

# Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform

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## Date published

6 November 2017

**Editor** Prof AA du Plessis

## How to cite this article

Botha JC and Govindjee A "Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform" *PER / PELJ* 2017(20) - DOI  
<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1395>

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## DOI

<http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1395>

## Abstract

This article responds to some of the issues raised by Marais and Pretorius in their 2015 article titled "A Contextual Analysis of the Hate Speech Provisions of the Equality Act" published in 2015(18)4 *PER* 901. In particular, the authors in the present response deal with a) the relationship between the prohibition of unfair discrimination and the regulation of hate speech; b) Marais and Pretorius' interpretation of aspects of the section 10(1) hate speech test; c) the role and interpretation of the proviso in section 12; and d) the constitutionality of section 10(1), as read with the proviso. For each of these issues, the authors first summarise Marais and Pretorius' contentions and then reply thereto. The authors also propose amendments to the threshold test for hate speech in terms of section 10(1) and suggest the enactment of new hate speech-specific defences.

## Keywords

Hate speech; Equality Act; unfair discrimination and the regulation of hate speech; threshold test for hate speech.

## 1 Introduction

In their article entitled "A Contextual Analysis of the Hate Speech Provisions of the Equality Act",<sup>1</sup> Marais and Pretorius deliver an interesting and thought-provoking interpretation of the meaning and constitutionality of section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* (the *Equality Act*),<sup>2</sup> as read with the proviso in section 12 of the Act. The contribution is worthy of a response.

Section 10(1) of the *Equality Act* prohibits hate speech and provides as follows:

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 incite harm;
- c) promote or propagate hatred.

Section 12 of the Act prohibits types of expression as a form of unfair discrimination and contains a proviso to both sections 10(1) and 12. It provides that:

No person may-

- a) disseminate or broadcast any information;
- b) publish or display any advertisement or notice that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person. Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution is not precluded by this section.

Section 7(a) of the Act also regulates expression as a form of unfair discrimination. It provides that:

Subject to section 6, no person may unfairly discriminate against another person on the grounds of race, including (a) the dissemination of any propaganda or idea, which propounds the racial superiority or inferiority of

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<sup>1</sup> Marais and Pretorius 2015 PER 901.

<sup>2</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (the *Equality Act*).

such person, including incitement to, or participation in, any form of racial violence.

The requirements for prohibited speech in sections 7(a), 10(1) and 12 of the *Equality Act* create many interpretative challenges.<sup>3</sup> The test for hate speech in section 10(1) is significantly broader than the definition for hate speech in the *Constitution*<sup>4</sup> and is therefore open to constitutional challenge.<sup>5</sup> There is considerable doubt about the meaning and intended application of sections 7(a) and 12. It is debatable whether these provisions regulate hate speech *per se* or whether they prohibit speech as a form of unfair discrimination. The proviso in section 12 has also caused interpretative difficulty. The position is compounded by the fact that the Act's objectives indicate that the drafters regarded the prohibition of unfair discrimination and hate speech as inter-related, yet the two are separately regulated.<sup>6</sup>

Marais and Pretorius correctly point out that the prohibited speech provisions in the *Equality Act* must be interpreted contextually and purposively in the light of the Act's objectives. They also stress that it is incorrect to construe section 10(1) only with reference to the constitutional right to freedom of expression and the hate speech limitation in section 16(2)(c) of the *Constitution*. They argue that the more appropriate context for an interpretation of section 10(1) is sections 9(3) and (4) of the *Constitution*, which provide that neither the state nor any person may unfairly discriminate against another person on a prohibited ground and that national legislation must be enacted to regulate such conduct.<sup>7</sup>

We agree that the meaning and constitutionality of the speech provisions in the *Equality Act* must be analysed in the light of the Act's structure and objectives and with reference to the various remedies available to redress

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<sup>3</sup> See generally Albertyn, Goldblatt and Roederer *Introduction* 2-4; Teichner 2003 SAJHR 349. For a recent and detailed account, see Botha *Hate Speech*.

<sup>4</sup> Section 16(2)(c) of the *Constitution of the Republic of South Africa*, 1996.

<sup>5</sup> Jon Qwelane has launched a constitutional challenge against s 10(1) following an Equality Court judgment that his column and an accompanying cartoon amounted to hate speech. See SAHRC v Qwelane (Eqc) (unreported) case number 44/EqJhb of 31 May 2011; Qwelane v Minister of Justice and Constitutional Development 2015 2 SA 493 (GJ). The judgment in SAHRC v Qwelane 2017 4 All SA 234 (GJ) was delivered in August 2017, after this article was accepted for publication. We do not agree with the decision.

<sup>6</sup> Teichner 2003 SAJHR 352; Albertyn, Goldblatt and Roederer *Introduction* 4.

<sup>7</sup> Marais and Pretorius 2015 PER 902. The *Equality Act* is the enabling legislation in question.

infringements.<sup>8</sup> We also agree that the Act was enacted to give effect to the constitutional guarantee of equality and to ensure the transformation of South African society.

We add, however, that the Act was enacted as a remedial human rights statute and as the intended legal instrument for transforming South African society.<sup>9</sup> To this end, the Act's preamble contains a number of transformative and reconciliatory ideals. It acknowledges, for example, that the systemic inequalities of the past and unfair discrimination remain pervasive in society and that the consolidation of the democracy requires their eradication. It also records that the Act was enacted to facilitate the transition to a democratic country, both united and diverse, which upholds constitutional values, and which is "marked by human relations that are caring and compassionate". The Act's objectives, listed in section 2, repeat these goals and resonate with the transformative constitutional mandate.<sup>10</sup> Thus, when interpreting the prohibited speech provisions in the Act, it is important to take into account that the Act was enacted as a legal means to create a more egalitarian society in which discrimination is overcome and reconciliation promoted and where the inherent dignity of all persons is respected.<sup>11</sup> This position notwithstanding, care must be taken not to conflate hate speech and unfair discrimination. Whilst the two are often causally linked, they must be treated as separate legal concepts.

In this contribution, we respond to some of the issues raised by Marais and Pretorius. In particular, we deal with a) the relationship between the prohibition of unfair discrimination and the regulation of hate speech;<sup>12</sup> b) Marais and Pretorius' interpretation of aspects of the section 10(1) hate speech test; c) the role and interpretation of the proviso in section 12; and d) the constitutionality of section 10(1), as read with the proviso. For each of these issues, we first summarise Marais and Pretorius' contentions and then reply thereto. Thereafter, we propose amendments to the threshold

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<sup>8</sup> Also see s 3(3), which emphasises contextual interpretation. See Albertyn, Goldblatt and Roederer *Introduction* 18; Bohler-Muller and Tait 2000 *Obiter* 410.

<sup>9</sup> For a discussion of the drafting history, see Gutto *Equality and Non-Discrimination in South Africa* 17-95.

<sup>10</sup> Section 2(b)(i)-(v) of the *Equality Act*.

<sup>11</sup> Krüger *Racism and Law* 151-152. The Act was also enacted to facilitate South Africa's international law obligations and must be interpreted with reference to relevant international law and comparable foreign law. See s 3 and s 233 of the *Constitution*.

<sup>12</sup> We have also dealt with this issue in Botha and Govindjee 2016 *SAJHR* 304-305 and Botha and Govindjee 2017 *Stell LR* 245, but expand our argument here in the light of Marais and Pretorius's contribution.

test for hate speech in terms of section 10(1) and also suggest the enactment of new hate speech-specific defences.

## 2 The link between unfair discrimination and hate speech

Marais and Pretorius contend that the type of "discriminatory expression" falling within the ambit of section 10(1) of the *Equality Act* should not be equated with the form of hate speech excluded from constitutional protection in terms of section 16(2)(c) of the *Constitution*.<sup>13</sup> They argue that the expression envisaged by section 16(2)(c) is "only expression of the most severe and deeply-felt, group related contempt that constitutes incitement to harm and imperils democracy".<sup>14</sup> They claim that the prohibition in section 10(1) aims to regulate low-grade discriminatory expression which demeans, hurts and degrades people on the basis of group characteristics and which does not promote equality.<sup>15</sup>

The authors reason that the meaning and constitutionality of section 10(1) must be tested by determining whether the expression prohibited thereby meets the fairness standard (for discrimination) and ultimately whether the prohibited expression fosters or inhibits equality.<sup>16</sup> The authors believe that the prohibition of hate speech could have been included within the ambit of section 6 of the *Equality Act*, which prohibits unfair discrimination generally, but suggest that a specific hate speech prohibition was enacted to enable the Act to achieve its objectives. They also argue that expression falling within the parameters of section 10(1) constitutes a form of unfair discrimination (in the sense that the speech creates disadvantage by promoting inequality and prejudice in society), but that a categorical prohibition was introduced to circumvent the need for hate speech complainants to prove the unfair discrimination requirements on a case-by-case basis.<sup>17</sup>

As indicated earlier, we agree that the underlying purpose of the *Equality Act* is to give effect to the constitutional right to equality by providing legal mechanisms aimed at overcoming unfair discrimination. We do not agree, however, with the conflation of hate speech and unfair discrimination. We

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<sup>13</sup> Marais and Pretorius 2015 *PER* 902-903.

