



***SUBMISSION ON PROMOTION OF EQUALITY
AND PREVENTION OF UNFAIR
DISCRIMINATION AMENDMENT BILL, 2021***

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1. Introduction

The proposed Promotion of Equality and Prevention of Unfair Discrimination Amendment Bill 2021 (“the Bill”) constitutes a dangerous departure from the current Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and would be unconstitutional violations of the rights to freedom of expression, religion, belief, and opinion.

The Bill will have six major consequences:

1. Redefining the terms *equality* and *discrimination*¹
2. Departing from the fault requirement that is found throughout our law by creating liability for unintentional acts or omissions, which cause prejudice to or undermine the dignity of a person²
3. Making persons vicariously liable for contraventions of the Act that are performed by their workers, employees, or agents.³ This would include discrimination, hate speech and harassment.⁴
4. A series of hefty obligations will be placed on non-governmental organisations, traditional leaders and institutions, community organisations and those contracting with the state,⁵ and the executive will be empowered to create codes to regulate these sectors.⁶ Without any hint of irony, government ministers will be empowered to discriminate between people, companies and organisations depending on their size, resources, and influence.⁷
5. In a further move against the ordinary meaning of equality, provision is made for the state funding of legal expenses incurred by those who institute complaints, but not of those who defend themselves against those complaints.⁸
6. It requires the state to overhaul all laws, policies, codes, practices and structures that do not conform to the newly proposed definitions of equality and discrimination.⁹

¹ Section 1 of the Bill

² Section 1 of the Bill

³ Section 6(3) of the Bill

⁴ Sections 6 to 12 of the Act create prohibitions on unfair discrimination, hate speech and harassment. Section 21 sets out the orders that an Equality Court can make in relation to these offences.

⁵ Sections 24, 26A, 27 and 28 of the Bill

⁶ Section 28(2) of the Bill

⁷ Section 28(4) of the Bill

⁸ Section 25(8) of the Bill

⁹ Section 25(6) of the Bill

2. New definitions

The underlined portions of the definitions are newly proposed in the Bill, whereas the parts in square brackets are deleted:

'discrimination' means any act or omission, including a policy, law, rule, practice, condition or situation which, whether intentionally or not, directly or indirectly –

- (a) imposes burdens, obligations or disadvantage on; **[or]**
- (b) withholds benefits, opportunities or advantages from**[,];**
- (c) causes prejudice to; or
- (d) otherwise undermines the dignity of,

any person **[on]** related to one or more of the prohibited grounds **[;]**,¹⁰ irrespective of whether or not the discrimination on a particular ground was the sole or dominant reason for the discriminatory act or omission;

'equality' includes –

- (a) the full and equal enjoyment of rights and freedoms as contemplated in the Constitution;
- (b) equal right and access to resources, opportunities, benefits and advantages;
- (c) **[and includes]** *de jure* and *de facto* equality;
- (d) **[and also]** equality in terms of impact and outcomes; and
- (e) substantive equality;

These new definitions are a radical departure from the ordinary meaning of the terms *equality* and *discrimination*. Given that these terms permeate the Act, the new definitions will have dramatic consequences for the existing offences that are created by the Act.

The removal of intent will make it impossible for the state, individuals and organisations to regulate their behaviour in accordance with the law. It will be impossible to know in advance whether one has breached the Act.

¹⁰ The prohibited grounds in Section 1 of the Act are:

- (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
- (b) any other ground where discrimination based on that other ground—
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a);

As an example, the United States Food and Drug Administration is contemplating a ban on menthol cigarettes. It issued the following statement:"

Banning menthol – the last allowable flavor – in cigarettes and banning all flavors in cigars will help save lives, particularly among those disproportionately affected by these deadly products. With these actions, the FDA will help significantly reduce youth initiation, increase the chances of smoking cessation among current smokers, and address health disparities experienced by communities of color, low-income populations, and LGBTQ+ individuals, all of whom are far more likely to use these tobacco products [...] For far too long, certain populations, including African Americans, have been targeted, and disproportionately impacted by tobacco use. Despite the tremendous progress we've made in getting people to stop smoking over the past 55 years, that progress hasn't been experienced by everyone equally.

