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Attention: Ms Pat Jayiya  
Constitutional Review Committee  
Parliament

Email: [pjayiya@parliament.gov.za](mailto:pjayiya@parliament.gov.za)

28 May 2013

Dear Ms Jayiya

**WRITTEN SUBMISSIONS BY THE FREEDOM OF EXPRESSION INSTITUTE (FXI) ON  
THE NEED TO REVIEW AND AMEND/REPEAL CERTAIN PROVISIONS OF  
SECTION 16 OF THE CONSTITUTION**

**1. INTRODUCTION**

1.1. These submissions are made by the Freedom of Expression institute (FXI).

1.2. The FXI is a not for profit non-governmental organisation which was established in January 1994 primarily to assist in the repeal and amendment of the South African laws inhibiting the freedoms of expression and association. Its aims today are broader. The present objective of the FXI include promotion of efforts to protect the public's right to receive and impart information, ideas and opinion, to defend freedom of expression as well as to oppose censorship and the fight for the right of access to information.

1.3. FXI welcomes this opportunity to make suggestions for the review and amendment/repeal of certain provision of section 16 of Chapter 2 of the Constitution of Republic of South Africa, 1996 ("the Constitution"), which chapter deals with the Bill of Rights. We note the closing date for submissions is 31 May 2013. We request the opportunity to participate in the public hearings which Parliament's Constitutional Review Committee ("the Review Committee") will undoubtedly hold.

## **2. BACKGROUND TO AND RATIONALES FOR THE FXI'S PROPOSED AMENDMENTS TO SECTION 16**

2.1. Section 16 of the Constitution guarantees everyone the Right to Freedom of expression recognising freedom of expression as a fundamental human right. This right, as is the case with all others, has to be balanced with other rights such as dignity, equality and privacy.

2.2. Freedom of expression is an integral right for democracy in that it ensures that everyone has the right to compete in "the marketplace of ideas" by sharing information and ideas. This is essential for human development because it allows us to make informed decisions.

2.3. Section 16(1) declares that everyone has the right to freedom of expression. Further it specifically lists several forms of expression that are protected.

2.4. Section 16(2) then contains a so-called "internal limitation" on the right to freedom of expression. Section 16(2) serves as an internal limitation that removes entire areas of expression from falling beyond the ambit of the right to freedom of expression and consequently from the ambit of constitutional scrutiny.<sup>1</sup>

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<sup>1</sup> South African Journal on Human Rights, Volume 3 Part 1, 1997, Lene Johannessen, pg 136

2.5. Section 16(2) does not fall within the right to freedom of expression; it is explicitly excluded from the protection of the Constitution. This has significant consequences. Effectively this means that section 36 (the general limitations clause) will not apply to restrictions on expression that fall within section 16(2) as such restrictions would be in respect of expression that is constitutionally unprotected. All the rights in Chapter 2, the Bill of Rights are and should be subject to the general limitations clause in section 36<sup>2</sup>. It is submitted that section 16(2), with its internal limitation clause fundamentally deviates from this fundamental constitutional arrangement.

2.6. Section 16(2) frees the government from an obligation to ensure that restrictions on expression falling within 16(2), such as legislation that restricts hate speech imposes only reasonable, justifiable and proportional limitations on expression. Thus the section essentially grants constitutional immunity to Parliament, removing a class of speech from the ambit of constitutional protection and subjects it to parliamentary sovereignty<sup>3</sup>.

2.7. It is submitted that section 16(2) is unnecessary, over-board and goes beyond the requirements of international law<sup>4</sup>. South Africa has signed but not ratified International hate speech conventions, specifically the International Convention on the Elimination of all Forms of Racial Discrimination and the International Covenant on Civil and Political Rights. It is worth noting that South Africa has included article 19 of the International Covenant on Civil and Political Rights in the text of the freedom of expression clause. However by granting constitutional immunity to governmental action to restrict the expression contained in section 16(2), the section goes beyond what is required from international human rights instruments. It does so by failing to incorporate safeguards against over-breadth and abuse inherent in international hate speech provisions<sup>5</sup>. These international conventions mandate its parties to enact legislation to implement its provisions; it does not however require the implementation to be at that of a Constitutional level.

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<sup>2</sup> South African Journal on Human Rights, Volume 3 Part 1, 1997, Lene Johannessen, pg 139

<sup>3</sup> Supra, pg 138

<sup>4</sup> Supra, pg 136

<sup>5</sup> Supra, pg 142

- 2.8. In comparison to other jurisdictions like the United States where they have very little limitations on their right to free speech and Canada who have a constitutional order similar to that of South Africa it is evident that it is possible to limit racially offensive speech by a considered use of the general limitation clause.
- 2.9. Whilst recognising the need for protection against racism and hate speech, particularly given our terrible history of Apartheid and Colonial oppression, it is submitted that section 16(2) is not the appropriate tool to achieve this. When one notes the other sections in the Bill of Rights for example section 10, 11, and 13 among other rights, it is noted that the right is merely stated. In sections such as 22, 23 and 32 the right is stated and it is noted further that national legislation should be enacted. Section 16(2) is the only section that contains these kinds of internal limitations.
- 2.10. In our respectful view, the repeal of section 16(2) will bring section 16 in line with the other rights of the Bill of Rights.
- 2.11. National legislation can and should be enacted which prohibits propaganda for war, incitement of imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm. Indeed, such legislation has in fact been enacted by our democratic Parliament. See for example the Film and Publications Act 65 of 1996 as well as the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA).
- 2.12. It is worth noting that the clearer the law is, the less room there is for varying interpretations, ambiguity and confusion. If section 16(2) is repealed, the section 16 will set out that the right to freedom of expression is constitutionally protected. National legislation which restricts expression such as hate speech, including PEPUDA and the Film and Publications Act, then elaborates on the definitions and limitations of such right. It is in line with and consistent with the Constitution, in particular, it is in line with the general limitations clause which requires all such restrictions to be justifiable and proportional.

### 3. FXI'S PROPOSED AMENDMENTS TO SECTION 16

For the Review Committee's ease of reference we set out below the proposed amendments and or insertions in the manner of a Bill, that is:

Words in **bold type** in square brackets [ ] indicate omissions from existing provisions

Words underlined with a solid line indicate insertions in existing enactments

#### FXI's Proposed Amendments to Section 16 of the Constitution:

##### *16. Freedom of Expression*

[(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, that constitutes incitement to cause harm.]**

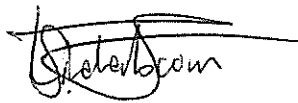
### 4. CONCLUSION

4.1. FXI thanks the Review Committee for the opportunity to make these representations and stresses that the recommendations made above are made in the spirit of contributing to the strengthening of the Right to Freedom of Expression and in turn to the growth of our democracy.

4.2. This, we propose can be done by requiring governmental restrictions on freedom of expression to meet the requirements of the Constitution's general limitations clause set out in section 36.

4.3. FXI reiterates its desire to make oral representation at any hearings held. Please do not hesitate to contact the writer should FXI for further enquiries.

Kind regards



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