

11 August, 2016

Attention: Leanne Morrison (EPMO - Assessing the impact of Legislation Project)  
Chairperson, Committee on Social Cohesion and Nation Building in South Africa  
Parliament of the RSA  
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Dear Sir/Madam

**SUBMISSION BY FREEDOM OF EXPRESSION INSTITUTE TO THE HIGH LEVEL PANEL ON THE ASSESSMENT OF KEY LEGISLATION, COMMITTEE ON SOCIAL COHESION AND NATION BUILDING IN SOUTH AFRICA**

**1. INTRODUCTION**

- 1.1 The FXI is a non-governmental organisation which was established in 1994 to promote and advance freedom of expression and related rights. The FXI objectives are to fight for and defend freedom of expression, to oppose censorship, to fight for the right of equal access to information and knowledge, and to promote access to media and a free press.
- 1.2 The FXI welcomes this opportunity availed by the High Level Panel on the Assessment of Key Legislation in South Africa to make written submissions to the Committee on Social Cohesion and Nation Building in South Africa.
- 1.3 FXI's submission is aligned to the focus area on Discrimination (racism, tribalism, xenophobia and sexism).

**2. BACKGROUND AND RATIONALE**

- 2.1 The justification for FXI submission is that free expression is a necessary condition for social cohesion. Free expression ensures the protection of marginalized and excluded voices in society; and mutual respect for minority views. However, an overly broad definition of hate speech has the potential to limit free expression, which in turn threatens social cohesion. Therefore, any limitation on expression should be defined narrowly in order to legitimately limit forms of unprotected speech without undermining the right to free expression.
- 2.2 Section 16(2)(c) of the Constitution of South Africa states that the right to freedom of expression does not extend to -
  - a) propaganda for war;
  - b) incitement of imminent violence;
  - c) or *advocacy of hatred* that is based on *race, ethnicity, gender or religion*, and that *constitutes incitement to cause harm*.
- 2.3 Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000) (PEPUDA) states that 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.

- 2.4 The FXI notes with concern inconsistencies between the Constitution and the PEPUDA definition of hate speech. The FXI further notes that the PEPUDA definition has further implications on the interpretation of hate speech given in proposed legislation such as the Film and Publications Amendment Bill (2016) and all other legislation referencing hate speech.
- 2.5 The rationale underlying FXI submissions is that limitation on expression imposed by s10(1) of PEPUDA is overly broad in that –
- i. It expands the nature of prohibited action from one that “*constitutes incitement*” to one that “*could reasonably be construed to demonstrate a clear intention*”.
  - ii. It expands the consequence that the prohibited action from “*incitement to cause harm*” to an *intention to “be hurtful”, “be harmful or to incite harm”, or to “promote or propagate hatred”*. Therefore, there is vagueness in what constitute an intention to be harmful.
- 2.6 Therefore, s10(1) of PEPUDA is impractical to enforce strictly and is inadequate to achieve the intended purpose of such limitation without prejudicing protected forms of speech under s16(1) of the Constitution. (See Annexure 1: *Analysis of key legislation on hate speech in South Africa*)
- 2.7 The FXI acknowledges that s16(2) sets out forms of expression that are not protected under the right to freedom of expression. The FXI further reiterates that any legislation derived from such limitation must be consistent with s16(1) of the Constitution and must not unintentionally limit protected freedom of expression.

### 3. SUBMISSION

- 3.1 The FXI submits that s10(1) of PEPUDA be amended, in line with the s16(2), to read as follows -

Subject to the proviso in section 12, no person may communicate messages based on *race, ethnicity, gender or religion*, against any person or group, that -

- a) propagates and advocates for hatred, and
  - b) constitutes incitement to cause harm, or
  - c) to cause imminent violence
- 3.2 The FXI further submits that all definitions of hate speech in South African legislation be aligned to such interpretation of hate speech.

### 4. CONCLUSION

- 4.1 The Freedom of Expression Institute requests the opportunity to make full oral submissions to the committee. Any such invitation should be addressed to Mr Zororo Mavindidze, Senior Researcher, Freedom of Expression Institute, zororom@fxi.org.za, 011 482 1913 (Office) or alternatively 073 554 8310 (Mobile).

Yours faithfully,



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## ANNEXURE 1: ANALYSIS OF KEY LEGISLATION IMPACTING HATE SPEECH IN SOUTH AFRICA