However, the BBC reported that¹²

[...] black leaders like Al Sharpton, have said banning a product that is most popular among African Americans is discriminatory. They warn that criminalising these products may lead to an underground network of buyers and sellers, and give rise to many more upsetting interactions between law enforcement and young black men.

If these facts were applied to the new definitions of discrimination in the Bill, a failure to ban menthol cigarettes would be discriminatory because the cigarettes cause prejudice to people on grounds related to their race or sexual orientation. However, introducing the ban would also be discriminatory because it causes prejudice on grounds related to race, because the cigarettes are particularly popular among African Americans – so much so that they would risk confrontations with the police by illegally buying and selling these cigarettes.

3. Strict liability

It is an almost sacrosanct principle of our law that people are only held liable for harms which they cause through their own fault. When harming someone's dignity, intent is required, as in the cases of defamation and the *actio iniuriarum*.¹³

¹¹ United States Food and Drug Administration. 2021. *FDA commits to evidence-based actions aimed at saving lives and preventing future generations of smokers*. Available at <https://www.fda.gov/news-events/press-announcements/fda-commits-evidence-based-actions-aimed-saving-lives-and-preventing-future-generations-smokers>. Accessed on 21 June 2021.

¹² BBC. 2021. *Why the proposed US ban on menthol cigarettes is controversial*. 29 April. Available at <https://www.bbc.com/news/world-us-canada-56934957>. Accessed on 21 June 2021.

¹³ Van der Walt, J.C. & Midgley, J.R. 2005. *Principles of delict*. Fourth edition. Johannesburg: LexisNexis South Africa.

In *Minister of Justice v Hofmeyr* the Appellate Division held that¹⁴

[i]njuria is the wrongful and intentional infringement of an interest of personality. In an action for damages based on injuria the plaintiff must prove intent (*dolus, animus injuriandi*) on the part of the defendant.

During apartheid, the press were held strictly liable for what they published, but this approach was discarded under our new constitutional order. In the landmark *National Media Ltd v Bogoshi* case the Supreme Court of Appeal held that¹⁵

[i]f we recognise, as we must, the democratic imperative that the common good is best served by the free flow of information and the task of the media in the process, it must be clear that strict liability cannot be defended and should have been rejected in *Pakendorf*. Much has been written about the ‘chilling’ effect of defamation actions but nothing can be more chilling than the prospect of being mulcted in damages for even the slightest error.

Strict liability has been rejected by the Supreme Court of the United States of America,¹⁶ the German Federal Constitutional Court,¹⁷ the European Court of Human Rights,¹⁸ the Courts in the Netherlands, the English Court of Appeal, the High Court of Australia¹⁹ and the High Court of New Zealand.²⁰

The Bill’s definition of discrimination will do away with the requirement of intent, which will create a new statutory delict based on strict liability. This will undoubtedly lead to the chilling effect that has been forewarned by the Supreme Court of Appeals. It would also entail an infringement of the right to freedom of expression.

4. The value of freedom of speech

Section 16(1) of the Constitution states that:

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;

¹⁴ *Minister of Justice v Hofmeyr* 1993 3 SA 131 (A) 154

¹⁵ *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA) 1210

¹⁶ *Gertz v Robert Welch Inc* 418 US 323 (1974)

¹⁷ 12 BVerfGE 113

¹⁸ *Lingens v Austria* (1986) 8 EHRR 407

¹⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

²⁰ *Lange v Atkinson and Australian Consolidated Press NZ Ltd* 1997 (2) NZLR 22

- (c) freedom of artistic creativity; and
- (d) academic freedom and freedom of scientific research.

There are four main reasons why freedom of expression is so valuable:

1. It aids us in the search for truth.
2. It is vital for the functioning of a democracy.
3. It enhances moral agency.
4. It instils tolerance.

These considerations have been approved in the judgments of our highest courts.

4.1 Truth

Allowing the free dissemination of beliefs, opinions and other forms of expression brings immense benefits. It allows for intellectual, cultural, and scientific progress while provoking discussion and aiding the search for truth.

Since we are fallible, we cannot know with certainty that a particular opinion is false. When we suppress opinions that are believed to be false, we risk missing out on the truth.²¹ By stifling beliefs that are different from our own, we lose the opportunity to “challenge, reconsider and perhaps reaffirm” our own views.²²

This has been recognised by the Constitutional Court in *State v Mamabolo* where it was held that²³

[f]reedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.

