

The Constitutionality of the Prohibition of Hate Speech in terms of Section 10(1) of the *Equality Act*: A Reply to Botha and Govindjee

ME Marais* and JL Pretorius**

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Abstract

This is a reply to a critique by Botha and Govindjee (2017 *PELJ* 1-32) of our interpretation of the hate speech provisions of the *Equality Act (Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000)* in Marais and Pretorius (2015 *PELJ* 901-942), in which we considered the constitutionality of section 10(1) of the Act, amongst other things. We address Botha and Govindjees' rejection of our view that hate speech is a form of unfair discrimination and that the most appropriate constitutional framework within which section 10(1) should be interpreted and assessed is sections 9 and 10 of the *Constitution*. We consider Botha and Govindjees' rejection of this point of departure, their opposing different interpretation of the role of the proviso in section 12 of the Act and, generally, their reasons for concluding that section 10(1) is unconstitutional. We maintain that Botha and Govindjee's proposals for reform unduly restrict the hate speech prohibition to cover exclusively expression that warrants criminalisation. In doing so, they fail to fully acknowledge the transformative obligation in terms of international law, the *Constitution* and the *Equality Act*, to prohibit and prevent unfair discrimination.

Keywords

Hate speech; *Equality Act*; unfair discrimination and hate speech regulation; hurt and harm; *bona fide* engagement in protected expression; incitement; freedom of expression; dignity; equality.

.....

1 Introduction

Hate speech remains an important and contentious issue in South Africa and elsewhere. It is important because hate speech directly implicates the foundational values of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*). It is contentious because the regulation of hate speech has to reconcile deep tensions in relation to human dignity in the sense of autonomy and as a right to be respected by others, in relation to freedom of expression as a contributor to the realisation of equality and also as potentially instrumental to its violation, and in relation to freedom of expression as both an essential ingredient of, as well as a potential threat to deliberative democracy. Hate speech regulation therefore requires a constitutional framework conducive to a cautious and proportional evaluation of the worth of the censured expression and the importance of the aims of its prohibition.

This contribution is a reply to a response by Botha and Govindjee¹ to an article in which we sought to place the hate speech provisions of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (the *Equality Act*) in such a constitutional framework.² There are fundamental differences in our respective approaches to the interpretation and constitutionality of the prohibition of hate speech in section 10(1) of the *Equality Act*. The main points of difference concern the relationship between the prohibition of unfair discrimination and the regulation of hate speech, the constitutionality of section 10(1) and the proviso of section 12, as well as Botha and Govindjee's proposals for the reform of section 10(1).

Botha and Govindjee do not view section 10(1) as primarily prohibiting a form of unfair discrimination. They submit that compared with section 16(2)(c) of the *Constitution*, the hate speech prohibition is vague, imprecise and over-reaching. In their view section 10(1) "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

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¹ Botha and Govindjee 2017 *PELJ* 1-32.

² Marais and Pretorius 2015 *PELJ* 901-942.

or proportional restriction thereto".³ They propose an amendment that would substantially narrow the scope of section 10(1).⁴ We, on the other hand, consider the constitutional right to equality and non-discrimination as the primary context for interpreting the *Equality Act's* hate speech provisions. This approach, in our view, provides a more coherent interpretive basis to address the constitutional concerns raised by Botha and Govindjee.

In this reply we test our views and arguments against those presented by the authors. We maintain the correctness of our approach as set out in our original article, which we will briefly reiterate here. In line with this approach, we argue that narrowing down the section 10(1) prohibition as proposed by the authors would unduly negate legitimate and compelling aims of the *Constitution*, the *Equality Act* and international law.⁵

2 The link between unfair discrimination and hate speech

Section 10(1) of the *Equality Act* reads as follows:

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to -
 - (a) be hurtful;
 - (b) be harmful or to incite harm;
 - (c) promote or propagate hatred.

The proviso in section 12 stipulates:

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.

Botha and Govindjee disagree with our contention that the above-mentioned hate speech provisions of the *Equality Act* should be seen as prohibiting a species of unfair discrimination.⁶ We argued that section 10 of the Act, as an integral part of a legislative instrument explicitly intended to realise the constitutional right to equality, should *primarily* be interpreted in the latter context, and not section 16 of the *Constitution*. We justified this

³ Botha and Govindjee 2017 *PELJ* 27.

