaneous ways. It is an exilir of constitutional health."*⁴⁵

...

"Laughter too has its context. It can be derisory and punitive, imposing indignity on the weak at the hands of the powerful. On the other hand, it can be consolatory, even subversive in the service of the marginalised social critics. What has been relevant in the

⁴⁵ ***Laugh it Off*** at para 109.

present matter is that the context was one of laughter being used as a means of challenging economic power, resisting ideological hegemony and advancing human dignity."⁴⁶

69 Second, art forms such as parody, satire and comedy can –

*“provide important social commentary and channel negative opinion in a non destructive way. To limit this opportunity would impinge on freedom of speech and deprive society of a form of entertainment and amusement.”*⁴⁷

70 Art and humour are thus also granted additional protection as means of political expression.

71 As Pieter-Dirk Uys argues in his submission on the Bill:

“Since 1974, knowing that direct actions against apartheid were easily stopped, I have used every possible diversion tactic to focus attention on government corruption. These include intentionally insulting persons and groups of persons who were perpetuating legalised racism, religious persecution, sexual perversity, ethnic cleansing, and other 'democratically-accepted' ways to destroy and demean democratic freedoms.

Legislation against so-called hate speech can easily be used as a way to criminalise criticism of how we are being governed, on what is wrong in our society and its people - with humour. Bad government, rampant corruption, arrogant behavior and a minefield of explosive truths will be protected. The jokes will be on the victims.

Democracy has freedom of expression and freedom of speech as the backbone of its survival. Carefully using weapons of ridicule, offense, insult, and humour against totalitarianism and fascism (now renamed 'populism') has proven that hate speech can be deflated and diminished with the contempt it deserves.”

72 Third, humour also has a special role in helping societies manage moments of

⁴⁶ Ibid.

⁴⁷ M Sainsbury 'Parody, satire and copyright infringement: The latest addition to Australian fair dealing law' (2007) 12 *Media and Arts Law Review* at 302. Similarly, Vaidhyathan argues that '[l]iterature, music, and art are essential elements of our public forums. They are all forms of democratic speech and should be encouraged and rewarded, not chilled with threats of legal action'; see S Vaidhyathan *Copyrights and Copywrongs* (2001) at 16.

crisis.⁴⁸ For instance, Achter reviews the value of humour after the September 11 bombing in the United States where various comedic writers gathered in New York for a public panel:

*"The rationale for the panel asked: 'How can we laugh at a time like this? How can we not?' It continued: 'Arguably, comedy creates community when we need it most; the lens of humor helps us pin down and examine the vastly incomprehensible. Also, who couldn't use a little good old-fashioned distraction?'"*⁴⁹

- 73 For example, former Constitutional Court judge, Albie Sachs, tells the story in his autobiography 'The Strange Alchemy of Life and Law' of being in hospital after he was seriously injured (losing his arm and the sight in one eye) by a car bomb placed by South African security agents in 1988.⁵⁰ He recounts telling himself an old Jewish joke "*spectacles, testicles, wallet and watch*" after he realised that while he had lost his arm, he was still alive and all his 'necessary faculties' were still intact:

*"So I have lost an arm, that's all, I've lost an arm that's all. They tried to kill me, to extinguish me completely, but I have only lost an arm. Spectacles, testicles, wallet and watch. I joke, therefore I am... This is a time for laughter."*⁵¹

- 74 Justice Sachs further writes of an exchange between himself and President Jacob Zuma, who had been sent by the ANC leadership to greet Sachs after he was discharged from hospital. It is an illustration of the unifying role that humour may play. He recalls telling President Zuma his Jewish joke, which is worth quoting in full:

"Zuma doubles up and yells with laughter, his mouth wide open, his head rolling back and then coming down again, his eyes full of sympathetic mirth. I feel moved by the situation, by the intense interaction between us. This is what the ANC is, we do not wipe out our personalities and cultures when we become members, rather we bring in and share what we have, Zuma's African-ness, his Zulu appreciation of conversation and humour is mingling with my Jewish

⁴⁸ P Achter 'Comedy in Unfunny Times: News Parody and Carnival After 9/11' (2008) 25 (3) *Critical Studies in Media Communication* at 276.

⁴⁹ Ibid.

⁵⁰ A Sachs *The Strange Alchemy of Life and Law* (2009).

⁵¹ Ibid at 127.

*joke, enriching it, prolonging and intensifying the pleasure. [W]e are close, yet we do not have to become like each other, erase our personal tastes and ways of seeing and doing things, but rather contribute our different cultural inputs so as to give more texture to the whole. This is how one day we will rebuild South Africa, not by pushing a steamroller over the national cultures, but by bringing them together, seeing them as many roots of a single tree, some more substantial than others, but all contributing to the tree's strength and beauty.*⁵²

- 75 Thus humour and comedic expression have the potential, in certain instances, to promote the sense of togetherness to which Sachs alludes – causing the audiences to appreciate their various idiosyncratic, cultural differences through laughing together. Similarly, humour can be a means of exploring and critiquing attitudes in society. As Chester Missing asks:⁵³

*“What do you call a white person who didn’t benefit from apartheid?
... An albino.”*

- 76 Yet these forms of laughter and expression will be precariously placed if the Bill were to be passed in its present form.

(B) THE IMPORTANCE OF THE PURPOSE OF THE LIMITATION

- 77 The long title of the Bill provides a summary of the Bill’s stated purposes. Most relevant to the present enquiry are the following stated purposes:

77.1 To give effect to the Republic’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance in accordance with South Africa’s international law obligations.

77.2 To provide for the offence of hate crimes and the offence of hate speech and the prosecution of persons who commit those crimes.

⁵² Ibid at 128.

⁵³ Eric Conway-Smith ‘Is apartheid funny? South Africa’s new comedians think so’ (12 May 2013) available at: <https://www.pri.org/stories/2013-05-12/apartheid-funny-south-africa-s-new-comedians-think-so>

- 77.3 To provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences.
- 78 The Bill's preamble states that the Bill is drafted bearing in mind that "*South Africa has committed itself to uphold the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban*" (**"the Durban Declaration"**).
- 79 As well as South Africa's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (**"the International Convention"**) are also referred to. The Bill notes that the International Convention requires States Parties to:
- "declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin".*
- 80 Section 2 of the Bill sets out its objects as follows:
- "(a) give effect to the Republic's obligations regarding prejudice and intolerance in terms of international law;*
(b) provide for the prosecution of persons who commit offences referred to in this Act and provide for appropriate sentences;
(c) provide for the prevention of hate crimes and hate speech;
(d) provide for effective enforcement measures;
(e) provide for the co-ordinated implementation, application and administration of this Act; and
(f) combat the commission of hate crimes and hate speech in a co-ordinated manner."
- 81 We accept that the purpose of prohibiting and discouraging these extreme forms of expression are appropriate and important.

(C) THE NATURE AND EXTENT OF THE LIMITATION

82 The nature and extent of the limitations in the Bill are significant. They criminalise entire categories of speech which are protected. We note that there are many jokes and remarks which would constitute hate speech under the Bill but should be afforded protection – regardless of whether they are offensive or not. Below we include a sample of jokes from the Comedians that would arguably be prohibited under the Bill.

83 Indeed, the prohibitions under the Bill stretch so far and wide that it may be that a judge could arguably have been guilty of hate speech in a judgment available on the Internet in a taxation case. In the **Dave King** case,⁵⁴ Hartzenberg J began his judgment as follows:

"Scotsmen are known to be thrifty. The first respondent is a Scot. He cannot be accused of squandering his money on the unnecessary payment of income tax".

84 This is an indefensible situation.

85 We underscore that artistic works take place in a particular context – whether it be an improvised dramatic work before a live audience, or a theatre where the comedian is exposing flaws in society by creating offence, or a cartoon which illustrates current events, or a satirical television show. Each artistic work should be understood and interpreted by the audience and by the authorities in that light.

86 The Bill if passed in its present form will have the perverse and unintended effect that a drama or comedic series where a character is hateful or mocking towards another character who has a disability will now not be permitted (even if the point of the drama or comedy is to criticise this behaviour). The Oscar-winning movie, *The King's Speech*, which was about King George VI

⁵⁴ **Commissioner of the South African Revenue Service v King and Others**, Case Number 4745/02.

overcoming his stammer, comes to mind. The same could apply to a racist or homophobic character in a movie that is broadcast – for instance the critically acclaimed Quintin Tarantino movie, *Django Unchained*. It could never be suggested that this is what the Constitution intends by limiting the right to freedom of speech in section 16(2) of the Constitution. All this is solved if there is a clear exemption to the crime, which we propose below.

87 It might be contended that all of these claims are alarmist. The provisions make clear that context will be considered. The provisions also expressly provide that the offence will be determined “*having regard to all the circumstances*”. But this call to context in individual cases is insufficient protection for the right to freedom of expression.

88 What it means is that a person is unlikely ultimately to be convicted, but it does nothing to cure the chilling effect that the breadth of the prohibitions create. The Comedians submit that the Bill will still likely have intolerable effects in at least two respects:

88.1 First, it will mean that those persons whose jokes or entertainment is close to the fringe may endure the beginning stages of prosecution until the criminal trial is eventually acquitted.

88.2 Second, artists and comedians may engage in self-censorship in order to risk falling foul of the Bill.

89 Critically, it is irrelevant whether they will not eventually be imprisoned or made to pay a fine. The mere spectre of criminal sanction is what creates the chilling effect.