²¹ Meyerson, D. 1997. *Rights limited: Freedom of expression, religion and the South African Constitution*. Johannesburg: Juta and Company, p. 78.

²² Wolff, J. 1996. *An introduction to political philosophy*. Oxford: Oxford University Press, p. 118.

²³ *State v Mamabolo (E TV, Business Day and the Freedom of Expression Institute Intervening)* [2001] ZACC 17, 2001 (3) SA 409 (CC), at par. 37

4.2 Democracy

Freedom of expression is the cornerstone of a functioning democratic state. It gives people the opportunity to be exposed to differing viewpoints to enable them to make informed and legitimate decisions about their political and private lives.²⁴

In *Khumalo & Others v Holomisa* Justice O'Regan held that²⁵

[w]ithout [freedom of expression], the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.

In *Holomisa v Argus Newspapers Ltd* the court held that²⁶

[i]n a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional venture depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced, and if they are to be informed with the factual content and critical perspectives that investigative journalism may provide.

In this respect the media (which are afforded explicit protection in the Bill of Rights) plays a crucial role. The media allows for a variety of views to be presented. The freedom of the media to do so is inseparably linked to the rights of consumers of the media to receive information and ideas.

In recognising this, the Constitutional Court in *Khumalo & Others v Holomisa* held that²⁷

[t]he print, broadcast and electronic media have a particular role in the protection of freedom of expression in our society. Every citizen has the right to freedom of the press and the media and the right to receive information and ideas. The media are key agents in ensuring that these aspects of the right to freedom of information are respected. The ability of each citizen to be a responsible and effective member of our society depends upon the manner in which the media carry out their constitutional mandate. As Deane J stated in the High Court of Australia, "... the freedom of the citizen to engage in significant political communication and discussion is largely dependent upon the freedom of the media". The media thus rely on freedom of expression and must foster it. In this sense they are both bearers of rights and bearers of constitutional obligations in relation to freedom of expression.

²⁴ De Waal, J. et al. 2001. *Bill of Rights handbook*. Johannesburg: Juta and Company, p. 310.

²⁵ *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), at par. 21 ("Khumalo")

²⁶ *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588 (W) at 608–9

²⁷ *Khumalo & Others v Holomisa* [2002] ZACC 12, 2002 (5) SA 401 (CC), at par. 22–24

Furthermore, the media are important agents in ensuring that government is open, responsive and accountable to the people as the founding values of our Constitution require. [...] In a democratic society, then, the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably, extremely powerful institutions in a democracy and they have a constitutional duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledgling democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperilled. The Constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of s 16.

The media plays this important role in large part due to its capability to reach a broad range of people and to provide coverage of the whole range of human affairs – political, social, religious, financial and a myriad of other topics. However, the media is only one half of the value-relationship in respect of freedom of expression and democracy. It is the everyday person who, faced with this broad sweep of ideas and information, is the other critical component.

If citizens believe that the media that they are exposed to underwent a filtering process to remove all inappropriate forms of expression, they are less likely to be critical of the material that they consume. Societies that allow for a broad selection of opinions create an environment that strengthens people's analytical skills and trains them to question the views that are presented to them.²⁸

4.3 Autonomy

The legal philosopher Ronald Dworkin wrote:²⁹

Morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true or false in matters of justice and faith. Government insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions. We retain our dignity, as individuals, only by insisting that no one — no official and no majority — has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it.

²⁸ Strossen, N. 2000. *Defending pornography: Free speech, sex and the fight for women's rights*. New York: New York University Press, p. 263.

²⁹ Dworkin, R. 1996. *Freedom's law: The moral reading of the America Constitution*. Oxford: Oxford University Press, p. 200.

When people are exposed to a range of conflicting opinions on a subject, they are given the opportunity to exercise their rational faculties, weigh up the arguments on both sides and come to form their own view on the matter. This underpinning of freedom of expression was recognised in *Case and Another v Minister of Safety and Security and Others* by Mokogoro J in her judgment, in which the point was succinctly made:³⁰

Freedom of speech is a *sine qua non* for every person's right to realise her or his full potential as a human being, free from the imposition of heteronomous power. ... It is also foundational to each individual's empowerment to autonomous self-development.