⁴ Botha and Govindjee 2017 *PELJ* 28-29.

⁵ See para 2.4.

⁶ Botha and Govindjee 2017 *PELJ* 9.

interpretive framework for section 10, in brief, by referring to the Act's primary aim, stated in its preamble, to give effect to section 9 of the *Constitution*, which requires the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality. The preamble also commits to the facilitation of the transition to a democratic society, "united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".⁷ The value of ubuntu, which has become an integral part of our constitutional values and principles, should be added.⁸

The Equality Court recently stated that

... the constitutional prohibition on hate speech has in fact been given practical legislative effect by the Equality Act. This Act was enacted following s 9(4) of the Constitution which provides, as stated before, that national legislation must be enacted in order to prevent or prohibit unfair discrimination. As such, the hate speech, contended for by the Commission here, falls squarely into the category of conduct that perpetuates systemic patterns of discrimination, and as a direct consequence, the Equality Act aims at prohibiting such conduct.⁹

In the Court's view it is equally clear from both section 9 of the *Constitution* and the relevant provisions of the *Equality Act* that "all persons should not only (not) be unfairly discriminated against, but should also be provided with

⁷ In *Afri-forum v Malema* 2011 6 SA 235 (EqC) para 110 it is stated that "(t)he Equality Act does not only seek to prohibit conduct. It seeks in the very prohibition to open avenues of conciliation; to confer dignity upon all members of society by assisting them to find the building blocks necessary to shape their ability to make the judgments which will regulate their future conduct. The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (*Equality Act*) seeks to drive this process forward by setting the moral standard to which members of society must adhere". S 10 necessarily encompasses the hate speech described in s 16(2)(c) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*), as well as similarly threatening hate speech. Hate speech of this extreme nature might not be susceptible to this approach, and might require harsh measures not provided for in terms of the Act. Hence s 10(2) of the Act provides for the referral for prosecution of hate speech that constitutes criminal offences.

⁸ Himonga, Taylor and Pope 2013 *PELJ* 380-384 para 2.3. In *Afri-forum v Malema* 2011 6 SA 240 (EqC) para 18 the Equality Court listed a number of characteristics of ubuntu, including that it "dictates a shift from confrontation to mediation and conciliation", "dictates good attitudes and shared concern", "works towards sensitising a disputant or a defendant in litigation to the hurtful impact of his actions to the other party and towards changing such conduct rather than merely punishing the disputant", and "favours civility and civilised dialogue premised on mutual tolerance".

⁹ *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* 2018 2 SA 149 (GJ) (hereafter the *Qwelane* case) para 20.

protection against utterances which have a severe impact on the psychological well-being of vulnerable minorities in our society".¹⁰ The prohibition of expression aimed at hurting and harming others related to their group characteristics unmistakably reflects the undertaking in the preamble, and also empowers those who are targeted with an instrument of protection.¹¹

Botha and Govindjee agree that the Act's express intention to overcome unfair discrimination and to promote a more egalitarian society is an important contextual setting for interpreting the prohibited speech provisions of the Act. They also admit to a "causal link" between hate speech and unfair discrimination".¹² They nevertheless insist that hate speech and unfair discrimination "must be treated as separate legal concepts"¹³ and advance the following doctrinal, textual, and comparative arguments in support of their viewpoint.

2.1 Different tests for hate speech and unfair discrimination in terms of the Act

Firstly, Botha and Govindjee argue that the test for unfair discrimination in section 6 of the Act differs substantially from the section 10(1) requirements for hate speech.¹⁴ They mention two considerations in this respect: whereas the test for unfair discrimination has to do with the effect of the impugned conduct, and not with the perpetrator's intent, hate speech by definition requires a clear intention to be hurtful, harmful or to incite hatred; in addition, unlike unfair discrimination, the section 10 hate speech definition does not rely on a comparator.¹⁵

As to the first point, this can obviously not be a general *conceptual* proposition that, requiring intent for a particular form of unlawful conduct, excludes such conduct from qualifying as unfair discrimination. In as far as the argument is restricted to the narrower context of the specific textual provisions of the Act (which seems to be the case), it also fails to convince. The fact that the Act does not require intent for a finding of unfair discrimination generally in terms of sections 6 and 14 does not logically imply that it cannot do so for particular species of discrimination. Indeed, the

¹⁰ *Qwelane* case paras 13-14.