90 The approach adopted in the Bill is in this regard inconsistent with the views that the Cabinet and the African National Congress (“**the ANC**”) has publicly taken in relation to criminal defamation. It was announced at a legal workshop arranged by the Legal Research Group of the ANC in September 2015 that

the ANC planned to get rid of criminal defamation. The Minister in the Presidency, Jeff Radebe, in his capacity as head of policy for the ANC, opened the workshop by stating:

“A growing democracy needs to be nourished by the principles of free speech and the free circulation of ideas and information. Criminal defamation detracts from these freedoms.”

91 The Minister also announced that the ANC would spearhead legislation to rid our country of criminal defamation, saying that *“no responsible citizen and journalist should be inhibited or have the shackles of criminal sanction looming over him or her”*.

92 This announcement from the ruling party effectively means that the days of criminal defamation are numbered: legislation will in due course be processed and, as the ANC is the majority party in Parliament, the outcome of eradication of the crime appears to be extremely likely.

93 We submit that an overbroad definition of hate speech will again curtail the very kind of speech and impose the very shackles that the ANC and the government will remove by decriminalising defamation.

Two potential responses and why they are insufficient

The prosecutorial discretion is insufficient to cure the defects

94 Section 4(3) of the Bill provides:

“(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her.”

95 It might be suggested that, even if there are constitutional limitations or defects, this provision for prosecutorial discretion – regarding whether to prosecute a particular person in each case – helps to cure or curb them.

96 We submit that this cannot be so.

97 In ***Teddy Bear Clinic***⁵⁵ the Constitutional Court made clear that the existence of prosecutorial discretion cannot save otherwise unconstitutional provisions. The Court emphasised that the “*mere existence of a prosecutorial discretion creates the spectre of prosecution*” which undermines the particular rights at play (in that case, children’s rights).

98 The Court emphasised, moreover, that the discretion is only exercised at a later stage:

*“[T]he discretion cited by the respondents only occurs at the stage of deciding whether to prosecute, by which time the adolescent involved may already have been investigated, arrested and questioned by the police”.*⁵⁶

99 Accordingly, the fact that a person might not actually be prosecuted does not remove all of the harms occasioned by the overbroad criminalisation of constitutionally protected – even if offensive or abhorrent – speech.

Intention and the belated enquiries into context are insufficient

100 Just as the prosecutorial discretion is not sufficient to save the Bill, nor are the requirements of criminal intention and the Bill’s insistence on the examination of “*all the circumstances*”.

101 We submit that the following principles enunciated by the Constitutional Court in relation to scandalising the court are analogous to a situation where a person has taken offence to a work of artistic or comedic expression:

“It would be unwise, if not impossible, to attempt to circumscribe what language and/or conduct would constitute scandalising the court. Virtually the only prediction that can safely be made about

⁵⁵ ***Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and Another*** 2014 (2) SA 168 (CC) at para 76; see also ***S v Mbatha***; ***S v Prinsloo*** 1996 (2) SA 464 (CC) at para 23.

⁵⁶ ***Teddy Bear Clinic*** at para 76.

*human affairs, is that none can safely be made. The variety of circumstances that could arise, is literally infinite and each case will have to be judged in the context of its own peculiar circumstances: what was said or done; what its meaning and import were or were likely to have been understood to be; who the author was; when and where it happened; to whom it was directed; at whom or what it was aimed; what triggered the action; what the underlying motivating factors were; who witnessed it; what effect, if any, it had on such audience; what the consequences were or were likely to have been.*⁵⁷ (Emphasis added.)

102 Thus persons engaging in artistic or comedic expression may not ultimately be convicted. But this does not eradicate the harms of criminalising the speech. Put differently – the analysis of the context of the speech is a necessary criterion but it is not a sufficient one.

103 This is made clear by the decision of the Zimbabwean Constitutional Court in the **Madanhire** case in which it struck down criminal defamation as unconstitutional.⁵⁸ The Zimbabwean Constitutional Court found, unanimously, that the crime failed the proportionality test in constitutional law.

104 One of the critical bases in the court’s reasoning was the harsh consequences that flow from a charge of criminal defamation:

“The accused person would be investigated and face the danger of arrest. This would arise even where the alleged defamation is not serious and where the accused has an available defence to the charge. Thereafter, if the charge is prosecuted, he will be subjected to the rigours and ordeal of a criminal trial. Even if he is eventually acquitted, he may well have undergone the traumatising gamut of arrest, detention, remand and trial. Moreover, he will also have incurred a sizeable bill of costs which will normally not be recoverable”. (Emphasis added.)

105 According to the Court it was the very existence of the crime that created a stifling or chilling effect on freedom of expression:

“The overhanging effect of the offence is to stifle and silence the free flow of information in the public domain. This in turn may result in

⁵⁷ **S v Mamabolo** at para 46.

⁵⁸ **Madanhire v Attorney-General** 2014 JDR 1967 (ZiCC)

the citizenry remaining uninformed about matters of public significance and the unquestioned and unchecked continuation of unconscionable malpractices”.

- 106 The very same factors obtain in the context of criminalising particular forms of speech.

Jokes and cartoons arguably barred by the Bill

- 107 Importantly these concerns are not merely in the abstract. Various jokes made by the Comedians would arguably have to be removed from their performances – otherwise they could be prosecuted for hate speech and hate crimes under the Bill. We list several examples below.

- 108 We also attach hereto marked “**B**” a collection of cartoons by Zapiro which might arguably foul of the Bill.

- 109 **Nik Rabinowitz:**

109.1 On Heritage Day, September 2006, President Jacob Zuma said "Same sex marriage is a disgrace to the nation and to God. When I was growing up, ‘ungqingili’ [homosexuals in isiZulu] could not stand in front of me, I would knock him out.” His remarks were made while the South African parliament was conducting public hearings on the Civil Union Bill that would legalise same-sex marriages.

109.2 Nik Rabinowitz’s joke at the time was an impression of Zuma’s apology:

“I apologise to all our Gay and Libyan comrades. However, what I said was taken out of context. Why do these people always take it up the wrong way?”

110 **Tumi Morake:**

110.1 *"ADD versus dom kids: black and white children have the same symptoms but they are labeled differently. If a black child is dom the white child has ADD. One you treat with meds, the other you smack. We don't even discipline them the same way. The white kid gets warnings and time-outs, the black kid wakes up in ICU."*

110.2 *"We have one department for women, children and people with disabilities. Now, if I am in the same bracket as disabled guys then I deserve disabled parking! I mean come on, between me in my pencil heels and the guy in the wheelchair who needs to park closer to the entrance? Who's suffering more? The elephant on stilts or the guy already in a trolley?"*

110.3 *"UCT did a study and they say they found that black men are the most unattractive race but white men came up tops. Now black guys want a rematch in the bedroom. And you know who's gonna win that one: indian guys. That's not a man in bed, that's a vibrator (shaking head like an Indian person)."*

111 **Joey Rasdien:**

111.1 *"I am a Muslim coloured guy. God makes no one more dangerous."*

111.2 *"Behind every successful black politician there is an Indian Guy. Madiba had Kathrada. Mbeki had Pahad. Zuma had Shabir Shaik, fired him, now he has Atul Gupta, Mac Maharaj and he thought he had Pravin Gordhan which leads one to believe Gordan might not be as Indian as his name might suggest."*

111.3 *"I dated a Jewish girl once. Me being Muslim and she being Jewish we had to break up for obvious reasons. ... She is a slut."*

112 **John Vlismas:**

112.1 *"I don't think gay people should get married - nobody should risk losing a house that magnificently decorated."*

112.2 *"Why are you shocked that I'm picking on Albinos? Nature does. They're always the first to go."*

113 **Christopher Steenkamp:**

113.1 *"I'm half Afrikaans and half Greek, that's a difficult combination. I'm basically just a ball of hair and hatred".*

113.2 *"The proof is in the phone book, look at how many there are of one surname. There are basically only 8 Afrikaans surnames and that isn't because South Africa was colonised alphabetically, it's a clear case of sister f**king".*

114 **Don Packett:**

114.1 *"I ride a motorbike because I fundamentally disagree with traffic. What I fundamentally disagree more with, is the fact that guys with limps and white sticks and big glasses are allowed to walk between the cars where my bike goes. One of my nemeses is a guy on William Nicol, you know Elvis right? (I do a crippled-Elvis knee-swinging impersonation here) well he constantly gets in my way. The blind guys move when I hoot, but Elvis is a sneaky ninja! The other day I was riding down William Nicol and saw Elvis in the distance, and I was determined to make this a smooth crossing. We locked eyes. It was game time. As I rode closer I banked left, and he banked left. I then banked right, and he banked right. For a second it was like I was trying to tackle Brian Habana. He was consistently hobbling into my trajectory. At the final moment I banked to the side and he followed, and I smashed right into*

him. Two things happened simultaneously. One: I didn't fall off my bike, which was a miracle. But the bigger the miracle was that, two: I healed him! Because he jumped up and started sprinting toward me like Usain Bolt. His crippled legs were completely cured!"

114.2 *"Being a white, English man has its advantages in the bedroom. You know, you can get quite colourful and amorous with the English language. Simple, subtle gestures and words of encouragement, like... 'Touch yourself' whispered ever so softly can really heighten the mood. Afrikaans guys on the other hand, would lay their woman on the bed, stroke their hair, look into their eyes and say 'Speel met jou koeksuster. Ja dis lekker!' I think Indian guys have a tough time in the bedroom too. 'Hey men there's so much of commotion commotion going on in my pants right now for you lady! The blood is red-lining all its way to my crotch, right!?' The champions of getting action, though, are black dudes. I saw a black guy walk walking down the street recently, he saw a couple girls on the opposite side of the road and shouted 'Hey! Zwagala!' and the girls hopped towards him shouting 'Ohkaaaaaay'."*

These jokes and cartoons are legally-protected speech under the Constitution

115 We submit that, far from constituting impermissible hate speech, jokes like the ones set out above are constitutionally protected speech. Some people will find the jokes offensive – some may not appreciate the particular brand of humour and may view them as unnecessarily crude. But this does not deprive them of constitutional protection. The Constitutional Court made this very clear in the ***Laugh it Off*** case, as did the European Court of Human Rights in the ***Handyside*** decision (both discussed above).