<sup>14</sup> We believe that this interpretation sets the bar too high, but do not address this issue here. We have analysed the meaning of the constitutional test for hate speech elsewhere. See Botha and Govindjee 2014 SACJ 145-153 and Botha and Govindjee 2016 SAJHR 297-302.

<sup>15</sup> Marais and Pretorius 2015 *PER* 903.

<sup>16</sup> Marais and Pretorius 2015 *PER* 903-904.

<sup>17</sup> Marais and Pretorius 2015 *PER* 906.

argue that it is essential that hate speech and discrimination be recognised as independent concepts, with their own separate causes of action, even though the two are causally connected and the Act's objectives indicate that their prohibition is inter-related.<sup>18</sup> There is, in fact, a somewhat troubled relationship in the Act between the measures used to regulate hate speech and discriminatory speech, often causing confusion. This problem cannot be resolved with reference to section 10(1) only. Such an approach would be unjustifiably narrow. Both sections 7(a) and 12 must be considered and it is necessary to juxtapose the Act's treatment of hate speech with the regulation of unfair discrimination.

Section 6 of the *Equality Act* provides that no one may discriminate unfairly against another person.<sup>19</sup> Sections 7, 8 and 9 then prohibit unfair discrimination on specific grounds. The definition of discrimination in the Act comprises three elements, namely: a) a direct or indirect act or omission;<sup>20</sup> b) that causes harm by imposing a burden or withholding a benefit; and c) on a prohibited ground.<sup>21</sup> Discrimination thus involves an element of harm, arising either from the imposition of a burden or the denial of a positive benefit. It is not necessary to prove an intention to discriminate.<sup>22</sup> The focus is on the impact of the discriminatory conduct in issue.

Once the complainant has proved these three elements, discrimination is established and the respondent must then prove that the discrimination was not unfair. Section 14 of the Act contains a legislative test for determining fairness. Section 14(2) provides that when determining unfairness, a court must have regard to the context; the list of factors in section 14(3);<sup>23</sup> and whether the discrimination reasonably and justifiably differentiates between people on objective criteria intrinsic to the activity concerned.<sup>24</sup>

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<sup>18</sup> See Botha and Govindjee 2016 SAJHR 304; Teichner 2003 SAJHR 352; Kok 2001 TSAR 297; Kok and Botha 2014 *Litnet Akademies* 208-209.

<sup>19</sup> "Discriminate" is defined in s 1(1)(viii) of the *Equality Act*.

<sup>20</sup> Discrimination is direct (where there is a direct link between the discrimination and a prohibited ground) or indirect (where an apparently impartial act has a harmful effect on a person or persons identified by a prohibited ground). See Albertyn, Goldblatt and Roederer *Introduction* 33-34.

<sup>21</sup> Albertyn, Goldblatt and Roederer *Introduction* 33.

<sup>22</sup> Albertyn, Goldblatt and Roederer *Introduction* 34-35; *City Council of Pretoria v Walker* 1998 2 SA 363 (CC) para 43.

<sup>23</sup> The list of factors in s 14(3) is broad. They appear to be based on a combination of the criteria taken into account by the Constitutional Court in *Harksen v Lane* 1988 1 SA 300 (CC) (hereafter *Harksen*) and those applied during a limitation enquiry in terms of s 36 of the *Constitution*. See generally Krüger 2011 SALJ 479, 480; *MEC for Education: Kwa-Zulu Natal v Pillay* 2008 1 SA 474 (CC) paras 70, 137, 168.

<sup>24</sup> *Harksen* paras 51-53.

In summary, the scheme underlying the unfair discrimination provisions in the Act is that a complainant must firstly advance a *prima facie* case of discrimination on a prohibited (or analogous) ground. The onus then shifts to the respondent to prove either that the discrimination did not occur or that none of the prohibited grounds apply.<sup>25</sup> Once it has been determined that there is a case of discrimination, the respondent must prove that the discrimination was not unfair.<sup>26</sup>

It is thus clear that the test for unfair discrimination in section 6 of the Act differs substantially from the section 10(1) requirements for hate speech. Firstly, the hate speech elements do not correlate with the unfair discrimination requirements. The test for discrimination focuses on the effect of the discriminatory conduct as opposed to the perpetrator's intent, whereas the test for hate speech requires that the words used demonstrate a clear intention to be hurtful, harmful or to incite hatred. Additionally, the hate speech test does not contain a comparator.<sup>27</sup> Secondly, the Act clearly distinguishes between hate speech and discrimination, because section 15 specifically provides that hate speech is not subject to a section 14 fairness determination. Thirdly, an act or omission which unfairly imposes a burden or withholds a benefit on a prohibited ground is not comparable to speech that propagates hatred on a prohibited ground. As Kok and Botha point out, unfair discrimination and hate speech have separate causes of action (both in terms of the *Equality Act* and generally) and a conflation of the two concepts causes uncertainty.<sup>28</sup> The authors warn that if the requirements for discrimination are applied in cases of hate speech, the Act's aims (promoting human dignity and reconciliation) will be undermined.<sup>29</sup>

Marais and Pretorius argue, nonetheless, that hate speech as prohibited by section 10(1) is a sub-set of unfair discrimination and that a separate hate speech prohibition was introduced mainly to accommodate the evidentiary

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<sup>25</sup> Section 13(1) of the *Equality Act*. Also see Kok 2008 SAJHR 449.

<sup>26</sup> Section 14 of the *Equality Act*. The respondent bears a full burden as opposed to an evidentiary burden, easing the complainant's evidentiary burden.

<sup>27</sup> Krüger *Racism and Law* 162, 173-174. This view assumes that a comparator is logically presumed in the test for discrimination. Also see Kok 2001 TSAR 297; Gutto *Equality and Non-Discrimination in South Africa* 151.

<sup>28</sup> Kok and Botha 2014 *Litnet Akademies* 208-209; Kok 2001 TSAR 297.

<sup>29</sup> Kok and Botha 2014 *Litnet Akademies* 208-209; Kok 2001 TSAR 297. With reference to ss 7(a) and 12 of the *Equality Act*, which prohibit specific types of expressive conduct under the guise of unfair discrimination, Krüger and Albertyn *et al* also acknowledge that the Act conflates unfair discrimination with hate speech, unnecessarily complicating the application of these provisions. See Krüger *Racism and Law* 162, 173-174; Albertyn, Goldblatt and Roederer *Introduction* 58, adding s 7(a) appears to be a repetition of s 10 and could be construed as an alternative means for the regulation of racist hate speech

burden of complainants. They add that the constitutionality of section 10(1) must be tested with reference to the fairness standard for discrimination.<sup>30</sup>

There are thus two conflicting approaches: a) hate speech and unfair discrimination are separate phenomena and should not be confused and b) the type of hate speech regulated by section 10(1) of the Act is a form of unfair discrimination. We submit that the true position lies midway between these poles. Hate speech and unfair discrimination must be treated as distinct concepts with their own individual requirements, but the connection between the two is not as remote as suggested by some commentators. This is because hate speech has the tendency to promote or perpetuate unfair discrimination, particularly when directed at vulnerable groups in society. Indeed, it is recognised internationally that it is necessary to regulate hate propaganda because it seeks to delegitimise the members of target groups and has the tendency to create a climate in which the marginalisation and stereotyping of vulnerable groups is encouraged, justifying discriminatory treatment.<sup>31</sup> Hate speech, in other words, fosters the creation of a society best described as the antithesis of the constitutional ideal. Thus, the regulation of both hate speech and the regulation of unfair discrimination have a common objective, namely the protection of human dignity and equality and the eradication of systemic discrimination.