¹¹ Marais and Pretorius 2015 *PELJ* 904.

¹² Botha and Govindjee 2017 *PELJ* 9. We come back to this point somewhat later. See para 2.3.

¹³ Botha and Govindjee 2017 *PELJ* 9.

¹⁴ Botha and Govindjee 2017 *PELJ* 7.

¹⁵ Botha and Govindjee 2017 *PELJ* 7.

Act itself in section 12 explicitly prohibits certain types of expression as forms of unfair discrimination, for which "a clear intention to unfairly discriminate" is required. Sections 6 and 14 of the Act merely reflect settled jurisprudence that the intention to discriminate is not a requirement for a finding of unfair discrimination in all instances.¹⁶

Moreover, even in a context restricted to applying sections 6 and 14 of the Act, intent can feature as a prominent fairness consideration. This will be most evident when the relevance of the purpose of the discriminatory conduct is considered.¹⁷ This is one of the pertinent fairness indicators also mentioned in section 14 of the Act.¹⁸ The importance of the purpose (and by implication of the intent) as a contextual fairness consideration was already appreciated in *Harksen v Lane*.¹⁹ The court held that if a discriminatory measure whose primary aim is the achievement of a worthy and important societal goal impinges upon the dignity of the complainants, or affects them in a comparably serious manner, the fact that this is not its intended result may have a significant bearing on the fairness enquiry. Conversely, a clearly discriminatory intent could therefore in particular circumstances decisively tilt the scales in the opposite direction. If discriminatory intent is a relevant – and sometimes even decisive – unfair discrimination consideration, then there is no clear conceptual or doctrinal dichotomy between the hate speech and unfair discrimination provisions of the Act. There is therefore no reason why the Act should not treat hate speech as a particular species of discrimination, for which a specific intent is a requirement. This, *in principle*, would not be different from other particular instances of discrimination where intent could be a conclusive factor for a finding of unfairness. There are also obvious instrumental reasons for requiring the demonstration of a clear and specific intent for hate speech discrimination: it attests to the particularly egregious nature of this

¹⁶ *President of RSA v Hugo* 1997 6 BCLR 708 (CC) paras 42-43. Also see *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 43: "There is nothing in the language of section 8(2) which necessarily calls for the section to be interpreted as requiring proof of intention to discriminate as a threshold requirement for either direct or indirect discrimination."

¹⁷ In *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 44, Langa CJ qualified his finding that intention is not a necessary requirement for unfair discrimination generally: "This does not mean that absence of an intention to discriminate is irrelevant to the enquiry. The section [8 of the interim Constitution] prohibits 'unfair' discrimination. The requirement of unfairness limits the application of the section and permits consideration to be given to the purpose of the conduct or action at the level of the enquiry into unfairness."

¹⁸ Section 14(3)(f) of the *Equality Act*.

¹⁹ *Harksen v Lane* 1997 11 BCLR 1489 (CC) 1510H. Also see *Municipality of the City of Port Elizabeth v Rudman* 1998 4 BCLR 451 (SE) 462A-C.

form of discrimination, and it is in addition a necessary element to prevent disproportionate invasions of the freedom of speech.²⁰

Furthermore, the section 10(1) prohibition *is* in fact concerned with impact and effect. The object of the prohibition is to protect target groups from the direct and ensuing hurtful and harmful impact and effects of exposure to the malicious communication of disrespect, scorn, or hatred related to group characteristics.²¹ These issues will be addressed in more detail later, in particular in the discussion of the harms associated with unfair discrimination and hate speech²² and the *bona fide* engagement in expression described in terms of the proviso.²³

The further argument that hate speech fits awkwardly within the definitional template of unfair discrimination, because a finding of hate speech does not hinge on the presence of a comparator group, is also unpersuasive. The comparator requirement in discrimination law obliges proof of the existence of a person or persons similarly situated to the discrimination claimant, except for the latter's protected characteristic, but who did not suffer the same discriminatory treatment. This is the traditional methodology in discrimination cases for proving that the impugned conduct is the reason for (or "based on") one or more of the prohibited grounds.²⁴ In this respect, it is significant that the section 10 definition of hate speech is similarly worded to standard discrimination clauses, including section 9(3) of the *Constitution* and section 6 of the *Equality Act*.²⁵ In line with these clauses, it also prohibits conduct "based on one or more of the prohibited grounds". If the authors