(D) THE RELATION BETWEEN THE LIMITATION AND ITS PURPOSE

116 While we accept that the stated purposes of the Bill are important, we submit that there is a lack of a rational connection between the conduct that is

targeted by the Bill and the conduct that is ultimately prohibited by it. As we have demonstrated above the nature and extent of the limitations are significant and they criminalise entire categories of speech which are constitutionally protected.

- 117 The stated purposes of the Bill make clear that it is linked to South Africa's international obligations and undertaking under the International Convention and the Durban Declaration. It is, accordingly, important to understand what those instruments prohibit and the bases upon which they do so.

117.1 The Durban Declaration urges states to take a number of steps against racism and xenophobia, for example:

“72. Urges States to design, implement and enforce effective measures to eliminate the phenomenon popularly known as ‘racial profiling’ and comprising the practice of police and other law enforcement officers relying, to any degree, on race, colour, descent or national or ethnic origin as the basis for subjecting persons to investigatory activities or for determining whether an individual is engaged in criminal activity;

84. Urges States to adopt effective measures to combat criminal acts motivated by racism, racial discrimination, xenophobia and related intolerance, to take measures so that such motivations are considered an aggravating factor for the purposes of sentencing, to prevent these crimes from going unpunished and to ensure the rule of law;

86. Calls upon States to promote measures to deter the emergence of and to counter neo-fascist, violent nationalist ideologies which promote racial hatred and racial discrimination, as well as racist and xenophobic sentiments, including measures to combat the negative influence of such ideologies especially on young people through formal and non-formal education, the media and sport;

89. Urges States to carry out comprehensive, exhaustive, timely and impartial investigations of all unlawful acts of racism and racial discrimination, to prosecute criminal offences ex officio, as appropriate, or initiate or facilitate all appropriate actions arising from offences of a racist or xenophobic nature, to ensure that criminal and civil investigations and prosecutions of offences of a racist or xenophobic nature are given high priority and are actively and consistently undertaken, and to ensure the right to equal treatment before the tribunals and all other organs administering justice. In this regard, the World Conference underlines the importance of fostering awareness and providing training to the various agents in the

criminal justice system to ensure fair and impartial application of the law. In this respect, it recommends that anti-discrimination monitoring services be established”.

118 It thus requests that states adopt measures to combat racial profiling in the prosecution of crimes and to consider crimes motivated by race as aggravating circumstances for the purposes of sentencing.

119 But nowhere – in any of its 62 pages – or 219 paragraphs – does it call upon states to criminalise expression in the manner set out in section 4 of the Bill. There is accordingly no rational connection between the stated purpose and the mechanisms under section 4.

120 The same is so in relation to the International Convention. The preamble to the Hate Crimes Bill states:

“AND SINCE the International Convention on the Elimination of All Forms of Racial Discrimination, to which the Republic is a signatory, requires States Parties to declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin”

121 Article 2(d) provides that *“Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”*.

122 Articles 4 (a) and (b) provide:

“(a) 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;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law”

123 Thus the only relevant conduct that the states are called upon to criminally sanction is:

123.1 The dissemination of ideas based on racial superiority or hatred;

123.2 Incitement to racial discrimination;

123.3 Acts of violence or incitement to acts of violence against persons of another race or ethnic group.

124 There are two points to emphasise:

124.1 First, this is plainly no basis for creating an offence which prohibits ridicule or insult on the grounds listed in the Bill (as opposed to, for example, disseminating Nazi propaganda).

124.2 Second, section 39(1)(b) of the Constitution provides that when interpreting the Bill of Rights a court must “consider” international law. The court need not follow international law – it may be binding on South Africa, as a country at the international level, but at the domestic level the provisions of the Constitution still triumph. Accordingly, even if the International Convention provided that states parties should create an offence for ridicule on the basis of a person’s trade or occupation (which it plainly does not) the courts could still find legislation that enacted that purpose to be inconsistent with the Constitution.

125 Another purported catalyst for the hate speech provisions under section 4 of the Bill is section 9(3) of the Constitution which prevents unfair discrimination on any of the listed grounds, which include:

“race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

126 Section 9(4) goes on to state that national legislation must be enacted to

prevent or prohibit unfair discrimination. That legislation is the Equality Act.

127 But those constitutional provisions do not anywhere state or suggest that the bases for the crime of hate speech should be insult or ridicule on the basis of the listed grounds under the Constitution or on the ground of a person's trade or occupation.

128 Accordingly, we submit that the stated purposes under the Bill bear no rational link whatsoever to:

128.1 the ban of speech which merely ridicules; or to

128.2 the ground of trade or occupation.

129 As regards the threshold of ridicule: we emphasise that the Supreme Court of Canada has previously struck down as unconstitutional legislation which prohibited speech that "*ridicules, belittles or otherwise affronts the dignity*" of a person or class of persons. The court found those words are not rationally connected to the objective of protecting people from hate speech.⁵⁹ The same is true for the provision under the Bill.

130 As regards the ground of trade or occupation: we submit that this ground is qualitatively distinct from the others outlawed in the Constitution and the Bill and there can be no basis for this inclusion.

131 Accordingly there is no rational link between the purposes of the prohibition and the manner in which section 4 of the Bill has been crafted. For this reason alone the section fails the limitations analysis and is unconstitutional.

⁵⁹ *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11.

(E) LESS RESTRICTIVE MEANS TO ACHIEVE THE PURPOSE

132 As Dr Callamard correctly notes, any restrictions on freedom of expression should be necessary in a democratic society:

“The word ‘necessary’ means that there must be a ‘pressing social need’ for the limitation. The reasons given by the State to justify the limitation must be ‘relevant and sufficient’; the State should use the least restrictive means available and the limitation must be proportionate to the aim pursued. The European Court of Human Rights has warned that one of the implications of this is that States should not use the criminal law to restrict freedom of expression unless this is truly necessary.”⁶⁰ (Emphasis added, footnotes omitted.)

133 We submit that there are plainly less restrictive means to achieve the purposes of the Bill.

133.1 First – hate speech is already dealt with under the Equality Act and criminally in the form of *crimen injuria*;

133.2 Second – the low thresholds for hate speech should be removed;

133.3 Third – the ground of trade and occupation should be removed;

133.4 Fourth – there should, in any event, be a blanket exemption for artistic expression.

Hate speech is already regulated under the Equality Act and criminally in the form of *crimen injuria*

134 We do not concede that the manner in which the Equality Act deals with hate speech is necessarily constitutional. Nevertheless, any difficulties under the

⁶⁰ Agnes Callamard “Expert meeting on the links between articles 19 and 20 of the ICCPR: Freedom of expression and advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence” UN HCHR available at: <http://menschenrechte.org/wp-content/uploads/2013/05/Freedom-of-expression-and-advocacy-of-religious-hatred-that-constitutes-incitement-to-discrimination-hostility-or-violence.pdf> (Accessed 20 January 2017).

Equality Act are amplified by the Bill because it not only extends the operation of the term hate speech to cover a wider category of speech but it also alters a civil remedy into a criminal offence.

135 We note that the fact that the Equality Act already regulates hate speech using civil remedies is relevant for two reasons:

135.1 First, it means that the Bill is not required in order to address hate speech;

135.2 Second, we submit that it is, in any event, more appropriate to do so using civil sanction (as the Equality Act does) rather than criminal.

136 On this score we note that in various cases the Equality Courts has dealt with matters which would now be criminalised by the Bill:

136.1 In ***Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park***⁶¹ the North Gauteng High Court sitting as an Equality Court awarded an amount of R75 000 for the impairment of the complainant's dignity as well as emotional and psychological suffering for having been unfairly discriminated against on the ground of sexual orientation.

136.2 In ***Zonke Gender Justice Network v Malema*** the Magistrate's Court sitting as an Equality Court in Johannesburg⁶² ordered the respondent to pay R50 000 damages for utterances that were held to constitute hate speech and harassment.

136.3 In ***N G Kempton v André van Deventer***⁶³ the Magistrate's Court in Cape Town sitting as an Equality Court ordered the respondent to pay R50 000 damages for hate speech which was racially motivated.

⁶¹ 2009 (4) SA 510.

⁶² Under Case Number 2/2008.

⁶³ Under Case Number 9/2013.

137 In addition we note that the approach adopted by the court in *ANC v Sparrow*⁶⁴ is instructive. Here – after finding the defendant liable for damages the court also included an order as follows:

“The clerk of the Equality Court is directed to submit this matter in its entirety to the Director of Public Prosecutions KwaZulu-Natal for consideration regarding the institution of criminal proceedings, either in terms of the common law or relevant legislation.”