We therefore argue that sections 7(a) and 12 of the *Equality Act*, which are often criticised for causing an unnecessary tension between hate speech and unfair discrimination, should be interpreted as prohibitions which are intended not to regulate hate speech *per se* but public expression against target groups where the "speaker" demonstrates an intention to discriminate against the group or to incite such discrimination. Poor legislative drafting has obscured the true purpose of these provisions.<sup>32</sup> For example, it seems that the section 7(a) and 12 prohibitions are seldom applied in practice, even where the conduct complained of falls squarely within the ambit of either provision.<sup>33</sup> It is probable that this may be a consequence of a

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<sup>30</sup> Marais and Pretorius 2015 *PER* 906. Also see Krüger *Racism and Law* 162, 173-174; Albertyn, Goldblatt and Roederer *Introduction* 58. Krüger believes that hate speech is closely linked to unfair discrimination. She claims that all forms of hate speech infringe the right to human dignity and lead to negative stereotyping and the vilification of targeted groups.

<sup>31</sup> *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11 paras 71, 74, 114 (hereafter *Whatcott*); *General Recommendation No 35: Combating Racist Hate Speech* UN Doc CERD/C/GC/35 (2013) (hereafter *General Recommendation No 35*).

<sup>32</sup> Also see our argument in Botha and Govindjee 2016 SAJHR 304.

<sup>33</sup> See *Democratic Alliance v Volkraad Verkiesing Kommissie* (SAHRC) (unreported) case number MP1213/0024 of 5 December 2013 and *Thiem v MacKay* (SAHRC)

misunderstanding of their complex requirements, which combine elements of unfair discrimination and hate speech.

To this end, whilst recognising the causal link between hate speech and discrimination, we argue that better practice dictates that they remain separate. This approach ensures that the prevention of acts of discrimination *and* hate speech is afforded proper attention and that both are regulated with due regard to their own specific requirements and their own particular "harms". Moreover, the constitutionality of the hate speech prohibition in section 10(1) must be tested not with reference to the fairness standard for discrimination, but by way of a proportionality analysis aimed at striking an appropriate balance between freedom of expression, on the one hand, and human dignity and equality, on the other. We believe that the test proposed by Marais and Pretorius favours equality at the expense of freedom of expression.

Our suggested approach accords with that in international law where it is accepted that the phenomena of discrimination and hate speech are distinguishable. Both the *International Convention on the Elimination of all Forms of Racial Discrimination* ("ICERD")<sup>34</sup> and the *International Covenant on Civil and Political Rights* (the "ICCPR")<sup>35</sup> treat discrimination and hate speech as separate but inter-related concepts. Article 20 of the ICCPR, for example, requires States parties to enact legislation to prohibit the "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence".<sup>36</sup> Article 26 of the ICCPR, on the other hand, entitles everyone to equality. States parties must prohibit unfair discrimination and "guarantee to all persons equal and effective protection against discrimination" on a prohibited ground.<sup>37</sup> The United Nations Human Rights Committee ("UNHRC") explains that although undefined in the ICCPR, the term "discrimination" should be interpreted as defined in ICERD, namely "any distinction, exclusion, restriction or preference which is based on any ground ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal

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(unreported) case number FS/1314/0083 of 18 September 2013 for examples of cases where s 12 would have found proper application.

<sup>34</sup> *International Convention on the Elimination of all Forms of Racial Discrimination* (1965) (hereafter ICERD).

<sup>35</sup> *International Covenant on Civil and Political Rights* (1966) (hereafter ICCPR).

<sup>36</sup> Section 16(2)(c) of the Constitution is modeled on this limitation.

<sup>37</sup> Also see aa 2, 3, 4, 14, 15, 23, 24 of the ICCPR – all of which deal with the right to equality.

footing, of all rights and freedoms".<sup>38</sup> Thus, the advocacy of hatred which incites to discrimination in terms of Article 20(2) "is not concerned with differentiation alone" and there is a distinction between the obligation to regulate hate speech that incites to discrimination and the prevention of acts of discrimination.<sup>39</sup>

ICERD treats discrimination and hate speech similarly. Whilst Articles 2 and 5 require States parties to eliminate all forms of racial discrimination, Article 4(a), upon which section 7(a) of the *Equality Act* is modelled, demands that States parties take positive steps to criminalise the dissemination of ideas based on racial superiority or hatred; incitement to racial discrimination; and incitement to acts of violence against a target group. In *General Recommendation No 35* the Committee on the Elimination of Racial Discrimination ("CERD") distinguishes between the phenomena of discrimination and hate speech by specifically referring to the speech forms in Article 4(a) as "racist hate speech". Such speech, says CERD, should be interpreted "as a form of other-directed speech which rejects the core human rights principles of human dignity and equality and seeks to degrade the standing of individuals and groups in the estimation of society".<sup>40</sup> CERD has recognised that hate speech creates a climate of racial hatred and discrimination and stresses that Article 4 is critical to the struggle to eliminate racial discrimination.<sup>41</sup> Thus, the purpose of ICERD is to safeguard vulnerable groups from instances of discrimination and hate speech.<sup>42</sup>

In many foreign jurisdictions, including the United Kingdom, Australia and Canada, hate speech and unfair discrimination are separately regulated and dealt with as definitive concepts with their own specific elements.<sup>43</sup> Moreover, academic writers worldwide regularly use the distinction between hate speech and unfair discrimination to defend the enactment of hate speech-specific laws or to substantiate their illegitimacy. For example, in the United States the critical race theorists suggest that hate speech is far

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<sup>38</sup> *General Comment No 18: Non-discrimination* UN Doc HRI/GEN.1.Rev.9 (1989) para 8.

<sup>39</sup> Ghanea 2010 *IJMGR* 430.

<sup>40</sup> *General Recommendation No 35* paras 5, 6 and 10.

<sup>41</sup> *General Recommendation No 35* para 5; *General Recommendation No 15: Organized Violence based on Ethnic Origin* UN Doc GA/48/18 (1993) para 1.

<sup>42</sup> Thornberry "Forms of Hate Speech and ICERD" 22-23.

<sup>43</sup> See generally Gelber and McNamara 2015 *Law & Soc'y Rev* 631, 636-637; Sumner "Incitement and the Regulation of Hate Speech" 209-210; *R v Keegstra* 1990 3 SCR 697 para 60; Whatcott paras 58, 81-83; Rosenfeld "Hate Speech in Constitutional Jurisprudence" 259-265.

worse than mere discrimination and constitutes a form of "violence with words", justifying separate regulation.<sup>44</sup>

We thus argue that it is incorrect to relegate hate speech as a sub-set of unfair discrimination. Consequently, the constitutionality of section 10(1) of the *Equality Act* should not be tested with reference to the fairness standard for discrimination, as suggested by Marais and Pretorius. A preferable approach is to apply the requirements in section 36 of the *Constitution* to determine whether the limitation to freedom of expression in section 10(1) appropriately balances the rights to freedom of expression, human dignity and equality, and is a necessary, rational and proportionate measure, to the extent that it responds to a grave social need and is the least intrusive measure available to protect the interest identified.<sup>45</sup>

### 3 The section 10(1) elements

It is trite that the test for hate speech in section 10(1) of the *Equality Act* is broader than the constitutional threshold test. Many of the established requirements for a hate speech regulator have been omitted from the test: hurt and hatred are conflated; the focus is on demeaning inter-personal speech as opposed to that which stereotypes the target group; the communication of words is actionable; incitement to hatred is not necessary; and the speech need not cause harm. For this reason, the prohibition has been criticised for widening the net of prohibited speech to include a wide range of speech forms within its ambit.<sup>46</sup>

In this contribution we restrict our comments to the elements of the section 10(1) test as discussed by Marais and Pretorius.

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<sup>44</sup> Delgado and Stefanic "Words that Wound" 23-24, 90. Ronald Dworkin uses the distinction between hate speech and unfair discrimination to justify his political legitimacy theory. He argues that whilst discrimination laws are needed to protect vulnerable people in society from harm, hate speech laws cannot be justified, because opponents to anti-discrimination laws must be able to voice their objections thereto. Thus, hate speech is the price we pay for the legitimacy of discrimination laws. See Dworkin "Foreword" vii - viii. For a counter to this theory, see Waldron *The Harm in Hate Speech* 178-179, 182-183.

<sup>45</sup> General Comment No 34: Article 19: Freedoms of Opinion and Expression UN Doc CCPR/C/GC/34 (2011) (General Comment No 34) paras 22, 33-34.