²⁰ The following dictum of Dickson CJ in *Canada (Human Rights Commission) v Taylor* 1990 3 SCR 892 931-932 reflects the same approach pertaining to the issue of an element of intent: "The preoccupation with effects, and not with intent, is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a *subjective intent* requirement into human rights provisions, rather than allowing tribunals to focus solely upon effects, would thus defeat one of the primary goals of anti-discrimination statutes. At the same time, however, it cannot be denied that to ignore intent in determining whether a discriminatory practice has taken place according to s 13(1) increases the degree of restriction upon the constitutionally protected freedom of expression. This result flows from the realization that an individual open to condemnation and censure because his or her words may have an *unintended* effect will be more likely to exercise caution via self-censorship."

²¹ See para 3.3.2.2.

²² See para 2.3.

²³ See para 3.3.2.

²⁴ See, for instance, *Van der Walt v Metcash Trading Ltd* 2002 4 SA 317 (CC) para 49; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) para 39. In the context of employment discrimination also see the cases mentioned in Pretorius, Klinck and Ngwena *Employment Equity Law* 3-6 fn 12.

²⁵ Also see s 6 of the *Employment Equity Act* 55 of 1998.

are suggesting that the comparator methodology is an indispensable means of proving the causal link between the discriminatory conduct and a prohibited ground, then section 10 would clearly also necessitate a comparator, because it too requires the complainant to establish that the impugned speech is "based on" a prohibited ground.

This elevation of the comparator methodology from a *means* of establishing the link between discriminatory conduct and a prohibited ground to an essential *definitional element* of discrimination needs, however, to be questioned. Fredman has pointed out that the comparator requirement is naturally linked to a formal understanding of equality as consistency of treatment.²⁶ This conceptual association has become problematic with the development of "the notion of equality beyond consistency into a substantive concept, based on the fundamental values of dignity and respect for the individual".²⁷ Whereas the comparator demand could arguably be seen as a necessary benchmark of equality as consistency, it lacks the same diagnostic status in relation to understandings of equality underpinned by dignity. In an earlier judgment, the Canadian Supreme Court stated that the purpose of the equality right is to "prevent the violation of human dignity and freedom through the imposition of limitations, disadvantages or burdens, through stereotypical application of presumed group characteristics".²⁸ This, and not whether others are treated similarly or not, is the deciding factor for equality so understood. Equality as dignity can be violated even if groups are treated equally badly.²⁹ Harassment jurisprudence has also long demonstrated that proof of a better-treated comparator is not a *sine qua non* for identifying harassment as a form of dignity-violating unfair discrimination.³⁰ Moreover, unfair discrimination can

²⁶ Fredman *Discrimination Law* 8-10, 95-102, 108-111. Also see Fredman 2014 *Int J Law Context* 445.

²⁷ Fredman *Discrimination Law* 121; Fredman 2014 *Int J Law Context* 445-446.

²⁸ *Miron v Trudel* 1995 2 SCR 418 489. Also see *President of RSA v Hugo* 1997 6 BCLR 708 (CC) para 41: "At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups." More recently, the Canadian Supreme Court has qualified its reliance on human dignity in equality jurisprudence somewhat: see *R v Kapp* 2008 SCC 41; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham* 2011 2 SCR 670. Also see Albertyn and Fredman 2015 *Acta Juridica* 430-455.

²⁹ Fredman *Discrimination Law* 18.

³⁰ See Fredman *Discrimination Law* 120-121; Pretorius, Klinck and Ngwena *Employment Equity Law* ch 6 para 6.3; Goldberg 2011 *Yale LJ* 780-785. Goldberg's analysis focusses mainly on employment discrimination, but has much wider doctrinal significance. It should also be noted that in so far as her analysis addresses the peculiarities of the relevant US laws and jurisprudence, not all of the concerns

take place in contexts where comparators are difficult to identify, or are even completely absent, such as workplace settings with an insufficient number of comparable co-workers,³¹ or homogenous workplaces or job categories, or workplaces with uniquely situated employees, with no easily identifiable similarly situated co-workers, etc.³² Goldberg has also questioned the functionality in today's economy of the use of comparators as the sole heuristic marker of employment discrimination on a protected ground.³³ In a modern, mobile, knowledge-based economy, easily comparable jobs and therefore comparators have become more difficult to identify.³⁴ Straightforward comparison becomes problematic in the absence of workplace settings where multiple workers engage in fixed and easily comparable, standardised tasks.³⁵ To the extent that contemporary jobs have become more flexible and dynamic in nature, the insistence on comparators does not sit comfortably with the modern world of work.³⁶