138 The approach followed by the Equality Court in *Sparrow* alerts us to the fact that hate speech is already criminalised in the form of the crime of *crimen injuria*. There have been many successful prosecutions where racists have been held to be criminally liable under the common law. An example is *State v Pistorius*,⁶⁵ where the Supreme Court of Appeal rightly upheld the conviction for *crimen injuria* of a farmer for saying of a security guard “die k***** praat kak”. As the Supreme Court of Appeal held:⁶⁶

“It is a well-known fact that these words formed part of the apartheid-era lexicon. They were used during the apartheid years as derogatory terms to insult, denigrate and degrade the African people of this country. Similarly words like ‘boer’, ‘coolie’ and ‘bantu’, the word is both offensive and demeaning. Its use during apartheid times brought untold pain and suffering to the majority of the people of this country. Suffice to say that post-1994, we, as a nation, wounded and scarred by apartheid, embarked on an ambitious project to heal the wounds of the past and create an egalitarian society where all, irrespective of race, colour, sex or creed would have their rights to equality and dignity protected and promoted. Our Constitution demands this. Undoubtedly, utterances like these will have the effect of re-opening old wounds and fanning racial tension and hostility.”

139 The derogatory and impermissible use of the word was affirmed by the Constitutional Court in its recent judgment in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and*

⁶⁵ [2014] ZASCA 47; 2014 (2) SACR 314 (SCA). See also earlier decided cases such as *S v Meiring* 2011 JDR 1544 (FB) at paras 23, 25, 27 and 39; *Mostert v S* [2006] 4 All SA 83 (N) at pages 93 to 95; *S v Bugwande* 1987 (1) SA 787 (N) at 794E-796G.

⁶⁵ [2014] ZASCA 47; 2014 (2) SACR 314 (SCA). See also earlier decided cases such as *S v Meiring* 2011 JDR 1544 (FB) at paras 23, 25, 27 and 39; *Mostert v S* [2006] 4 All SA 83 (N) at pages 93 to 95; *S v Bugwande* 1987 (1) SA 787 (N) at 794E-796G.

⁶⁶ At para 37.

Others,⁶⁷ where the unanimous court stated that –

“It follows that the word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia, in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.”

140 One also has to be mindful that there is no authority for *crimen injuria* that warrants a prison sentence of six months or more.⁶⁸ Therefore, the Bill seeks to radically change the common law.

141 In ***Afriforum and Another v Malema and Another***,⁶⁹ the South Gauteng High Court sitting as an Equality Court interdicted and restrained Julius Malema and others from singing the song known as ‘*Dubula Ibhunú*’ at any public or private meeting held by or conducted by them. We submit that an interdict would also be a suitable and less-restrictive remedy in appropriate cases.

The lower thresholds under the Act should be removed

142 We submit that the criteria of ridicule and insult are far too invasive of constitutionally protected expression. This submission is not only justified by the constitutional definition of hate speech but is supported by the principle in

⁶⁷ [2016] ZACC 38 at para 4

⁶⁸ ***Coetzee v National Commissioner of Police and Others*** 2011 (2) SA 227 (GNP) at para 27. In ***S v B*** 1980 (3) SA 846 (A), the court combined the appellant’s four convictions of *crimen injuria* to one. Even where there were four convictions the court imposed a suspended prison sentence of 12 months’ imprisonment suspended for five years as well as some further conditions.

⁶⁹ 2011 (6) SA 240 (EqC)

Handyside, which emphasises that offensive speech is protected speech (which has been endorsed by our Constitutional Court in the **Islamic Unity**).

143 This submission is also plainly supported by foreign law. We set out below some examples of foreign cases and instruments which demonstrate how far more extreme, abhorrent and disgusting speech is still protected in open and democratic societies.

144 What all of this makes clear is that the threshold criteria for hate speech should be left to the higher thresholds stated in the Constitution, namely speech that either incites imminent violence or advocates hatred as well as constituting incitement to cause harm.

The position under the Bill is more restrictive than foreign jurisdictions

The joint statement by international organisations

145 In 2001, a joint statement was published by the United Nations Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (“OSCE”) Representative on Freedom of the Media, and the Organization of American States (“OAS”) Special Rapporteur on Freedom of Expression.⁷⁰ The joint statement stipulated various criteria which hate speech laws should respect.

146 For present purposes the key principle is that no one should be penalised for the dissemination of “hate speech” unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence.⁷¹

147 Put differently – mere ridicule or insult is not sufficient to attract any sanction.

⁷⁰ Available at: <https://www.article19.org/data/files/pdfs/igo-documents/three-mandates-statement-1999.pdf>

⁷¹ Ibid.

The European Court of Human Rights

148 In **Fáber v. Hungary**⁷² the applicant publicly displayed a flag associated with fascism and the Arrow Cross regime at the embankment of the Danube river – precisely where large numbers of Jewish people had been exterminated. The applicant was asked by the police to leave the area or to stop displaying the flag. He refused and was arrested and fined 50 000 Hungarian forints. After the Hungarian domestic courts had upheld his conviction the applicant applied to the European Court of Human Rights.

149 The Second Section of the European Court emphasised the importance of the right to express ideas that shock or offend. It held:

“Any measures interfering with freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy and often even endanger it”.⁷³

150 Further:

“However, even assuming that some demonstrators may have considered the flag as offensive, shocking, or even “fascist”, for the Court, its mere display was not capable of disturbing public order or hampering the exercise of the demonstrators’ right to assemble as it was neither intimidating, nor capable of inciting to violence by instilling a deep-seated and irrational hatred against identifiable persons. The Court stresses that ill feelings or even outrage, in the absence of intimidation, cannot represent a pressing social need for the purposes of Article 10 § 2.”⁷⁴

151 The Court also emphasised that even if the display may – understandably – have caused uneasiness and hurt amongst those who witnessed the flag

⁷² Application no. 40721/08.

⁷³ The **Faber** judgment at para 37.

⁷⁴ The **Faber** judgment at para 56.

(which might have included victims and their relatives) could “*not alone set the limits of freedom of expression*”.⁷⁵ The Court found that the arrest and conviction violated Article 10 read with Article 11 of the European Convention of Human Rights.⁷⁶

- 152 In ***Lehideux and Isorni v France***⁷⁷ the European court found that criminal penalties were not justifiable in a scenario in which certain individuals had published an advert praising Nazi collaborator Philippe Pétain in a French newspaper *Le Monde*. The Court held that while the criminal penalty was prescribe by law and pursued a legitimate aim, it was not necessary in a democratic society and accordingly violated Article 10 of the European Convention (which deals with freedom of expression).

The United States Supreme Court

- 153 In the ***Brandenburg*** case,⁷⁸ a leader of the Ku Klux Klan’s Ohio sect held a rally in order to celebrate his racist ideology. He was captured on television stating, amongst other things: “*if our president, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken*”. His message also included racial slurs about black people and Jewish people.
- 154 Brandenburg was convicted of violating state law in Ohio which prohibited “*advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform*” as well as “*voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.*”

⁷⁵ The ***Faber*** judgment at para 57.

⁷⁶ The ***Faber*** judgment at para 59.

⁷⁷ Application Number 24662/94 (September 23, 1998).

⁷⁸ ***Brandenburg v Ohio*** 395 U.S 444 (1969).

155 The United States Supreme Court overturned Brandenburg's conviction holding:

"Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

156 As the rally was not aimed at inciting specific acts of violence – and was unlikely to do so – the restrictions on Brandenburg's speech was unconstitutional.

157 At the centre of this decision is the notion – made famous by John Stuart Mill – that the law should protect freedom of expression unless and until individuals might be physically harmed.

158 In ***Virginia v Black***,⁷⁹ the United States Supreme Court three men were convicted in two separate cases of breaching a Virginia statute against cross burning. The Court distinguished between acts which could lawfully be outlawed: *"those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."*⁸⁰ The Court held that it regarded intimidation as a type of real threat *"where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death."*⁸¹ The Court found that the act of cross burning often involves intimidation and often creates fear in victims that they are a target of violence. Banning this kind of intimidation did not fall foul of the First Amendment. However, the Court ruled that the statute at hand went too far. Its provisions created the risk of suppressing the act of cross burning completely as its provisions stated that any cross burning amounted to prima facie evidence of intent to intimidate.⁸²

⁷⁹ 538 U.S. 343 (2003).

⁸⁰ ***Virginia judgment*** at p 359.

⁸¹ ***Virginia judgment*** at p 360.

⁸² ***Virginia judgment*** at p 348.

There should be an exemption for artistic and comedic expression like those under similar legislation

159 In relation to the overlap between humour and hate speech the Canadian Supreme Court has found:

“Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However ... offensive ideas are not sufficient to ground a justification for infringing on freedom of expression.

... There may be circumstances where expression that “ridicules” members of a protected group goes beyond humour or satire and risks exposing the person to detestation and vilification on the basis of a prohibited ground of discrimination. In such circumstances, however, the risk results from the intensity of the ridicule reaching a level where the target becomes exposed to hatred.”

160 But importantly if one were to follow the Canadian approach (applying a restrictive interpretation of hate speech) it is likely *“that almost all humour and satire would continue to be free expression within the law”*.⁸³

161 We submit that this ably demonstrates that – even if the rest of the arguments in this submission were to be disregarded and the hate speech provisions in the Bill are left intact (which we have argued would be an impermissible and unconstitutional approach) – there should still be a blanket exemption in the Bill for artistic and comedic expression.

162 This is eminently sensible, which is precisely why Parliament has seen fit to adopt such an approach in the Equality Act and in the Films and Publications Act.

⁸³ Vanessa Haggie Research paper entitled “But Names Will Never Hurt Me: Extending Hate Speech Legislation To Protect Gender And Sexual Minorities In New Zealand” at p32-33 at p 33. Available at: <https://core.ac.uk/download/pdf/41338624.pdf>

The Equality Act

- 163 Section 10 of the Equality Act prohibits an expanded notion of hate speech (compared to section 16(2)(c) of the Constitution) by providing as follows:

“(1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.”