<sup>46</sup> See generally De Vos 2010 *PULP Fictions* 10; Pillay 2013 *SAPL* 239; Teichner 2003 *SAJHR* 380; Kok and Botha 2014 *Litnet Akademies* 206.

### **3.1 "No person may publish, propagate, advocate or communicate words"**

Firstly, Marais and Pretorius state that the term "words" in section 10(1) is far too restrictive, especially when contrasted with the terminology used in section 16 of the *Constitution*.<sup>47</sup> We agree. The constitutional right to freedom of expression is widely interpreted to include any action or conduct which communicates meaning.<sup>48</sup> Furthermore, it is recognised in both international and foreign law that put bans on hate speech aim to address *expression* which exposes target groups to hatred.<sup>49</sup> Thus, "words" should be replaced with the term "expression" or "acts of expression".

Secondly, Marais and Pretorius argue that the "publish, propagate, advocate or communicate" element in section 10(1) should be amended to provide that no person may propagate, advocate or communicate expressive content which meets the other section 10(1) requirements. They add that the provision should be interpreted to exclude private conversations despite the use of the word "communicate".<sup>50</sup> We disagree and also do not accept that the wording of the proviso provides a solution by limiting the ambit of the hate speech test. In fact, the inclusion of "communicate" in section 10(1) is highly problematic. This term does not mandate that the expression be disseminated to a public audience and permits the regulation of a broad range of private speech (even where the speaker does not intend to advocate hatred or incite harm and even if a member of the target group does not hear the speech).<sup>51</sup>

We contend that private communications should not be included in a hate speech prohibition. We propose the insertion of a "publicity" element in section 10(1), namely that the speech should occur in the hearing or presence of the public in a public place or that it should be published or

<sup>47</sup> Marais and Pretorius 2015 *PER* 907.

<sup>48</sup> *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) para 48.

<sup>49</sup> See aa 19(3) and 20 of the ICCPR; a 4 of ICERD; *General Comment No 34* para 50; *General Recommendation No 35* para 7. Hate speech may occur indirectly and include non-verbal forms of speech, such as the display of racist symbols at public gatherings.

<sup>50</sup> Marais and Pretorius 2015 *PER* 908-909.

<sup>51</sup> Krüger *Racism and Law* 166; Kok and Botha 2014 *Litnet Akademies* 206; De Vos 2011 <http://constitutionallyspeaking.co.za/malema-judgment-a-re-think-on-hate-speech-needed/>

disseminated to the public.<sup>52</sup> The recognised purpose of hate speech regulation is to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination. It is improbable that most private conversations will have this effect.

We acknowledge that the preamble to the *Equality Act* reflects the need to transform individual attitudes and to promote reconciliation. It is therefore arguable that hateful private conversations about target groups should be regulated. The purpose of hate speech laws, however, is not to censor mere ideas (even if repugnant). A ban must focus on the "mode of expression" – public speech which exposes target groups to hatred and which is likely to cause harm. And, whilst the regulation of this type of speech may not necessarily "compel anyone to think correctly",<sup>53</sup> the regulation of hate speech which occurs publicly sets a normative benchmark and has the potential to shape future behaviour.<sup>54</sup>

Another problematic area with this part of the section 10(1) test is that the words "publish", "propagate" and "communicate" do not necessarily entail an intention to promote hatred. "Advocate" is a far more forceful verb. As we discuss below, however, the lack of intention for a hate speech prohibition in human rights legislation does not necessarily render the prohibition too broad, because the effect or impact of the speech should be the critical factor. The speech must occur publicly, expose the target group to hatred, and cause harm. We therefore submit that the use of the words "publish" and "propagate" in section 10(1) is not overly problematic, but that the inclusion of private communications within its ambit over-reaches and is not rationally connected to the Act's purpose. A solution would be to sever the term "communicate" from section 10(1). But, as the threshold test for hate speech in section 10(1) is replete with difficulties, a better solution would be to amend the provision in its entirety (as we explain below).

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<sup>52</sup> See, for example, the definition of a "public place" in s 319(7) of the *Canadian Criminal Code*.

<sup>53</sup> *Whatcott* paras 51, 58. Compare the criticism of Cameron 2013 SCLR 33.

<sup>54</sup> *Minister of Home Affairs v Fourie* 2006 1 SA 524 (CC) para 138; Sarat and Kearns "Beyond the Great Divide" 30-31.

### **3.2 That could reasonably be construed to demonstrate a clear intention**

Marais and Pretorius properly point out that this part of the section 10(1) test creates an objective test and that the intention to propagate hatred must be determined both from the perspective of the speaker and from that of the target group.<sup>55</sup> The authors add that an analysis of the meaning of the words used by the speaker assists when interpreting what the speaker intended to communicate.<sup>56</sup> We agree that section 10(1) creates an objective test for intention and that the impact of the speech on the target group should not be *the* decisive factor. We stress, in addition, that neither the subjective intention of the victim, nor the perspective of the author of the message, should be preferred because this approach would permit subjectivity to cloud the analysis.<sup>57</sup> Instead, it must be established whether the reasonable person, aware of the context and circumstances surrounding the publication, would regard the publication as demonstrating an intention on the speaker's part to expose the target group to hatred and be likely to cause harm. Moreover, whilst the meaning of the words used by the speaker plays an important role in this enquiry, this analysis should not be elevated to a level where sight is lost of the ultimate determination, as arguably occurred in *Afri-forum v Malema*.<sup>58</sup> The Court, in this case, misconstrued the section 10(1) test in an attempt to solve the apparent problem of the meaning of the song in issue. Instead, the Court merely had to ascertain whether the reasonable person, aware of the context, would regard the song's publication as demonstrating an intention to expose the target group to hurt, harm, or hatred. It was unnecessary to prove that Malema subjectively intended the words to cause harm. It was also unnecessary to ascertain whether everybody in society understood what the words meant whenever Malema sang the song.

We acknowledge that a number of academic commentators have criticised the lack of a subjective intention requirement in section 10(1).<sup>59</sup> We have previously argued that the use of an objective test to determine a hatemonger's intention in remedial human rights legislation is acceptable, provided that the hate speech prohibition is carefully crafted to regulate the

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<sup>55</sup> Marais and Pretorius 2015 *PER* 911-912.

<sup>56</sup> Marais and Pretorius 2015 *PER* 912.

<sup>57</sup> Compare the approach in *Herselman v Geleba* (E) (unreported) case number 231/2009 of 1 September 2011 21, 24 where the Court focused on the views of the recipient community.

<sup>58</sup> *Afri-forum v Malema* 2011 6 SA 240 (Eqc) paras 55, 103, 109.

<sup>59</sup> See Albertyn, Goldblatt and Roederer *Introduction* 92-93, 95; Teichner 2003 *SAJHR* 380; De Vos 2010 *PULP Fictions* 11.

promotion of hatred against target groups.<sup>60</sup> At this level the focus should be on remedying the harm caused by hate speech, as opposed to the subjective intention of the hatemonger.<sup>61</sup> This approach augments the objectives of the *Equality Act*'s, namely the promotion of transformation and reconciliation in South African society.<sup>62</sup>

It is noteworthy that the international standard does not require an intention requirement for a hate speech prohibition in anti-discriminatory legislation, provided that the provision is narrowly structured and does not regulate offensive speech. States parties are entitled to prohibit forms of "hate speech" in terms more restrictive than Article 20(2) of the ICCPR.<sup>63</sup> States parties are also urged to make a clear distinction between expression which should attract a criminal sanction and expression which merely justifies a discriminatory remedy.<sup>64</sup> For criminal liability it is emphasised that the speaker must intend to incite harm against the target group.<sup>65</sup> According to CERD, however, less serious cases should be addressed by means other than criminal law, and here the impact of the speech on targeted groups is critical.<sup>66</sup>

### **3.3 Against any person and a) be hurtful, or b) be harmful or to incite harm or c) promote or propagate hatred**

Marais and Pretorius justify the inclusion of the terms "person" and "hurt" in section 10(1) with reference to the *Equality Act*'s stated objectives and its remedial purpose. They also suggest that section 10(1) regulates expression which hurts a targeted victim and causes harm and that the proviso appropriately limits the ambit of the prohibition.<sup>67</sup> We disagree.

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<sup>60</sup> Botha and Govindjee 2016 SAJHR 310-311. In any event, intent is usually determined objectively by having regard to the context and all relevant circumstances, including various objective factors. In hate speech cases such factors would include the identity and status of the speaker; the recipient audience; the group targeted; the form, manner and reach of the publication; the words used; and the impact of the speech.