The comparator requirement also struggles to come to grips with more subtle and complex forms of discrimination which go beyond easily identifiable and overt forms of exclusion based on relatively "thin" (i.e. one-dimensional) conceptions of protected identities.³⁷ In employment discrimination theory, these forms of exclusion are sometimes referred to as "second-generation" discrimination cases.³⁸ They do not result from overt or blatant forms of prejudice, but from the organisational and cultural dimensions of bias manifested in "patterns of interaction, informal norms, networking, mentoring, and evaluation".³⁹

Contemporary discrimination theories, such as intersectionality theory,⁴⁰ identity performance theory⁴¹ and structural discrimination theory⁴² have attempted to illuminate second-generation discrimination and to highlight the inadequacy of traditional jurisprudential tools (including the demand for

raised are applicable to the South African legal position, to the extent that different textual and doctrinal approaches apply.

³¹ Resulting in statistically small sample sizes that are not reliable for the purpose of comparison.

³² Goldberg 2011 *Yale LJ* 753-764.

³³ Goldberg 2011 *Yale LJ* 758.

³⁴ Goldberg 2011 *Yale LJ* 731-732.

³⁵ Goldberg 2011 *Yale LJ* 755.

³⁶ Goldberg 2011 *Yale LJ* 756.

³⁷ Goldberg 2011 *Yale LJ* 735. Also see Sturm 2001 *Colum L Rev* 465-466.

³⁸ See eg Sturm 2001 *Colum L Rev* 458-568.

³⁹ Sturm 2001 *Colum L Rev* 458.

⁴⁰ Generally attributed to the work of Kimberlé Williams Crenshaw. See, for instance, Crenshaw 1989 *U Chi Legal F* 139-167; Crenshaw 1991 *Stan L Rev* 1241-1299.

⁴¹ See Goldberg 2011 *Yale LJ* 766-770 (especially the authors cited in fn 124).

⁴² See Goldberg 2011 *Yale LJ* 770-772.

a comparator) to come to grips with it. Intersectionality theory⁴³ addresses how disadvantage is compounded by a combination of traits, such as race plus gender, which is not fully accounted for in legal methodologies that treat the protected identities in isolation. As Goldberg explains, the comparator requirement may struggle to bring forms of discrimination based on multidimensional identities onto its radar. The appropriate comparator may be difficult to identify ("Is it someone who shares neither of the individual's traits or shares one but not the other?").⁴⁴ In addition, the fact that intersectional claimants are often small in number tends to undermine the evidentiary value of group-based comparisons.⁴⁵ Identity performance theory is concerned with discrimination that results from people's expressing ("performing") identity attributes in terms of styles of socialising, grooming, expression, etc.⁴⁶ In workplace settings, identity styles are not always attributable to distinct categories such as race or gender in a monolithic sense, which also complicates the usefulness of the standard comparator methodology to expose this kind of discrimination.⁴⁷ The aim of structural discrimination theory is to uncover discriminatory bias behind established workplace norms, structures and interactions.⁴⁸ Also in this respect, Goldberg argues that comparators are unlikely to shed light on the identity traits that motivate the exclusionary interaction patterns in all but the most blatant situations.⁴⁹

What these examples illustrate is that a comparator, on its own, is not necessarily determinative of the group-based discriminatory nature of the perpetrator's conduct.⁵⁰ Insisting, nevertheless, on proof that the perpetrator did not or would not have subjected other groups to the same discriminatory treatment would at best merely reinforce in an indirect way what had already been established directly, namely dignity-related, identity-based harm. It is for this reason, and not because hate speech is conceptually distinct from unfair discrimination, that section 10 does not require the comparator analysis.

⁴³ Crenshaw 1991 *Stan L Rev* 1242.

⁴⁴ Goldberg 2011 *Yale LJ* 736, 764-766.