- 164 Importantly, however, section 12 of the Equality Act contains an exclusion:

“Bona fide engagement in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution.”

- 165 The SAHRC considered a complaint against the well-known cartoonist Zapiro for the ‘*Rape of Justice*’ cartoon published in the *Sunday Times* in 2008. The cartoon depicted Julius Malema, then the ANC Youth League (ANCYL) President, Blade Nzimande, Gwede Mantashe and Zwelinzima Vavi, all of whom were the then General Secretaries of the South African Communist Party (SACP), the African National Congress (ANC) and the trade union COSATU respectively, holding down a blindfolded female figure wearing a sash with the words ‘Justice System’ on it, while President Jacob Zuma stands over her with his pants down, about to rape her.

- 166 The complaint was that the cartoon was an infringement of the right to dignity, and that it amounted to hate speech. Ultimately the Human Rights

Commission found that section 10 of the Equality Act was not applicable, as the provision refers only to the publication of “words”.⁸⁴

167 In any event the Human Rights Commission emphasised – correctly – that while the cartoon might be considered offensive and distasteful, it was still protected political expression, published in the public interest and which stimulated valuable political debate. The Human Rights Commission found that the cartoon accordingly deserved a heightened level of protection.⁸⁵

168 We submit that Parliament should not merely follow the wide definition of hate speech under the Equality Act. But Parliament should follow the Equality Act’s blanket exemption for artistic, comedic and academic expression.

The Films and Publications Act 65 of 1996

169 The Films and Publications Act has various provisions which deal with material which incites violence or advocates hatred. For instance section 16(4)(a)(ii) of the Act provides that the classification committee shall refuse to classify a publication if it contains “*the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm*”.

170 Importantly the Act also provides an exemption as follows:

“unless, judged within context, the publication is, except with respect to child pornography, a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest.”

171 Similarly section 18(3)(a)(ii) of the Films and Publications Act, which deals with films and games provides:

“(3) The classification committee shall in the prescribed manner, examine the film or game referred to it and shall-

⁸⁴ *Manamela and Others v Shapiro* GP/2008/1037/E Mokonyama (SAHRC) 12 May 2010 at para 3.

⁸⁵ *Manamela* At para 5.

(a) *classify the film or game as a 'refused classification' if the film or game-*

(i) *contains child pornography, propaganda for war or incites imminent violence; or*

(ii) *advocates hatred based on any identifiable group characteristic and that constitutes incitement to cause harm”.*

172 But here again there is an exemption:

“unless, judged within context, the film or game is, except with respect to child pornography, a bona fide documentary, is of scientific, dramatic or artistic merit or is on a matter of public interest”

The BCCSA Codes

173 This, too, is the same for under the Codes of the Broadcasting Complaints Commission of South Africa (“**the BCCSA**”). The BCCSA Codes prohibits the broadcasting of:

“material which, judged within context, amounts to (a) propaganda for war; (b) incitement of imminent violence; or (c) the advocacy of hatred that is based on race, ethnicity, religion or gender and that constitutes incitement to cause harm.”⁸⁶

174 But the Code provide that these clauses do not apply to: *bona fide* scientific, documentary, dramatic, artistic or religious programmes, and programmes that contain discussions and opinions on matters of public interest or that relate to religion, belief or conscience.⁸⁷

175 In **Coetzee v YFM**,⁸⁸ a radio station appealed against a decision by a Commissioner in terms of which it was held that the broadcast of a song called ‘*Tjatjarag*’, in which the words ‘*shoot the Boer*’ were audible (though barely so) amounted to hate speech, and that there was incitement to cause harm. The programme itself was a light-hearted programme called ‘Flava in

⁸⁶ Clause 4(2) of the Free-to-Air Code. Clause 10 of the Subscription Broadcasting Code has slightly different wording but is identical in substance.

⁸⁷ See clause 5 of the Free-to-Air Code and clause 11 of the Subscription Broadcasting Code.

⁸⁸ Case no 12/2010 (BCCSA) 10 June 2010.

the morning' that was characterised by laughter, banter and jesting. The Appeals Tribunal of the BCCSA stressed the importance of the context in which a statement is made in determining whether the statement amounts to hate speech or not, and that the test for determining this is an objective one that should be judged on a case-by-case basis. It was held that the use of the words '*shoot the Boer*' in the song did not amount to hate speech and that it was a *bona fide* artistic broadcast, as it was broadcast in jest, with Julius Malema being lampooned by the presenters for his public utterances.

- 176 Moreover, in ***Dawood v Heart 104.9 FM***⁸⁹ Phat Joe, a radio presenter, set out the "*top five excuses people make for being late for work*" and included an example in which a person at a mosque replies to someone's request for advice by using the Quran as a weapon to severely beat the person who has asked for the advice and as a result is late for work. The BCCSA dismissed the complaint and held:

"Religion is a particularly sensitive area, and religious jokes may be considered in bad taste by many listeners. However, while the broadcast may well have been in questionable taste, it does not amount to hate speech, since there was no advocacy of hatred and no incitement to harm. In conclusion, therefore, the joke told on the Phat Joe show does not constitute hate speech."

- 177 We submit that the approach adopted by the BCCSA in ***Coetzee*** and ***Dawood*** cases is the correct one, as it takes into account context and, importantly, acknowledges that derogatory content is not all that is required in order for statements to qualify as hate speech; the statements must also advocate hatred *and* constitute incitement to cause harm.

- 178 **To summarise** – conduct will be exempt from the Equality Act, it will be exempt from the Films and Publications Act and the provisions of the BCCSA Codes but the very same conduct will not be exempt from the Bill.

- 179 This creates an obvious anomaly. A person would not infringe the civil

⁸⁹ 29/2011 (BCCSA).

prohibitions under the Equality Act – but they would simultaneously be guilty of a criminal offence under the Bill. This is plainly irrational and, we submit, intolerable in a democratic society.

The exemption for artistic and comedic expression is supported by foreign law

New Zealand

- 180 In a complaint which dealt with provocative humour that was reported to the New Zealand Advertising Standards Authority Complaint (“ASA”) in 2013,⁹⁰ the Commission had to consider if a Tui beer billboard advertisement which read *“Dad’s new husband seems nice – Yeah right”*, was offensive. The billboard was the subject of multiple complaints to the ASA, on the basis that *“the advertisement was homophobic; and called into question the validity of same-sex relationships.”* The ASA Chairman recognised that Tui advertisements were *“well-known for making provocative statements across a wide spectrum of society and about topical issues.”*
- 181 The ASA Chairperson noted the offence that the advertisements had caused the complainants but, nevertheless, found that the advert *“did not meet the threshold to be said to denigrate people on the grounds of their sexual orientation or meet the threshold to cause serious or widespread offence in the light of generally prevailing community standards”*. The ASA, accordingly, found no grounds to proceed with the complaint.
- 182 Another complaint was filed in May 2014 regarding a Tui beer billboard which stated: *“Oscar Pistorius seems like a balanced kind of guy. Yeah Right.”*⁹¹ The complainant argued that the billboard was insensitive and in poor taste. The majority of the Complaints Board found that the billboard was saved by the provision for humour under Basic Principle 6 of the New Zealand Code for People in Advertising. They stated that the humour did not reach the threshold

⁹⁰ Under case number 13/184 (15 May 2013).

⁹¹ Complaint Number 14/189 (13 May 2014).

of being reasonably likely to cause serious or widespread hostility, contempt, abuse or ridicule of Pistorius.

Belgium

183 Even though Article 444 of the Belgian Penal Code does not specifically exclude satirical work from the instances specified in Article 444, in 2004 the Belgian Constitutional Court clarified the law on this score. The Court stated that because of the scope given to the terms incitement, discrimination, hatred and violence, the offence cannot be presumed solely on ground of the existence of the *actus reus*. It requires specific mental element implied by the terms used by the law. The Court also specified that jokes, cartoons, opinions and pamphlets lack this special intent.⁹²

France

184 In 2006, the satirical publication Charlie Hebdo published three of the twelve so-called “Mohammed cartoons” that had initially been published in a Danish newspaper, *Jyllands-Posten*. A Muslim organisation initiated criminal proceedings against the editor-in-chief of Charlie Hebdo, for insulting their religious beliefs.⁹³

185 In March 2007, a Paris court acquitted the editor responsible, Philippe Val, and found that the cartoons did not incite hatred and could not be seen as “*hate speech*”. The court emphasised the importance of protecting free speech in a democratic society, and the need to tolerate the viewpoints of

⁹² Paper entitled ‘International Legal Research Group Online Hate Speech – No hate, No Hate Speech Movement’ prepared by The European Law Students’ Association at p66 referring to the Constitutional Court case of 6 October 2004, n° 157/2004, B.51

⁹³ The first, which appeared on the cover of the magazine, showed the Prophet Mohammed crying and saying, “*It’s hard being loved by idiots.*” The caption read, “*Mohammed overwhelmed by fundamentalists.*” The second showed the Prophet Mohammed apparently guarding the gates of heaven and saying to a line of suicide bombers, “*Stop! Stop! We have run out of virgins!*” The third showed the Prophet Mohamed wearing a turban in which a bomb is concealed with the fuse lit – See article ‘When satire incites hatred: Charlie Hebdo and the freedom of expression debate’ written by Peter Noorlander and posted on <http://journalism.cmpf.eui.eu/discussions/when-satire-incites-hatred/> on 27 January 2015.

others, including viewpoints that some may find offensive.