<sup>61</sup> *Canada (Human Rights Commission) v Taylor* 1990 3 SCR 892 931-932; *Whatcott* paras 126-127.

<sup>62</sup> See too Krüger *Racism and Law* 166.

<sup>63</sup> *General Comment No 34* paras 51-52.

<sup>64</sup> The *Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence* (2012) para 19 (hereafter the *Rabat Plan*).

<sup>65</sup> *Rabat Plan* para 22.

<sup>66</sup> *General Recommendation No 35* para 12.

<sup>67</sup> Marais and Pretorius 2015 PER 910.

There are a number of problematic features with this component of the prohibition, which the proviso does not redress (an issue addressed below).

Section 10(1) prohibits the publication of words "against any person" on a prohibited ground. The emphasis is on speech which demonstrates an intention to be *hurtful* when communicated about *any person*, as opposed to that which vilifies and ostracises the group. The purpose of hate speech regulation, however, is not to safeguard the emotional well-being of individuals. Instead, as recognised by the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*, the aim is to prohibit expression which "reinforces and perpetuates patterns of discrimination and inequality" and which undermines national unity, tolerance and reconciliation in society.<sup>68</sup>

This is also the case in international and comparative foreign law, where the focus is on both the societal impact of the speech and its potential to cause harm to the target group.<sup>69</sup> Thus, in *Saskatchewan (Human Rights Commission) v Whatcott* the Canadian Supreme Court stressed that "hate speech must rise to a level beyond merely impugning individuals: it must seek to marginalize the group by affecting its social status and acceptance in the eyes of the majority".<sup>70</sup> The emotional distress experienced by individual group members is not immaterial, but the regulation of hate speech, even in human rights legislation, must focus on group harm and not individual hurt. The aim is to protect the dignity and social standing of susceptible target groups and ultimately the public good.<sup>71</sup>

Furthermore, contrary to Marais and Pretorius' interpretation, section 10(1) does not include a causal link between the hurt and resultant harm as a separate requirement. We argue that the inclusion of hurtful inter-personal speech in the threshold test for hate speech in section 10(1) without a link with resultant harm does not meet the aim of protecting vulnerable groups from hatred and the consequent risk of discrimination against the group. In short, this component of the provision is not rationally connected to the

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<sup>68</sup> *Islamic Unity Convention v Independent Broadcasting Authority* 2002 4 SA 294 (CC) paras 29-30, 33, 46.

<sup>69</sup> *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* UN Doc A/67/357 (2012) para 44(f).

<sup>70</sup> *Whatcott* paras 80, 82.

<sup>71</sup> *Whatcott* paras 80, 82. Similarly, in *Whatcott* the restriction in issue was declared unconstitutional on the grounds that it regulated offensive speech which did not expose the target group to hatred.

legislative purpose of addressing the marginalisation and systemic discrimination of groups and should be omitted from the test.

Another area of concern is the missing constitutional "incitement to cause harm" requirement. Indeed, the wording of sub-sections 10(1)(a), (b) and (c) generally is highly problematic. It seems that the drafters wished to capture a wide range of speech forms within the provision's ambit. Possibly this is why aspects of the constitutional test are replicated here in a haphazard fashion. For example, sub-section 10(1)(b) prohibits words which could be construed to be harmful or to incite harm. Section 10(1)(c), on the other hand, prohibits words that promote or propagate hatred.<sup>72</sup> To overcome these problems, we recommend an amendment of section 10(1) to prohibit expression which promotes hatred against target groups and causes harm. An objective test should be applied to determine if there is an adequate causal nexus between the speech and the probability of harm. Important factors include the identity and status of both speaker and audience; the mode and reach of the speech; the content and purpose of the speech; the vulnerability of the group; historical patterns of discrimination against the group; and relevant social and political circumstances.<sup>73</sup>

In our view, however, an incitement requirement is not necessary in remedial anti-discrimination legislation. Our proposed threshold test focuses on the effects of hate speech and is aimed at providing an effective means to overcome the recognised harm caused thereby. Because the test is an objective one and does not require a subjective intention to advocate hatred, it would be illogical to insist that the speaker also intends to incite others to cause harm. It is sufficient that the speaker publicly promotes hatred against a target group on a prohibited ground, which speech is likely to cause harm, either directly or indirectly.

Notwithstanding our support for the exclusion of the incitement and intention requirements in section 10(1), we contend that the threshold test for hate speech contained therein is an unjustifiable limitation to the right to freedom of expression. We address the constitutionality issue below, but before doing so interrogate the meaning and role of the proviso in section 12, which

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<sup>72</sup> In *Freedom Front v South African Human Rights Commission* 2003 11 BCLR 1283 (SAHRC) 1298 (hereafter *Freedom Front*) the SAHRC held that an "adequate nexus" between the speech and the harm was needed to render the speech in question hate speech.

<sup>73</sup> *Freedom Front* 1297; General Recommendation No 35 para 15.

clearly constrains the ambit of section 10(1), but which may not go far enough.

## 4 The proviso

Marais and Pretorius contend that their interpretation of the proviso in section 12 of the *Equality Act* limits the application of the section 10(1) prohibition, rendering it constitutionally justifiable. We answer this claim by addressing a number of problematic issues. Firstly, we determine the role and purpose of the proviso. Does it impose additional requirements for liability for sections 10 and 12 or should it be interpreted as a defence? Secondly, we examine the individual components of the proviso. Exactly what speech forms does it preclude from the ambit of sections 10 and 12? Thirdly, we address the question of whether the proviso properly narrows the reach of section 10(1).

### 4.1 Academic debate: the meaning and purpose of the proviso

Many authors have debated the meaning and purpose of the proviso. Some argue that the proviso should be read as an expanded version of section 16(1) of the *Constitution* and that sections 10 and 12 of the *Equality Act* will apply only if the forms of expression specified in the proviso fall within the ambit of section 16(2) of the *Constitution*.<sup>74</sup> Others argue that the proviso applies only to section 12.<sup>75</sup> Another suggestion is that the proviso should be treated as a defence to section 10 and 12 claims.<sup>76</sup>

Marais and Pretorius compare the link between the proviso and section 10(1) of the *Equality Act* to the relationship between sections 16(1) and (2) of the *Constitution*. Then, they claim that the proviso should be construed as an internal modifier of sections 10 and 12 of the *Equality Act* and be treated as definitional.<sup>77</sup> So a complainant will have to prove that the expressive conduct in question falls within the definitional ambit of the respective sections, "which excludes expression covered by the proviso". The authors assert therefore that the proviso should not be treated as a defence to a hate speech complaint.<sup>78</sup> In their view, this approach, together

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<sup>74</sup> Albertyn, Goldblatt and Roederer *Introduction* 93.

<sup>75</sup> Teichner 2003 SAJHR 357.

<sup>76</sup> Kok and Botha 2014 *Litnet Akademies* 210-211; Bronstein 2006 <https://www.activateleadership.co.za/cells/view/275> 24.

<sup>77</sup> Marais and Pretorius 2015 PER 912.

<sup>78</sup> Marais and Pretorius 2015 PER 912; Marais *Constitutionality of Categorical and Conditional Restrictions* 307-308.

with their interpretation of the components of the proviso, appropriately narrows the reach of section 10.

#### **4.2 Application of the proviso: requirement or defence?**

Marais and Pretorius' interpretation of the role of the proviso in section 12 is not persuasive. The suggested connection between section 10(1) of the *Equality Act*, as read with the proviso, and sections 16(1) and (2) of the *Constitution* seems strained. It fails to take into account the role of a proviso and the *Equality Act's* overall purpose. In any event, section 16(2) of the *Constitution* does not prohibit speech and merely defines the ambit of freedom of expression by stating that the right "does not extend to ..." and then lists the three types of expression excluded from constitutional protection. It is unclear how section 16(2) is comparable to the proviso, which by virtue of its explicit wording and positioning in sections 10 and 12 was clearly intended to qualify a respondent's liability.<sup>79</sup>

In *Janse van Rensburg v Minister of Defence* the Supreme Court of Appeal held that a proviso should ordinarily be construed as an exception or qualification to a preceding enactment and that its effect should not be interpreted as "enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect". Thus, a proviso should not be treated as an "independent enacting clause", but as an exception "dependent on the main enactment".<sup>80</sup> Furthermore, when the words "subject to" are used in a proviso, they do not have an *a priori* meaning and it is quite acceptable to interpret them as imposing a limitation or exception.<sup>81</sup>

The *Equality Act* was enacted to promote equality and provide the victims of hate speech and unfair discrimination with accessible forums to pursue complaints. In unfair discrimination cases a low burden is placed on a complainant, who is required to make out only a *prima facie* case of unfair discrimination. Marais and Pretorius' interpretation of the proviso requires section 10 and 12 complainants to prove the elements of the respective prohibitions *and* to prove that the speech in issue is *not* exempted speech; that is, for example, that it is not the *bona fide* engagement in artistic creativity. When regard is had to the overall scheme and purpose of the

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<sup>79</sup> It follows immediately upon the prohibition in s 12 and reads: "[P]rovided that ... it is not precluded by this section". The opening words of s 10(1) are "[S]ubject to the proviso in s 12 ...".