⁴⁵ Goldberg 2011 *Yale LJ* 736, 764-766.

⁴⁶ Goldberg 2011 *Yale LJ* 736, 764-766, 766-767.

⁴⁷ See the American cases illustrating this point, discussed by Goldberg 2011 *Yale LJ* 736, 764-766, 768-770.

⁴⁸ Goldberg 2011 *Yale LJ* 736, 764-766, 770.

⁴⁹ Goldberg 2011 *Yale LJ* 736, 764-766, 737-738, 770-772.

⁵⁰ This is the implication of the harassment case mentioned above, for instance.

2.2 Section 15 of the Act

Secondly, Botha and Govindjee⁵¹ state that the Act itself distinguishes between hate speech and discrimination because section 15 does not require fairness testing for hate speech. In our view this distinction does not imply that the expression described in section 10(1) is not a form of unfair discrimination. On the contrary, not requiring fairness testing in terms of section 14 of the Act merely acknowledges the fact that unfairness is intrinsic to the definitional terms of the categorical prohibition of hate speech in terms of section 10(1).⁵²

In addition, section 15 similarly excludes harassment from fairness testing, even though harassment is generally considered to be a form of unfair discrimination.⁵³ Section 6(3) of the *Employment Equity Act* expressly states that harassment of an employee constitutes a form of unfair discrimination. In *Liberty Group Limited v M*⁵⁴ the Labour Appeal Court stated that

... (i)n treating harassment as a form of unfair discrimination in s 6(3), the EEA recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace by creating an arbitrary barrier to the full and equal enjoyment of an employee's rights, violating that person's dignity and limiting their right to equality at work.⁵⁵

2.3 Different harms associated with unfair discrimination and hate speech

Thirdly, Botha and Govindjee⁵⁶ claim that a discriminatory "act or omission which unfairly imposes a burden or withholds a benefit⁵⁷ on a prohibited ground is not comparable to speech that propagates hatred on a prohibited ground". They appear to believe that this is self-evident, since they offer no further elaboration. It is unclear why the harms associated with unfair discrimination and hate speech are incomparable.⁵⁸ Hate speech plainly

⁵¹ Botha and Govindjee 2017 *PELJ* 7.

⁵² See Marais and Pretorius 2015 *PELJ* 902-903.

⁵³ Cooper 2002 *ILJ* 1; Pretorius, Klinck and Ngwenya *Employment Equity Law* ch 6 para 6.2.1.

⁵⁴ *Liberty Group Limited v M* 2017 10 BLLR 991 (LAC).

⁵⁵ *Liberty Group Limited v M* 2017 10 BLLR 991 (LAC) para 32.

⁵⁶ Botha and Govindjee 2017 *PELJ* 8.

⁵⁷ They are referring here to the definition of "discrimination" in s 1 of the *Equality Act* as "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantage on, or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds".

⁵⁸ Botha and Govindjee argue for the separate treatment of hate speech and discrimination so that they can be better regulated with reference *inter alia* to their

implies the social burden of exposing a group to public denigration, vilification, insult, marginalisation and threat. Being collectively branded by hateful stereotypes is also the converse of enjoying the benefit of group membership and social repute unburdened by a public discourse infected by group-directed animosity. The harms usually ascribed to hate speech are clearly generically exemplary of typical discriminatory harms.

Botha and Govindjee in effect concede the similarity of the harms associated with hate speech and unfair discrimination generally where they discuss the "causal link" between the two.⁵⁹ They state that "hate speech has the tendency to promote or perpetuate unfair discrimination, particularly when directed at vulnerable groups in society"; hate speech "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"; and that the regulation of hate speech and unfair discrimination "have a common objective, namely the protection of human dignity and equality and the eradication of systemic discrimination". If hate speech causes all the harmful things that are recorded here (*group-based* delegitimation, marginalisation, stereotyping), and its prohibition aims at protecting human dignity, equality and the eradication of systemic discrimination, then it really is all about unfair discrimination.⁶⁰

2.4 *International law*

Fourthly, Botha and Govindjee contend that their approach is vindicated by international law, in particular the *International Convention on Civil and Political Rights* (1966) (the "ICCPR") and the *International Covenant on the Elimination of all Forms of Racial Discrimination* (1965) (the "ICERD"), "where it is accepted that the phenomena of discrimination and hate speech are distinguishable".⁶¹ In support of this view, they refer to the fact that unfair discrimination and hate speech are dealt with in separate provisions in both of these instruments. Article 20(2) of the ICCPR obliges States parties to prohibit hate speech as defined by it, and article 26 entitles everyone to equality.⁶² They argue that the advocacy of hatred which incites to

"own particular harms". See Botha and Govindjee 2017 *PELJ* 9. We elaborate on this point further in para 3.2.