4.4 Tolerance

In *South African National Defence Union v Minister of Defence & Another* the Constitutional Court held that³¹

[t]he corollary of freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the acceptance of the public airing of disagreements and the refusal to silence unpopular views.

In her seminal paper on the dangers of suppressing racist speech, Denise Meyerson wrote that³²

[t]o drive an evil view underground can actually increase its strength; whereas to debate it out in the open is more likely to bring home its abhorrent nature. It is precisely those ... who, after all, believe there is a truth about the awfulness of racism, who should be optimistic about the power of debate and argument to demonstrate that truth. They came to their views by reason, and since they do not believe themselves to be intellectually superior, should trust in reason rather than the police force as the better weapon against falsehood.

It is only too easy for censorship laws to be put to different uses from those originally intended and if we are happy for them to be deployed in one way, we make it much easier for them to be deployed in other, more frightening, ways later. And a final consideration here is that, to the extent that racial animosities will continue to plague us, it is better to let them be played out at the level of words rather than to bottle them up, thereby not only increasing their virulence, but also making more likely a more dangerous kind of discharge. Forced, as we are, to weigh up evils here, we should therefore conclude that tolerance is more beneficial than costly.

³⁰ *Case and Another v Minister of Safety and Security and Others* [1996] ZACC 7, 1996 (3) SA 617 (CC) at par. 26

³¹ *South African National Defence Union v Minister of Defence & Another* [1999] ZACC 7, 1999 (4) SA 469 (CC) at par. 8

³² Meyerson, D. 1990. No platform for racists!: What should the view of those on the left be? *South African Journal on Human Rights* 6(3): 394–398.

While it is perhaps a stretch too far to suggest that by allowing offensive speech we can seek, through reasoned discourse, to persuade all of the holders of such views of their falsity, there are at least two other reasons related to the idea of tolerance that support such freedom. The first is that a public discourse on such issues may very well persuade reasonable people who have not yet made up their minds. These people would be more open to rational persuasion if they see a fair and comprehensive debate. If offensive views are forced into secrecy, a fence-sitter who falls into such a circle will likely only be trapped in an echo chamber of such offensive ideas, without the opportunity of an open and rational challenge to those views.

Second, allowing the freedom to express offensive views without threat of legal sanction can provide a measure of certainty as to how widespread such views are in society. The threat of legal sanction would be very unlikely to compel individuals to change their mind, but rather merely to hide their views more efficiently. The problem does not go away, it merely becomes more difficult to assess.

5. Impact on freedom of thought, belief and opinion

Section 15(1) of the Constitution states that³³

[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion.

The authors of Constitutional Law of South Africa state the following:

Section 15 is aimed at ensuring that everyone is free to adhere to deeply held beliefs and values, whether they are derived from religion, a system of personal morality, or a secular world view. A set of deeply held opinions – or convictions – can form a comprehensive view of the good life comparable to any and all conventional religious faiths. Viewed in this light, the protection of 'opinions' is not inconsistent with the protection of thought or belief. Nor is it necessarily incongruous in a clause concerned with recognising the individuality, freedom and dignity of every person and the diversity of ideas.

To exercise such rights, it is essential that people are permitted to express their thoughts, beliefs and opinions. That such beliefs and opinions can, and often do, amount to offensive worldviews, while regrettable, does not detract from the point. The importance of allowing people the right

³³ Farlam, P. 2008. *Freedom of religion, belief and opinion*. In Woolman, S. & Bishop, M. (Eds.). *Constitutional Law of South Africa*. Second edition. Johannesburg: Juta and Company, Chapter 41, 14.

to decide, for themselves, what conception of the good life they believe is correct and is critical to a legal order that respects its subjects' right to choose for themselves.

The Bill's redefinition of the term *discrimination* would imperil the teachings of rabbi's, priests, imams and other religious leaders on the basis that their sermons could be deemed to unintentionally cause prejudice towards others. The sacred texts of many faiths may differ from the currently fashionable mores of the day, but those who teach from them should not have to risk legal sanction.

6. Vicarious liability

Section 6(3) of the Bill creates vicarious liability in the following manner for individuals, companies, and groups of people:³⁴

If a worker, employee or agent of a person contravenes the Act in the course of his or her work or while acting as agent, both the person and the worker, employee or agent, as the case may be, are jointly and severally liable for a contravention and proceedings under the Act may be instituted against either or both of them unless the person took reasonable steps to prevent the worker, employee or agent from contravening the Act.