<sup>80</sup> *Janse van Rensburg v Minister of Defence* 2000 3 SA 54 (SCA) para 11.

<sup>81</sup> *Premier of the Eastern Cape Province v Sekeleni* 2002 3 All SA 407 (A) paras 13, 17.

Act,<sup>82</sup> this interpretation seems unlikely. It requires proof of a negative and imposes a very high evidential burden on complainants. It negates the Act's objectives and fails to take into account that the Act aims to provide easy access to justice for disadvantaged persons.<sup>83</sup> Accordingly, we submit that the proviso's role is to create a defence for a respondent, who will need to prove that the speech falls within its ambit and should thus be precluded from prohibition (even though it meets the respective section 10 and 12 threshold tests). This interpretation is supported by the reality that the question of whether a particular publication is *bona fide* or forms part of an academic or scientific enquiry would inevitably fall within the respondent's own peculiar knowledge.

#### **4.3 *The meaning of the proviso***

Marais and Pretorius provide a detailed interpretative account of the types of expression exempted from liability by the proviso.<sup>84</sup> We do not deal with each component of the proviso in detail and restrict ourselves to the more contentious issues.

##### **4.3.1 *Bona fide engagement***

The first question is whether the "*bona fide* engagement" requirement qualifies all the forms of expression listed in the proviso. Marais and Pretorius believe that it does, arguing that this interpretation is textually correct.<sup>85</sup> Bronstein, on the other hand, does not qualify the "publication of any information, advertisement or notice" with the *bona fide* requirement.<sup>86</sup> Whilst she does not offer an explanation for her interpretation, we submit that her approach is grammatically correct and should be accepted. The proviso reads "provided that *bona fide* engagement in artistic creativity ... or publication of any information ..."<sup>87</sup> If the words "*bona fide* engagement" are reinserted immediately after the word "or" in the proviso, the proviso would read as follows: "provided that *bona fide* engagement publication of any information, advertisement or notice ..." The result is an overly strained and distorted interpretation and one which cannot be justified on the basis

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<sup>82</sup> Section 3(3)(b) provides that when applying and interpreting the *Equality Act*, the purpose of the Act must be considered.

<sup>83</sup> *Manong v Department of Roads (No 2)* 2009 6 SA 589 (SCA) para 50.

<sup>84</sup> Marais and Pretorius 2015 PER 913-926.

<sup>85</sup> Marais and Pretorius 2015 PER 914.

<sup>86</sup> Bronstein 2006 <https://www.activateleadership.co.za/cells/view/275> 24-25.

<sup>87</sup> Own emphasis.

that it renders section 10, as read with the proviso, constitutionally compatible.<sup>88</sup>

When will a form of expression be regarded as *bona fide*? Marais and Pretorius contend that this element should be interpreted as requiring a "subjective conviction" that the expressive act will achieve its "intrinsic purpose", to be assessed in terms of a reasonableness standard.<sup>89</sup> We have no qualms with this suggestion, but prefer to avoid the use of the phrase "a subjective conviction". This terminology could cause confusion when juxtaposed with the objective test for intention in section 10(1). The jurisprudence that has developed under the *Broadcasting Code*<sup>90</sup> and the *Films and Publications Act*,<sup>91</sup> both of which exclude *bona fide* forms of expression (such as documentaries, publications and broadcasts) from their application, provides valuable guidance for an interpretation of the *bona fide* requirement in the proviso. The Broadcasting Complaints Tribunal of South Africa ("BCTSA") applies an objective contextual test when determining whether a particular broadcast is *bona fide*.<sup>92</sup> We submit that an analogous approach should be adopted for the proviso. It must be considered whether the form of expression in issue, assessed in its entirety and in the light of its context and purpose, can genuinely and legitimately be regarded as the engagement in artistic creativity, scientific enquiry or fair and accurate reporting in the public interest.

#### 4.3.2 "In accordance with section 16(1) of the Constitution"

The next question is whether this phrase qualifies all the forms of expression listed in the proviso. Marais and Pretorius believe that it does. In support of their contention, they point to a link between the forms of expression listed in section 16(1) of the *Constitution* and the proviso.<sup>93</sup> Both Krüger and Bronstein, however, suggest that the phrase applies only to the last part of

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<sup>88</sup> Section 39(2) of the Constitution; *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd. In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 1 SA 545 (CC) paras 21-24 (hereafter *In re: Hyundai*); *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) paras 23-24.

<sup>89</sup> Marais and Pretorius 2015 PER 914.

<sup>90</sup> Clauses 4.2 and 5 of *Free-to-Air Code of Conduct for Broadcasting Service Licensees* (2009).

<sup>91</sup> Sections 16(4) and 22 of the *Films and Publications Act* 65 of 1996.

<sup>92</sup> See generally *Suliman v 5FM* 2006 JOL 17677 (BCTSA) para 8; *Hamid v Chaifm* 2015 JOL 3343 (BCCSA) para 17.

<sup>93</sup> Marais and Pretorius 2015 PER 913.

the proviso, namely the publication of any advertisement, information or notice.<sup>94</sup>

In our view, the appendage of the phrase "in accordance with section 16(1) of the Constitution" to the end of the proviso adds little value to the proviso's meaning, regardless of which interpretation is preferred. Neither reading permits precision or clarity or provides a meaning placing the provision within constitutional bounds.<sup>95</sup> In any event, the use of the word "or" before "publication" suggests that Krüger and Bronstein's interpretation is grammatically and textually correct and should be accepted. Moreover, as we argue below, the wording of the last form of expression specified in the proviso was probably intended to apply specifically to the section 12 prohibition and should be dealt with as a separate exception. It seems that the drafters attempted to reproduce the essence of section 12 and then to preclude such forms of expression from liability if published "in accordance with section 16(1) of the Constitution".

#### *4.3.3 Artistic creativity, academic and scientific enquiry*

We agree with Marais and Pretorius that these components of the proviso should be broadly interpreted to include the artistic process, all *bona fide* art forms, such as dramatic productions, comedy shows, and artistic works, and *bona fide* statements made in genuine academic and scientific journals.<sup>96</sup>

#### *4.3.4 Fair and accurate reporting in the public interest*

For this part of the proviso, we agree with Marais and Pretorius that the closest comparator in South African law is the fair comment defence in defamation, as interpreted in *The Citizen 1978 (Pty) Ltd v McBride* ("McBride").<sup>97</sup> We go further and provide additional commentary on the elements of the defence, illustrating that it provides inadequate protection for media respondents. In terms of the wording of the proviso, a hate speech respondent must prove that the publication amounted to: a) fair and accurate reporting; b) in the public interest; and c) *bona fide* engagement therein. It is helpful to interpret these requirements with reference to similar

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<sup>94</sup> Krüger *Racism and Law* 170; Bronstein 2006 <https://www.activateleadership.co.za/cells/view/275> 24.

<sup>95</sup> *In re: Hyundai* paras 25-26; *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 3 SA 617 (CC) para 79 (hereafter *Case v Minister*); *Dawood v Minister for Home Affairs* 2000 3 SA 936 (CC) para 47.

<sup>96</sup> See, for example, *Manamela v Shapiro* (SAHRC) (unreported) case number GP/2008/1037E, where the SAHRC held that the cartoonist "acted with *bona fide* artistic creativity in the public interest".