⁵⁹ Botha and Govindjee 2017 *PELJ* 8.

⁶⁰ See the discussion in para 3.2.

⁶¹ Botha and Govindjee 2017 *PELJ* 9.

⁶² Article 26 of the *International Covenant on Civil and Political Rights* (1966) (the ICCPR) reads as follows: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language,

discrimination in terms of article 20(2) is not concerned with "differentiation alone", and that there is a distinction between the obligation to regulate speech that incites to discriminate and the prevention of acts of discrimination.⁶³ They premise their distinction between hate speech and discrimination on the definition of discrimination in terms of the ICERD, as adopted by the UN Human Rights Committee (UNHRC) for the purposes of the ICCPR, 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 footing, of rights and freedoms.⁶⁴

As far as the ICERD is concerned, Botha and Govindjee note that article 4(a) requires States parties to 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, while article 5 requires the elimination of all forms of racial discrimination.⁶⁵ They conclude that this signifies that the purpose of the ICERD is to safeguard vulnerable groups from instances of discrimination *and* hate speech.⁶⁶ The authors do not elaborate much on the criteria they identify as suggestive of a conceptual difference between discrimination and hate speech. They do not explain what they mean by the phrase "differentiation alone".⁶⁷ This notion, as purportedly characteristic of discrimination, can obviously not be understood literally, since that would contradict the established principle that discrimination, as a legal concept, always entails more than mere differentiation.⁶⁸ We presume that what they have in mind here is that hate speech has distinct characteristics setting it

religion, political or other opinion, national or social origin, property, birth or other status."

⁶³ Botha and Govindjee 2017 *PELJ* 10.

⁶⁴ UNHRC *General Comment No 18: Non-discrimination* (1989) para 7.

⁶⁵ Botha and Govindjee 2017 *PELJ* 10.

⁶⁶ Botha and Govindjee 2017 *PELJ* 10.

⁶⁷ Botha and Govindjee 2017 *PELJ* 10 fn 39. The authors rely here on a statement by Ghanea 2010 *IJMGR* 429, which they seem to misread. Ghanea argues that since discrimination legally entails more than mere differentiation of treatment, the prohibition of the advocacy of hatred that "incites discrimination" must consequently also entail more than "differentiation alone". Therefore, since both hate speech and discrimination are premised on more than "differentiation alone", the latter offers no basis of distinction between the two concepts. Ghanea squarely situates the ICCPR's prohibition of the advocacy of hatred within the state's "overarching role in obliterating ... discrimination through multifaceted interventions at different levels".

⁶⁸ UNHRC *General Comment No 18: Non-discrimination* (1989) para 13: "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant".

apart from discrimination generally (as the latter is typically defined in the ICERD). The special characteristics mainly concern the elements of advocacy of hatred and incitement to discrimination, hostility or violence. If this is the correct understanding, then it raises the same point we have dealt with already, namely that a legal instrument may prescribe different requirements for different species of discrimination. In paragraph 2.1 we refuted the argument that the requirement of a particular intent for hate speech necessarily disqualifies it from being classified as a form of discrimination. Equally, in paragraph 2.3 we showed how the harms normally associated with hate speech are generically related to typically unfair discrimination harms. We also noted that harassment is generally recognised as a form of discrimination, despite its distinguishing features.