Legislation	Section/Provision	Analysis of problematic aspects	Implication on social cohesion and recommendation
1. South African Constitution (1996) Chapter 1: Founding Provisions	1. The Republic of South Africa is one, sovereign, democratic state founded on the following values: a) Human dignity, the achievement of equality and the advancement of human rights and freedoms; b) Non-racialism and non-sexism.	The forms of speech that are not protected, as given in section 16(2) of the Constitution may pose a threat to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality and the advancement of human rights and freedoms.	Such speech can be limited; however, any such limitation must not undermine section 16(1) and must be consistent with section 16(2) of the Constitution.
3. South African Constitution (1996)	<b>10. Human dignity</b> Everyone has inherent dignity and the right to have their dignity respected and protected.	Crimen injuria is criminal charge related to impairing someone's dignity through speech. Crimen injuria requires an identifiable person to be on the receiving end of an insult. In crimen injuria litigation, an insult against an entire race group, would therefore not warrant criminal liability.	There exists provision for the protection of human dignity in common law; however, there is a gap in respect of speech that impairs the dignity of <i>groups</i> of people.
4. South African Constitution (1996)	<b>16. Freedom of expression</b> (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 or ideas; (c) freedom of artistic creativity; and (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; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.	It is important to stress that offensive or hurtful speech is protected under section 16(1) of the Constitution and hate speech is not protected. However, current jurisprudence on hate speech such as <i>Afriforum and Another v Malema 2010 (5) SA 235 (GNP)</i> is problematic because the courts have gradually broadened its definition to the point where forms of expression protected under 16(1) are threatened. Under the current jurisdiction, when speech, <i>'viewed objectively, has the propensity to incite hatred and cause harm to the party or group of persons affected thereby'</i> , such speech can be deemed hate speech and therefore is not capable of the protection afforded by section 16(1). This is not consistent with the interpretation of hate speech under section 16(2).	The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. Section 16 (2) should be the primary reference for definition of hate speech and any other forms of limitation of the 16 (1). This is the basis for challenging section 10 Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).
5. Promotion of Equality and	<b>10. Prohibition of hate speech</b>	Generally, limitation in Section 10 in effect limits free expression in an effort to protect dignity. The	The implication of this provision is that it becomes impractical to enforce strictly and

Prevention of Unfair Discrimination Act (4 of 2000)

- 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-
- be hurtful;
  - be harmful or to incite harm;
  - promote or propagate hatred.

limitation does not give protection to free expression, therefore elevating equality over freedom of expression.

Section 10 (1) expands the actions prohibited by section 16 (2) from "advocacy for hatred" (16 (2)(c) to include "publication, propagation or simply, communication of words"

It expands the nature of prohibited action from one that "constitutes incitement" to one that "could reasonably be construed to demonstrate a clear intention"

It expands the consequence that the prohibited action from "incitement to cause harm" to an intention to "be hurtful", "be harmful or to incite harm", or to "promote or propagate hatred". There is therefore vagueness in what constitutes an intention to be harmful. Section 10 does not require the aggrieved party actually to show that the person who engaged in the speech had the intention to be hurtful or to harm anyone.

Section 10 is therefore over-broad in defining hate speech.

In order to be deemed hate speech, all that is required is that a reasonable person must believe that the speech had the intention to be hurtful to a designated group. Section 10 does not require that speech actually incited or caused harm. All one will has to show is that a reasonable person, looking at the context within which the words were spoken, would have construed the person who uttered the words as having an intention to harm.

Therefore, the PEPUDA definition of hate speech allows for hurtful speech to be included in such classification, allowing for too subjective a view to be taken on what hate speech is.

inadequate to achieve the intended purpose of limiting hate speech.

PEPUDA should be amended and aligned to the parameters of Section 16 (2) of the SA Constitution.

A narrow interpretation of hate speech to be adopted by the courts. The courts must take into account more factors than mere incitement to cause harm.

**Suggested amendment**

Subject to the proviso in section 12, no person may communicate messages based on one or more of the prohibited grounds, against any person or group, that -

- propagates and advocates for hatred, and
- constitutes incitement to cause harm, or
- to cause imminent violence

**Suggested addition**

Expansion of PEPUDA, to include the term 'Dangerous speech' which may provide the legal scope to clearly differentiate dangerous speech from hate speech in a manner that is consistent with section 16 (2) Constitution.

Dangerous speech would therefore constitute an elevation beyond hate speech that may require stricter penalties. In such determination, the courts must consider:

- the level of a speaker's influence,
- the grievances or fears of the audience,
- whether or not the speech act is understood as a call to violence,
- the social and historical context of the audience, and
- the way in which the speech is disseminated



8. Film and Publications Amendment Bill

**Prohibition against propaganda for war, incitement of violence and hate speech**  
18H. No person may distribute through any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, or advocates hate speech.

The Bill proposes the insertion of a new section 18H prohibiting the distribution of any film, game or publication which advocates propaganda for war, incites violence or advocates hate speech through any medium "including the internet and social networking sites".

The use of the term hate speech would derive its effect from the PEPUDA, which serve as the primary reference legislation. Hence, the preceding critique applies.

Implied limitation on free expression online must be aligned to the Constitution 16 (2)

Definition inconsistent with Constitution 16 (2), and has negative implications on free expression

Should be aligned to 16 (2)(c), i.e. *advocate for hatred, which constitutes incitement to cause harm*

9. General comment related to specific legislation on hate speech

General comment related to specific legislation on hate speech

There is no legal objection to criminalizing hate speech. However, the danger is that hate speech legislation has the potential to infringe rather than legitimately moderate extremes of expression and at worst, use to eliminate free speech completely.

Therefore, any such law should be properly crafted and be in line with the parameters outlined in section 16(2) in the SA Constitution.

Any law criminalizing hate speech should consider the following:

- (a) the nature and extent of the harm that is incited by the particular type of hate-speech;
- (b) the nature and extent of the punishment imposed on the offender;
- (c) the relation between the punishment and the purpose of imposing the punishment, that is, whether the punishment is effective in achieving its purpose; and
- (d) whether there are less restrictive means to achieve this purpose (like those contained in Promotion of Equality and the Prevention of Unfair Discrimination Act, 2000 ('PEPUDA'), such as civil liability or apology, or perhaps even an education programme.