<sup>97</sup> *The Citizen 1978 (Pty) Ltd v McBride* 2011 4 SA 191 (CC) (hereafter *McBride*).

requirements for the various grounds of justification in the law of defamation.<sup>98</sup>

In the light of the connection with press and media freedom and the requirements of section 12(a), the use of the word "reporting" probably refers to a news report, whether in the form of a broadcast, telecommunication or newspaper report containing information.<sup>99</sup> The accuracy requirement means that the reporting must be exact and correct in all details. It would not be sufficient, for example, for the gist of the report to be true (as is permitted for the defence of truth for public benefit).<sup>100</sup> The report would probably have to be a factual account or statement containing information and not a comment or opinion, as opinions "may be criticised for being unreasonable, but rarely for being false".<sup>101</sup>

The report must also be fair. In *McBride* the Court interpreted the "fair" requirement for the fair comment defence to mean that the comment should be "an honest, genuine (though possibly exaggerated or prejudiced) expression of opinion relevant to the facts upon which it was based and not disclosing malice" to be objectively determined.<sup>102</sup> This interpretation, however, was obviously tailored to qualify the "comment" requirement of the defence, to be distinguished from a statement of fact. Here, the report must be fair. It must also be *bona fide*, which should be interpreted to mean "genuine". So, to construe the use of the word "fair" as honest and genuine in the context of the proviso amounts to tautology. A better reading is to use the alternative meaning of fair, which as explained in *McBride*, ordinarily means that something is "just, equitable, reasonable, level-headed and balanced".<sup>103</sup> Thus, the report must be accurate, genuine and it must also be reasonable and balanced.<sup>104</sup> It must furthermore be in the public interest. This concept is an elastic one, but should be interpreted to mean that the

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<sup>98</sup> We recognise that the defences are grounds of justification and that their purpose differs from the proviso.

<sup>99</sup> As opposed to a detailed account or formal record of a particular matter, such as a report generated by a parliamentary committee or the Public Protector.

<sup>100</sup> *Smit v OVS Afrikaanse Pers Bpk* 1956 1 SA 768 (O); *Times Media Ltd v Nisselow* 2005 1 All SA 567 (A).

<sup>101</sup> *McBride* paras 144-145, but compare the judgment of Zondo J at para 63 - the "regulation of false information" does not include opinions, because an opinion may be wrong or unjustified but cannot be false. Only a statement of fact can be false.

<sup>102</sup> *McBride* para 83.

<sup>103</sup> *McBride* para 82.

<sup>104</sup> The requirements for the defence of a reasonable publication would thus apply.

facts reported must be of public concern and both significant and relevant to the reasonable person in society.<sup>105</sup>

This portion of the proviso accordingly exempts *bona fide*, accurate and fair reports on matters of public interest. We accept Marais and Pretorius' suggestion that the decision in *Jersild v Denmark* illustrates its potential application.<sup>106</sup> Unfortunately, however, because the exemption is very narrow, it provides limited protection for the press and the media. Very few news reports would meet the threshold requirements. Furthermore, as indicated earlier, we disagree that the phrase "in accordance with section 16(1) of the Constitution" applies to this part of the proviso and therefore do not agree with Marais and Pretorius that the defence could be extended to include other forms of expressive content.<sup>107</sup> A proposed amendment is justified below.

#### *4.3.5 The publication of any information, advertisement or notice in accordance with section 16(1) of the Constitution*

Marais and Pretorius' examination of the component parts of this section of the proviso focuses mainly on the significance of the exclusion of "ideas" from the wording of the proviso.<sup>108</sup> Regrettably, however, their analysis provides little insight into the forms of expression actually exempted from prohibition thereby. In our view, this part of the proviso applies specifically to section 12 and would find limited application in hate speech-type cases (although it is probable that some published advertisements, information or notices could promote group hatred). As indicated earlier, it appears that the drafters repeated the essence of section 12 and then precluded such forms of expression from liability if published "in accordance with section 16(1) of the Constitution". The problem is that it is very difficult to determine the distinction between a notice, advertisement or information which falls foul of the Act and one which could be exempted because it was published in accordance with the constitutional right to freedom of expression. As Albertyn *et al* point out, "what the one hand seeks to capture, the second hand sets free".<sup>109</sup>

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<sup>105</sup> See generally *Independent Newspapers Holdings Ltd v Suliman* 2004 3 All SA 137 (SCA) paras 42-44; *Modiri v Minister of Safety and Security* 2012 1 All SA 154 (SCA) paras 20-24.

<sup>106</sup> *Jersild v Denmark* 1995 19 EHRR 1 (App No 15890/89).

<sup>107</sup> Marais and Pretorius 2015 *PER* 926.

<sup>108</sup> Marais and Pretorius 2015 *PER* 915-917.

<sup>109</sup> Albertyn, Goldblatt and Roederer *Introduction* 101.

Albertyn *et al*/then suggest that this part of the proviso should be interpreted to provide that only advertisements, notices, and information that *also* fall within the definitional ambit of section 16(2) are prohibited by section 12. This interpretation, however, is strained in the light of the Act's objectives as a transformative and remedial piece of legislation.<sup>110</sup> Furthermore, the heading of section 12 ("Prohibition of Dissemination and Publication of Information that Unfairly Discriminates") does not use any of the terminology used in section 16(2). It was clearly not intended to prohibit such speech only if it incites violence, advocates hatred or amounts to propaganda for war.

We believe that when enacting section 12, the drafters wished to create a separate prohibition to regulate the broad use of discriminatory signs, advertisements and notices (as occurs in other jurisdictions) and the publication of discriminatory information. The proviso, however, does not clarify when these forms of speech would be worthy of exemption and is therefore meaningless. As indicated earlier, Marais and Pretorius argue that the "*bona fide*" requirement should also apply here.<sup>111</sup> Whilst this suggestion offers a potential solution to the over-breadth problem, it is not a viable option as it is strained and not textually sound.<sup>112</sup> Accordingly, we propose an amendment, as discussed below.

#### **4.6 The effect of the proviso applied to sections 10 and 12**

In summary, we argue that the proviso creates a defence for a respondent accused of contravening either sections 10 and 12. The respondent must prove that the expressive conduct in issue falls within the ambit of the proviso and that liability is accordingly precluded. The proviso thus limits the broad effect of sections 10 and 12, but because it is inadequately drafted and very narrow, it does not temper the fact that these prohibitions limit the freedom of expression in terms more extensive than section 16(2) of the *Constitution*.

For section 10, the concern is that the communication of hurtful words on a prohibited ground against any person falls within its ambit and that the proviso exempts such expression only if it amounts to the *bona fide* engagement in artistic creativity, academic or scientific enquiry, or the *bona*

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<sup>110</sup> In other words, this interpretation does not accord with the Act's purpose and should be avoided. See *Kubyana v Standard Bank of South Africa Ltd* 2014 3 SA 56 (CC) para 18 (hereafter *Kubyana*).

<sup>111</sup> Marais and Pretorius 2015 PER 914.

<sup>112</sup> *S v Zuma* 1995 2 SA 642 (CC) paras 17-18; *Kubyana* para18.

*fide* engagement in fair and accurate reporting in the public interest. So, for example, a fair and accurate news report in the public interest about the use of the slogan "Kill the Boer" would not be prohibited by section 10(1).<sup>113</sup> Likewise, in the context of a *bona fide* stand-up comedy production, a rude racial joke about the characteristics of white people would not be actionable. But, even interpreted so, the proviso does not overcome the problem that with many instances of offensive speech (not taking place in the context *inter alia* of news reporting, a dramatic production or an academic journal), the defence would find little application. As explained earlier, the latter part of the proviso ("the publication of any information, advertisement or notice in accordance with section 16 of the Constitution") was probably intended to apply only to section 12 of the Act. But, even if we are incorrect on this point, its meaning is vague and causes uncertainty. We therefore submit that the proviso is very narrow and that it is necessary to test the constitutionality of section 10(1) in terms of section 36 of the *Constitution*.

## 5 The constitutionality of section 10(1), as read with the proviso

Marais and Pretorius argue that section 10(1) is a constitutionally justified limitation to freedom of expression. In support of this contention, they claim that the type of expression captured by section 10 is of low value when assessed against the traditional rationales for the protection of freedom of expression.<sup>114</sup> They explain that their interpretation of the provision's threshold test ensures that only a narrow range of discriminatory expression is regulated. The authors identify this type of expression as speech which unfairly promotes inequality in society and causes feelings of inferiority and marginalisation for historically disadvantaged groups. They suggest that the prohibition does not inhibit speakers from using other forms of speech to express "the hateful remarks section 10 prohibits".<sup>115</sup>

We disagree. Whilst there is no doubt that hate speech, properly defined, cannot be tolerated in a democratic society and that such speech does not promote the values underpinning freedom of expression, hate speech prohibitions must be principled, informed and precisely crafted. The

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<sup>113</sup> Kok and Botha 2014 *Litnet Akademies* 210-211 cite the decision in *Coetzee v YFM* 2010 JOL 25811 (BCCSA) as an example of how the proviso should be used as a defence to a claim of hate speech.