186 The court also noted that the cartoons appeared in a satirical magazine that the public was free to buy or not to buy. They did not, for instance, appear on billboards that everyone could see. As for the cartoons themselves, the court ruled that two of the three were not aimed at all Muslims, but merely satirised violent extremists. This was not hate speech, according to the court.⁹⁴

187 The first court of appeal confirmed the lower court's judgment on the ground that the cartoons targeted only terrorists or fundamentalists and not the whole Muslim community.⁹⁵

SUGGESTED WORDING FOR THE EXEMPTION SOUGHT

188 Based on the arguments advanced in these submissions we submit that section 4 of the Bill should at the very least include an exemption akin to that under the Equality Act as follows. The criminal prohibitions should not apply to:

“Bona fide engagement in artistic creativity or comedic expression, academic and scientific enquiry, fair and accurate reporting in the public interest or any publication in accordance with section 16 of the Constitution.”

CONCLUSION

189 For all of the reasons set out above, we respectfully submit that the Bill in its present form impermissibly limits the right to freedom of expression by expanding the definition of hate speech beyond constitutional means and because hate speech is adequately dealt with under the civil sanction under the Equality Act and the common law crime of *crimen injuria*. In any event we

⁹⁴ *Ibid.*

⁹⁵ Article entitled ‘Limits to expression on religion in France’ by Esther Janssen *Journal of European Studies* 1 (2009) at para 4. -

have demonstrated that the Bill would not pass constitutional muster because it does not contain an exemption for artistic and comedic speech.

- 190 The final section of these submissions has set out an appropriate exemption to be included in the Bill. The overarching point is that manner in which the Bill prohibits hate speech is not only impermissible but is not an appropriate means of dealing with hate speech. Indeed, as Pieter-Dirk Uys suggests:

“Fight hate speech through the social media: #HateSpeechMustEnd. Fight hate speech with love speech. Fight hate speech with education and alternatives. Fight hate speech through leading by example. And let us all remember: don't press send when pissed!”

ADVOCATE STUART SCOTT
ADVOCATE ITUMELENG PHALANE

Chambers, Sandton

31 January 2017

DARIO MILO
Webber Wentzel

BRIEF BIOGRAPHIES OF THE **COALITION OF SOUTH AFRICAN COMEDIANS**

1. **ZANews**

ZANews is a South African satirical puppet show first produced in 2008 by Both Worlds, a Cape Town-based production company. It is a satirical news programme in the form of a mock television newscast using puppets. It is broadcast on StarSat and streamed on the Internet on its website as well as on YouTube. ZANews features caricatures of key local and international political figures and celebrities, and often makes use of copyrighted material for the purposes of satire and parody. The programme has received numerous awards, including winning 14 awards at the South African Film and Television Awards to date, and being nominated twice for an International Emmy Award.

2. **Zapiro**

Jonathan Shapiro (also known as Zapiro) is a celebrated South African cartoonist. He has been the editorial cartoonist for the Sunday Times since 1998 and Daily Maverick starting 2017. Previously he was editorial cartoonist for Mail & Guardian (1994-2016), for The Times (May 2009-2016), for Sowetan (1994 – 2005), for Cape Argus (1996 – 1997), and Cape Times, The

Star, The Mercury, Pretoria News (2005 – 2008). He has held solo cartoon exhibitions in New York, Amsterdam, Frankfurt, Dhaka, Sweden and many in South Africa. Zapiro has won numerous awards for his cartoons, including being the first cartoonist to win a category prize in the CNN African Journalist of the Year Awards.

3. **David Kau**

David Kau is a leading South African comedian. He broke industry barriers at the beginning of his career. He was the first black stand-up comedian in the 1998 Smirnoff Comedy Festival in Cape Town. In 2001 David made numerous appearances in sketches on Television, including "The Phat Joe Show". In the same year he was picked for the 2001 "Just for laughs" comedy festival in Montreal. In 2003 he obtained mainstream exposure through the television comedy series "The Pure Monate Show:", which solidified him as a household name.

4. **Tumi Morake**

Tumi Morake is a "quadruple threat". She is an award winning comedian, actress, writer and producer. She is often referred to as South Africa's First Lady of Comedy. A title she achieved as a result of her triumphant career. Her career began in smoky clubs in 2006 where she would occasionally perform. She has headlined a multitude of comedy festivals all over South Africa. Her

sassy and bold character has garnered her numerous accolades including amongst others Free State Icon in 2011 and Entertainer of the Year at the 2012 Speakers of Note Award.

5. **Nik Rabinowitz**

Nik Rabinowitz is best known as a comedian. He is also an actor and author. He shot to fame as the multi-lingual presenter of SABC 1's "Coca-Cola Megamillions" Gameshow. He has had an illustrious career which saw him perform in stand-up gigs in London and at the Edinburgh Festival in the United Kingdom. He's starred in numerous local and international TV commercials and recorded an abundance of voice work and has performed for a wide range of audiences which include corporates, government and NGO's across Southern Africa.

6. **Celeste Ntuli**

Celeste Ntuli is a South African stand-up comedienne and actress best known as one of the Top 10 contestants on the second season of the SABC1 reality competition series So You Think You're Funny!, in 2009. She made her acting debut as one of the main cast members of the Mzansi Magic television show, isiBaya, in 2013. Before entering So You Think You're Funny! Celeste was working as a bookseller and part time as a stand-up comedienne, since 2005. She came third on the show. She featured on the Blacks Only comedy

showcase in 2010 and in 2012 performed a set at the South African Comic's Choice Awards. She also performed in the first Stand Up Zulu comedy show at the Durban Playhouse, in 2011.

7. **Pieter-Drik Uys**

Pieter-Drik Uys is a South African satirist turned performer, author and social activist. His enviable career spans well over 5 decades. He has become an award winning novelist and playwright and has written more than 20 plays and over 30 revues since his debut into theatre industry. Uys writes, directs, performs and produces his own work. A creative writer, he has written in many genres. One his books, "Trekking to Teema", became the first internet book in 2000. He is well known for his character Evita Bezuidenhout (also known as Tannie Evita) who has captured the hearts of millions of South Africans. Uys is exceptionally vocal as an activist and his satire often address pressing social and political issues.

8. **Mark Banks**

Mark Banks is one of the utmost recognized and respected stand-up comedians of his period .In 25 years of comedy, Mark ascertains at least one new one-man show each year, all of which he personally writes and performs himself. In 1996 he performed at the "Just for Laughs Comedy Festival" in Montreal. Banks also works as a Master of Ceremonies (MC) for award ceremonies, corporate functions, banquets and symposiums. Mark has also appeared regularly on TV as presenter or interviewee, as well as having

featured in several adverts. Mark was one of the cast members who performed with the Bafunny Bafunny tour at the Royal , whose line-up consisted of the top comedians in South Africa.

9. **Kagiso Lediga**

Kagiso Lediga is a South African stand-up comedian, actor and director. He has written and directed noteworthy television comedies including the Pure Monate Show, Late Nite with Loyiso Gola and the Bantu Hour. He has played starring roles in the films Bunny Chow. He has been nominated for numerous Golden Horn awards for his work as an actor, writer and director. Kagiso Lediga has performed at all the major comedy events on the local calendar including the prestigious Cape Town International Comedy Festival, where he won the People's Choice Award.

10. **John Vlismas**

John Vlismas is a South African stand-up comedian and entertainment promoter. His list of accolades includes winning the 2007 South African Comedy Award for best stand-up comedian of the year and was a finalist in the 2008 Yuk Yuk's Great Canadian Laugh Off. He is the Director of Whacked Management and Co-Owner of Virus Communications. He is also an Honorary Member of the Golden Key International Honour Society. He has

shared a line-up with Drew Carey, written dialogue for Jerry Springer, and hosted Chris Rock at his club.

11. **Nina Hastie**

Nina Hastie is a South African comedienne, actress and voice artist best known for guest starring on satirical comedy shows, especially Late Nite News and The Bantu Hour. She has performed at major theatres around the country such as The State Theatre, Wits Theatre and Joburg Theatre. She has headlined comedy festivals such as The Tshwane Comedy Festival, Soweto Comedy Festival, The Wits Comedy Festival and performed at The Nandos Comedy Festival. Nina has become a regular featured guest on television, on shows like Late Nite News with Loyiso Gola, Next of Next Week and 10 over 10; and on radio (Cliff Central, SA FM, Mix FM, Jacaranda FM, Metro FM and more).

12. **Joey Rasdien**

Joey Rasdien is a South African comedian, writer and actor best known as a writer and performer on the SABC1 sketch comedy series Pure Monate Show, from 2003-2004. He has performed at Yuk Yuks comedy club in Toronto, Canada and in Dubai. Corporate clients that he has performed for include SAB Miller, Spoornet, FNB, Sasol, Volkswagen, Standard Bank, Momentum Life and Vodacom, amongst many others. He has starred in numerous films

such as Running Riot, Bunny Chow, Dollars and White Pipes and Outrageous Blitz Patrollie.

13. **Christopher Steenkamp**

Christopher Steenkamp is a writer, comedian and artist. He currently writes for the Emmy Nominated. Late Nite News and is the Head Writer at Comedy On Air. He's co-produced and featured in Stand Up Africa, a documentary covering the South African comedy scene. He wrote and starred in Six Ways To Die, a pilot directed by Louw Venter. The show won an Award of Merit in the USA best shorts competition. Two of his sketches have been shortlisted in the international America Meets World Competition.