In terms of the Act, unfair discrimination, hate speech and harassment would all be contraventions.³⁵ The Bill also creates a new offence of retaliation or threatening to retaliate against a person who objects to a discriminatory act or omission or who instituted or wishes to institute proceedings in terms of the Act.³⁶ Furthermore, any person who causes, encourages or requests another person to discriminate against any other person is deemed to have discriminated against such other person.³⁷

In terms of sanctions, an Equality Court has the power to order the payment of damages,³⁸ an unconditional apology,³⁹ the revocation of a person's license⁴⁰ and the payment of costs.⁴¹

These new measures will flood our already overburdened courts with litigation.

³⁴ Section 1 of the Act defines persons to include juristic and non-juristic entities and groups of people.

³⁵ Sections 6 to 12 of the Act create prohibitions on unfair discrimination, hate speech and harassment. Section 21 sets out the orders that an Equality Court can make in relation to these offences.

³⁶ Section 9A of the Bill

³⁷ Section 6(2) of the Bill

³⁸ Sections 21(2)(d) and (e) of the Act

³⁹ Section 21(2)(j) of the Act

⁴⁰ Section 21(2)(l) of the Act

⁴¹ Section 21(2)(o) of the Act

7. Regulation of private and public organisations

The Bill creates a general obligation on all persons to eliminate discrimination and promote equality.⁴² Ministers will be empowered to create codes to regulate traditional leaders,⁴³ NGOs,⁴⁴ community-based organisations⁴⁵ and those who contract with the state.⁴⁶ These sectors will also be obliged to make provision in their budgets for funds to implement measures that are aimed at eliminating discrimination and promoting equality.⁴⁷

The Bill empowers the executive to create different measures and codes to target particular persons, non-governmental organisations, community-based organisations or traditional institutions, depending on their size, resources and influence.⁴⁸

Public bodies, which include traditional leaders, must set aside funds to eliminate discrimination and promote equality or explain why no funds were provided.⁴⁹

Given the state's obsession with demographic representativity, it is plausible that these codes could require private organisations to ensure that their staff reflect the race, gender, sexual orientation or language groups of the country.

8. Tilting the scales to favour complainants over defendants

The Bill makes provision for the granting of legal aid to those who institute proceedings, but not to those who are called on to defend themselves.⁵⁰ This could incentivise the launching of frivolous litigation since complainants would not be tempered by the costs of litigation. A bill that strove for equality must also provide legal aid to defendants.

⁴² Section 24(2) of the Bill

⁴³ Section 26(5)(b) of the Bill read with new definition of public body in Section 1 of the Bill to include a functionary or institution exercising a public power or performing a public function in terms of any legislation or under customary law or tradition.

⁴⁴ Section 28(2) of the Bill

⁴⁵ Section 28(2) of the Bill

⁴⁶ Section 27(1)(b) of the Bill

⁴⁷ Section 24(4) of the Bill

⁴⁸ Section 28(4) of the Bill

⁴⁹ Section 26A(3) of the Bill

⁵⁰ Section 25(8) of the Bill

9. Overhaul of entire legal and social system

The Bill requires the state to eliminate discrimination and to promote equality by implementing broad changes to legislation, policies, codes and practices.⁵¹ It states the following:⁵²

The measures to be adopted by the State to achieve equality must proactively address systemic and multidimensional patterns of inequality and discrimination found in social structures, rules, attitudes, actions or omissions which prevent the full and equal enjoyment of rights and freedoms as contemplated in the Constitution, including equal access to resources, opportunities, benefits and advantages and social goods.

10. Conclusion

The Bill poses a series of dangers to the rights of freedom of expression, religion, belief and opinion. It would lead to a flood of litigation against the state, private companies, traditional and religious institutions, and NGOs. This could be financially ruinous for those affected. The insidious regulations that are aimed at all these entities could cripple civil society. The Bill will undermine many of the hard-won freedoms and achievements that have been attained in our democracy. It should be withdrawn.

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⁵¹ Section 25(3) of the Bill

⁵² Section 25(6) of the Bill