<sup>114</sup> Marais and Pretorius 2015 *PER* 926-930. For an analysis of the value of the traditional rationales underpinning the freedom of expression in the context of hate speech regulation, see Botha 2017 *SALJ* forthcoming.

<sup>115</sup> Marais and Pretorius 2015 *PER* 926-930.

regulation of hate speech creates a tension between the rights to freedom of expression, human dignity and equality. When formulating hate speech laws the challenge is to balance the competing rights, which balance cannot be attained by applying only the fairness standard for discrimination. Instead, the legitimacy of hate speech regulation in South Africa must be assessed in terms of a comprehensive balancing enquiry, which takes into account a wide range of factors including: respect for the rights of the victims of hate speech; autonomy for speakers; the causal link between hate speech and hatred in a community; the impact of hate speech on the democracy; and the desire to achieve a diverse, harmonious and tolerant society.<sup>116</sup>

We submit that the existing section 10(1) prohibition, as read with the proviso, is vague, imprecise and over-reaches. The threshold test for hate speech contained therein creates a measure which is neither a reasonable and justifiable limitation to the freedom of expression (as tested in terms of section 36 of the *Constitution*), nor a clear, necessary or proportional restriction thereto (as required by Article 19(3) of the ICCPR). International practice dictates that States parties must justify all restrictions to the freedom of expression in terms of Article 19(3), showing that the limitation responds to a grave social need, that it is the least intrusive measure available, and that there is proportionality between the interest protected and the impairment of the freedom of expression.<sup>117</sup> In addition, it is considered unacceptable State practice to enact vague and inconsistent domestic legislation with variable terminology, and States parties must ensure that all hate speech restrictions are precisely delineated.<sup>118</sup>

Our primary concern is that the rational connection between section 10(1) and its purpose is missing and that it is not proportionate to the interest protected.<sup>119</sup> As explained, the purpose of hate speech regulation is to control the dissemination of hatred in society and to overcome the resultant discrimination and stereotyping of vulnerable groups. Thus, the question of whether a hate speech restriction is legitimately connected to these aims must focus on the group and not merely the individual and the speech prohibited must also be likely to cause harm.<sup>120</sup> Whilst harm caused to individual members of the group is not irrelevant, section 10(1) must be

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<sup>116</sup> See too Botha 2017 SALJ forthcoming; Tsesis 2015 *BU L Rev* 4.

<sup>117</sup> *Rabat Plan* para 18.

<sup>118</sup> *Rabat Plan* Recommendations fn 45.

<sup>119</sup> *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) paras 84-94; *Case v Minister* paras 48-52.

<sup>120</sup> *Whatcott* para 80.

aligned with the legislative objective of addressing the marginalisation of target groups and of promoting a tolerant, pluralistic and egalitarian society.<sup>121</sup> Moreover, we believe that the many interpretative and constitutional challenges to the prohibited speech provisions in the *Equality Act* compromise their effectiveness. We therefore suggest an amendment to section 10.

## 6 Proposals for the reform of section 10(1)

We recommend that section 10(1) be amended to read as follows:

No person may publish, propagate, or advocate any form of expression in public against an identifiable group of persons on one or more of the prohibited grounds that could reasonably be construed to demonstrate a clear intention to promote hatred against such group and which is likely to cause harm.

The proposed wording excludes the *communication of hurtful words* directed at *individuals* based on group characteristics from the ambit of section 10(1). Instead, the focus is on the regulation on the promotion of group hatred, which also causes harm. We submit that a restriction to freedom of expression in these terms is a reasonable and justifiable limitation to the freedom of expression and is rationally connected to the legislative purpose of addressing the marginalisation of vulnerable groups and of promoting a tolerant, pluralistic and egalitarian society.

The recommendation for a new threshold test for hate speech constrains the extent of the limitation to the freedom of expression, but a respondent should still be entitled to raise a defence. Here we recommend the insertion of new hate speech-specific defences in section 10 (as opposed to the proviso in section 12). We suggest that "the *bona fide* engagement in artistic creativity, scientific and academic enquiry" defence be retained. The media defence, however, is too narrow because it requires a respondent to prove that the speech was *bona fide* – that is, genuine; accurate (effectively excluding opinion or comment); reasonable and in the public interest. We recommend that a media respondent should be entitled to rely on the traditional "fair comment" defence to escape liability, provided that the engagement therein is *bona fide*, to be tested objectively and within context.

Finally, we do not support the inclusion of a "truth" defence. Many academics argue that the advocacy of hatred is necessarily untrue.<sup>122</sup> The

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<sup>121</sup> Whatcott paras 80-82.

<sup>122</sup> Moon 2008 <http://www.ohrc.on.ca/en/submission-canadian-human-rights-commission-concerning-section-13-canadian-human-rights-act-and> 37; Freiman

hatemonger claims that members of an identifiable group should be reviled because of abhorrent group characteristics. The Constitutional Court has reiterated that this type of conduct violates everyone's inherent human dignity and fails to respect the right to be different.<sup>123</sup> In a defamation case, a defendant is entitled to plead that the publication is true and in the public interest, but hate speech and defamation should not be confused. A plaintiff in a defamation suit alleges an injury to reputation. A defendant, in turn, is entitled to prove that the publication was not wrongful because the published facts were true and in the public interest. The injury to the plaintiff's reputation was deserved and should be made known. But, in hate speech cases, a group is maligned because of immutable group characteristics. The inclusion of a truth defence enables a respondent "to repeat his or her odious claims and make them the subject of legal context" thereby shifting the focus from the hatred "to historical, sociological or psychological claims that are simply window dressing for more basic assertions" about group qualities.<sup>124</sup> This cannot be tolerated.

## 7 Conclusion

Marais and Pretorius' analysis provides an interesting perspective on the meaning and constitutionality of section 10(1) of the *Equality Act*, specifically insofar as the role of the proviso is concerned. Their input in respect of a regularly overlooked area is invaluable. We do not agree, however, with their interpretation of the hate speech provisions. As we have demonstrated, hate speech and unfair discrimination are not analogous and the ambit of section 10(1) is far too wide, even when tempered by the proviso.

We therefore propose a new and stricter test for the regulation of hate speech in the *Equality Act*. We also recommend that a new section 10(2) be inserted in the Act containing hate speech-specific defences. This structure, we submit, is infinitely better than the bifurcated approach currently used where the existing defences are contained in section 12, incorporated by way of a proviso.

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2013 SCLR 295. A more nuanced approach is that hate speech is almost invariably untrue.

<sup>123</sup> *Le Roux v Dey* 2011 3 SA 274 (CC) para 202; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) paras 22-28, 124-132.

<sup>124</sup> Moon 2008 <http://www.ohrc.on.ca/en/submission-canadian-human-rights-commission-concerning-section-13-canadian-human-rights-act-and-37>.

We argue that our approach provides much needed clarity and ensures that hate speech is appropriately regulated in South Africa. Our revision of the section 10(1) test is narrowly tailored to regulate the public promotion of hatred against specified target groups, and which is likely to cause harm. We submit that this test complies with the benchmark for hate speech regulation in relevant international law. The restriction is clear and necessary, responds to a pressing social need, and is proportionate to the interest protected. It is precisely crafted and does not include offensive interpersonal speech within its realm. It is capable of achieving its objectives and is aimed at facilitating the transformation to a reconciled nation united in its diversity.

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### **List of Abbreviations**

BCCSA

Broadcasting Complaints Commission of South Africa

BCTSA	Broadcasting Complaints Tribunal of South Africa
BULR	BU L Rev
CHRC	Canadian Human Rights Commission
CERD	Committee on the Elimination of Racial Discrimination
ICCPR	International Convention on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Discrimination
IJMGR	International Journal on Minority and Group Rights
Law & Soc'y Rev	Law and Society Review
PER	Potchefstroom Elektroniese Regsblad / Potchefstroom Electronic Law Journal
Rabat Plan	Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence
SACJ	South African Journal of Criminal Justice
SAHRC	South African Human Rights Commission
SALJ	<i>South African Law Journal</i>
SAJHR	<i>South African Journal on Human Rights</i>
SAPL	Southern African Public Law
SCLR	Supreme Court Law Review
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
UNHRC	<i>United Nations Human Rights Committee</i>