14. **Conrad Koch**

Conrad Koch is South Africa's top comedy ventriloquist, and possibly the only one, and is a double International Emmy nominated comedian. His most famous puppet, Chester Missing, has won numerous awards in his own right, including being the first recipient of the Ahmed Kathrada Foundation's Anti-Racism Award. Chester Missing has interviewed most of South Africa's political elite and has held a number of regular radio and TV slots, and writes for City Press newspaper. Conrad has appeared at most of South Africa's biggest comedy events, and has done so internationally, including at the prestigious Just For Laughs Comedy Festival in Montreal.

15. **Jason Goliath**

Jason Goliath is a South African comedian and actor best known for his recurring role as Gatiep, a resident in the Sandton apartment block, in the SABC1 sitcom Ses'Top La. He has performed at numerous corporate events and leading comedy rooms including Parker's Monte & Emperors Palace, Melville Underground, Captains Comedy Festival, AWE dnesday Comedy Jam, AWE embrace it and many more. He was a featured comedian in the stand-up comedy series Comedy Central Presents Live @ Parker's, in November 2012. In 2016 he began hosting the late night talk show Larger Than Life on SABC3. humble beginnings

16. **John Barker**

John Barker is a South African filmmaker based in Johannesburg. He is best known for his feature film directorial debut Bunny Chow. The film was officially selected to screen at the Toronto International Film Festival in 2006. The film received many awards. John wrote, directed and produced South Africa's first music mockumentary Blu Cheez. The year 2014 saw Barker working with comic heavyweight (and Monty Python legend), John Cleese in Spud 3: Learning to Fly, as well as Directing a superb cast of local talent in the third of the Spud series by best-selling South African author, John van de Ruit.

17. **Casper Johannes De Vries**

Casper Johannes De Vries is a South African actor, comedian, entertainer, painter, composer, director and producer. Casper de Vries uses satire, blue, character, observational, sketch and word play comedy styles in his stage performances, and he is very outspoken on topics such as humanity, religion, social norms, language and politics. Casper's Live shows have been featured on South African television channels like SABC 2 and kykNET and more recently Comedy Central Africa since 1986. He is also the recipient of the 2016 Comics' Choice Awards Lifetime Achievement award.

ANNEXURE "B"



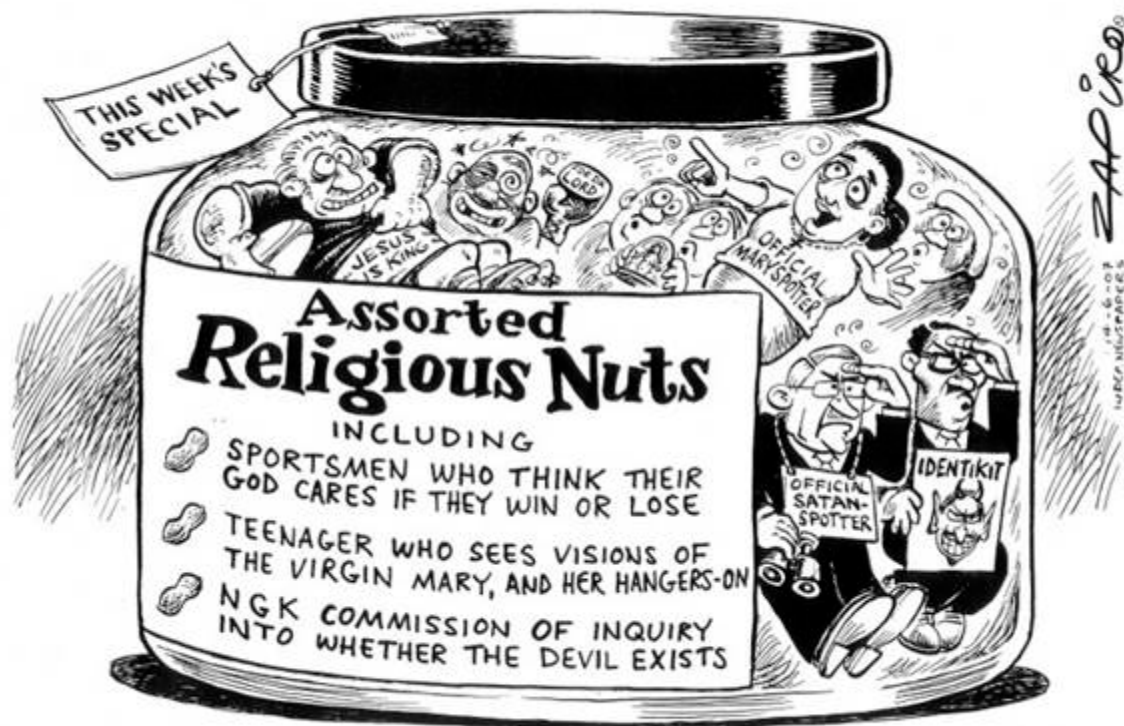
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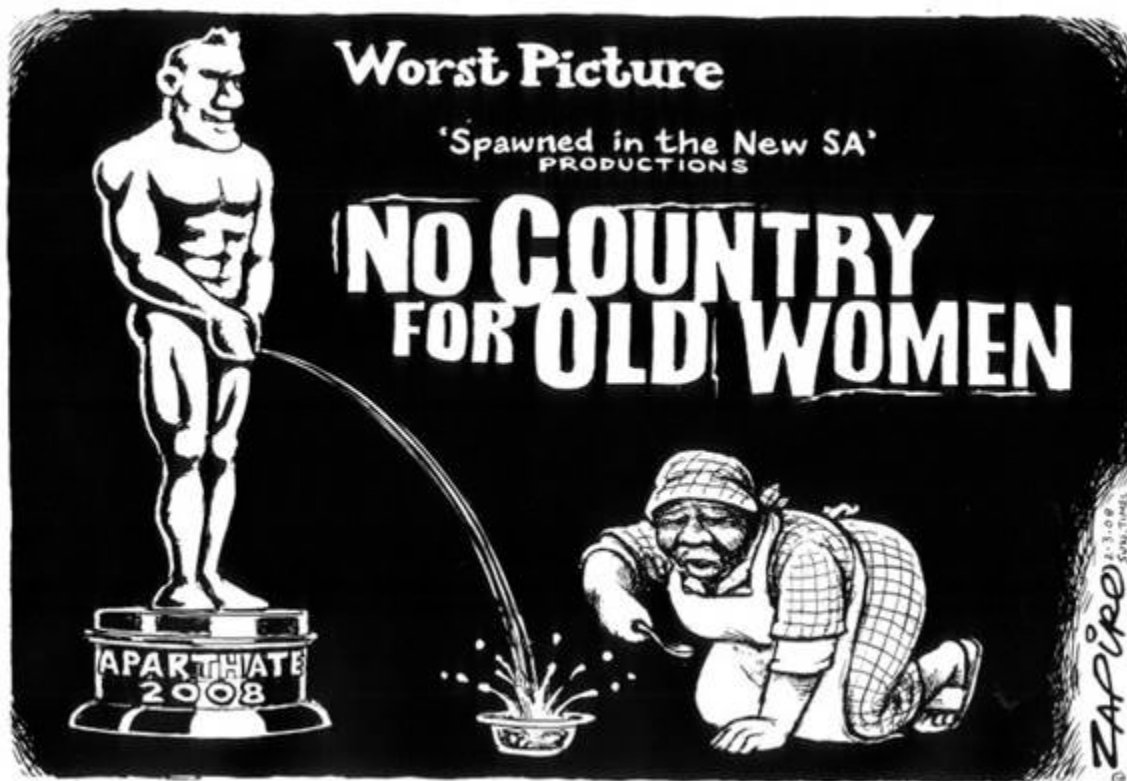


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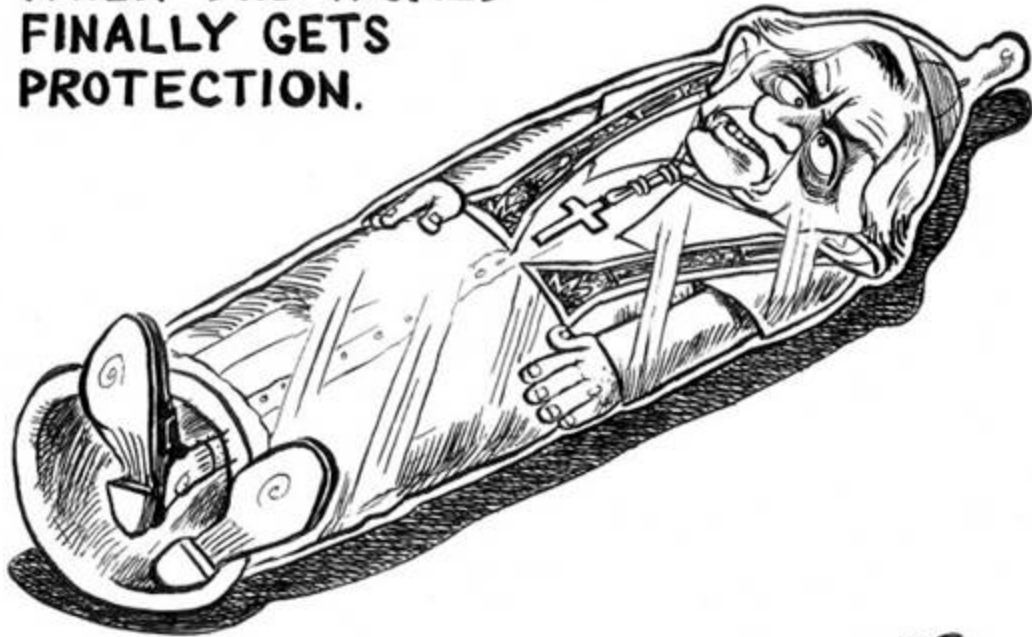


- 1 Can you provide **proof** of the existence of any of the above? (Photos please! — or at least documented scientific evidence).
 - 2 That was a tough question, wasn't it! If you couldn't do it, don't worry — nobody else can either. Even so, you do know, don't you, that some people believe in some of them?
 - 3 So... then can you — or anyone — explain why a newspaper columnist should have been fired for writing that people should be allowed to believe in **(N)**?
- P.S. SEND ANSWERS TO RAPPORT EDITOR TIM DU PLESSIS — NOT TO THIS CARTOONIST!





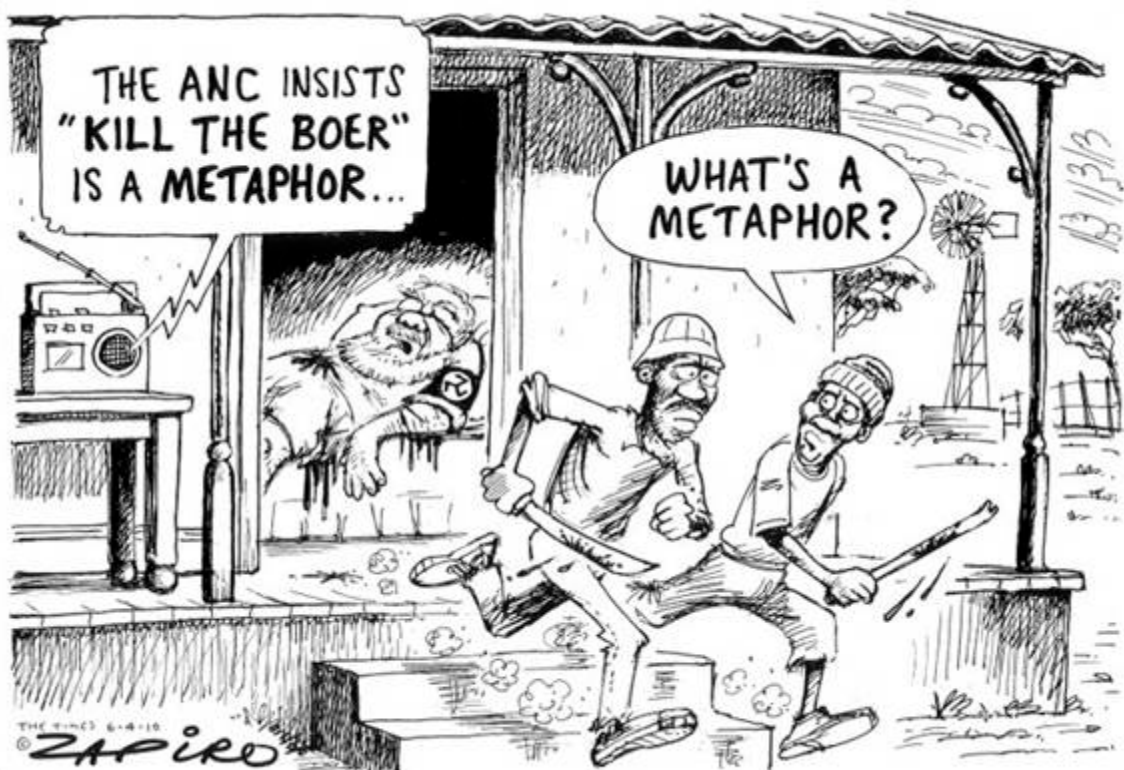
WHEN THE WORLD
FINALLY GETS
PROTECTION.



SUN-TIMES 22-3-09 ZAPIRO ©



ZAPIRO MEG 21-1-10



ANNEXURE "B"





ANNEXURE "B"

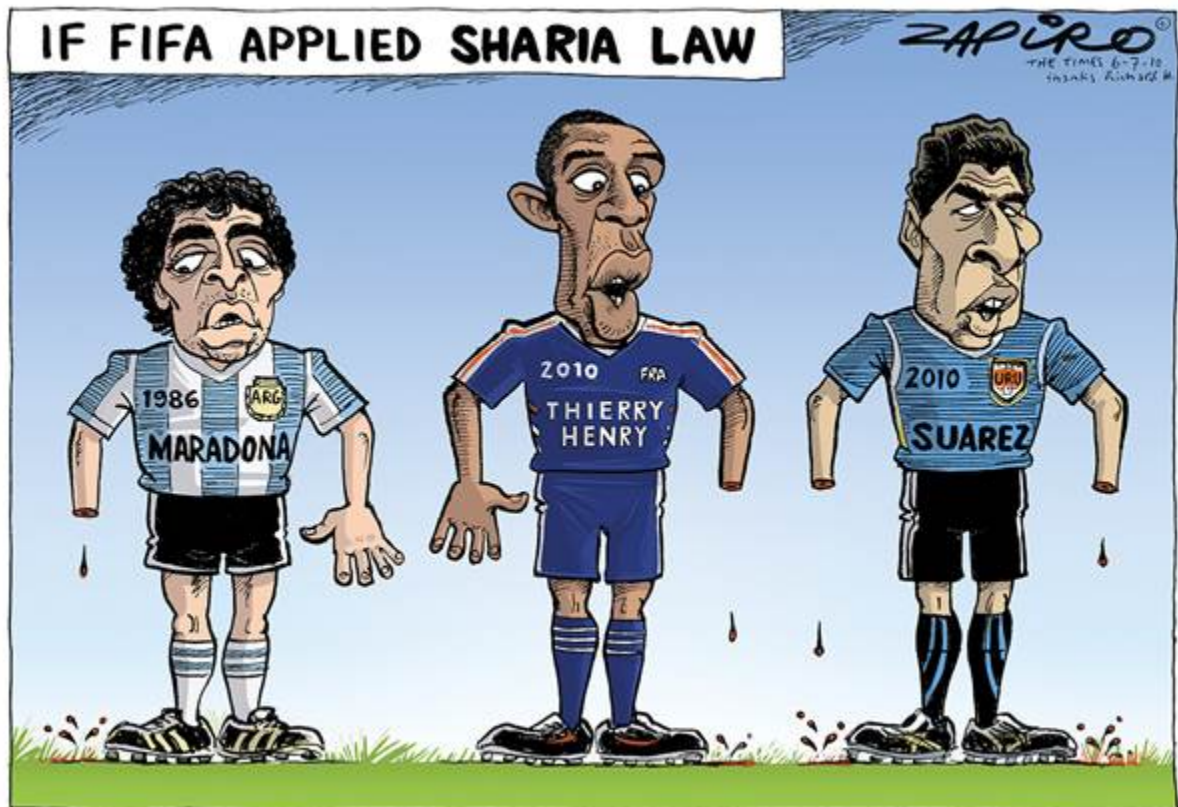
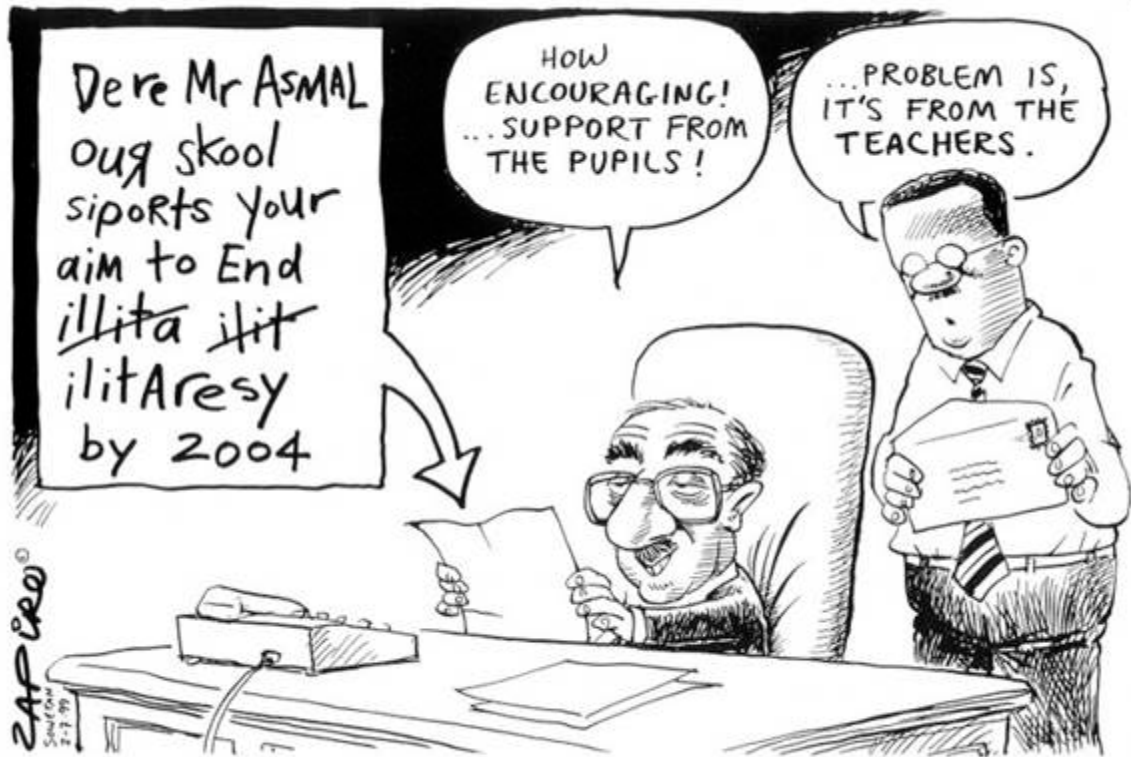
D.I.Y. Freedom of Expression

thanks PDU
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ZAPIRO









ANNEXURE “B”