By arguing for the recognition of hate speech as a particular species of discrimination, we acknowledge that, logically, hate speech must therefore display characteristics setting it apart from other forms of discrimination. These distinguishing characteristics, however, do not place hate speech outside the conceptual realm of identity-based discrimination. In General Recommendation No 35, the Committee on the Elimination of Racial Discrimination (CERD) itself clearly identifies racial hate speech as a form of discrimination by noting how article 4 is integrally linked with other provisions of the ICERD in the elimination of racial discrimination "in all its forms", and also by emphasising the integral connection between articles 4 and 5.⁶⁹ In General Recommendation 15, the CERD notes that "[w]hen the International Convention on the Elimination of All Forms of Racial Discrimination was being adopted, article 4 was regarded as central to the struggle against racial discrimination".⁷⁰ Thornberry aptly states that "(i)n the complex aetiology of racial discrimination, the transmission of racist ideas and attitudes through multiple forms and occasions of hate speech plays an indispensable role", and that the elements of hate speech in terms of article 4 of the ICERD can be linked in "a common ethos of preventing racial discrimination".⁷¹ In his commentary on the CERD's General Recommendation No 35, Thornberry also fittingly observes that "(t)he title

⁶⁹ CERD *General Recommendation No 35: Combating Racist Hate Speech* (2013) para 8.

⁷⁰ CERD *General Recommendation No 15 on Article 4 of the Convention* (1993) para 1. Also see the ICTR Trial Chamber in *Nahimana v The Prosecutor* ICTR-99-52-A para 1076, which held that the proscription of hate speech represents customary international law on the basis of its intrinsic relationship to the norm of non-discrimination: "hate speech that expresses ethnic and other forms of discrimination violates the norm of customary international law prohibiting discrimination".

⁷¹ Thornberry "Forms of Hate Speech and ICERD" 3, 10.

of ICERD refers to the elimination of 'all forms' of racial discrimination, including speech forms".⁷²

We conclude that in so far as the ICERD and the ICCPR draw a distinction between "the obligation to regulate speech that incites to discriminate and the prevention of acts of discrimination", this does not rise to the level of a conceptual difference as contended by Botha and Govindjee.⁷³

3 The constitutionality of section 10(1)

3.1 The constitutional framework

Both sections 16(2)(c) of the *Constitution* and 10(1) of the *Equality Act* are concerned with harmful expression related to group characteristics and can be described as hate speech provisions on this basis. The provisions should, however, be distinguished as far as their scope and aims are concerned. Section 16(2) of the *Constitution* places extreme anti-democratic expression, including hate speech in terms of section 16(2)(c), outside the ambit of constitutional protection.⁷⁴ This categorical exclusion calls for robust legislative and other measures, including criminalisation, to combat the serious threat of the incitement that it describes. Section 16(2)(c) narrowly defines hate speech as "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm". On the other hand, section 10(1) of the *Equality Act* is primarily concerned with the regulation of hurtful and harmful expression related to group characteristics in a much broader sphere that exceeds the ambit of unprotected expression under section 16(2)(c) of the *Constitution* to also involve *prima facie* protected expression. The broader scope of section 10(1) is related to the primary transformative aim of the Act, in particular the obligation in terms of section 9(3) and (4) of the *Constitution* to prohibit and prevent unfair discrimination. We therefore expressed the view that these

⁷² Thornberry Date unknown https://www.ohchr.org/Documents/Issues/Racism/IWG/Session15/CERD_GR35.docx 1.

⁷³ Also see *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC) para 31: "There is no doubt that the state has a particular interest in regulating this type of expression because of the harm it may pose to the constitutionally mandated objective of building the non-racial and non-sexist society based on human dignity and the achievement of equality. There is accordingly no bar to the enactment of legislation that prohibits such expression."

⁷⁶ Section 16(2) of the *Constitution* provides that the right in s 16(1) "does not extend to (a) propaganda for war; (b) incitement of imminent violence or; (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".

sections provide "the more directly applicable context within which to interpret section 10".⁷⁵

Botha and Govindjee, however, maintain that the constitutionality of section 10(1) should not be tested with reference to the fairness standard for discrimination. They contend that

... a preferable approach is that the determination 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, should be left to section 36 of the *Constitution*.⁷⁶

There appears to be some misunderstanding here. Our view that the hate speech provisions of the *Equality Act* are primarily intended to give effect to section 9 of the *Constitution* does not mean that section 9 is the only applicable standard for measuring the Act's constitutionality, or that equality interests would be dogmatically privileged where competing interests or rights are at play.⁷⁷ Whenever the Act is challenged on the basis of a possible infringement of any competing right, then the right to equality and non-discrimination will feature as an important but relative factor in the context of a proportionality analysis. If for instance the constitutionality of section 10(1) of the Act is contested in terms of section 16 as an unjustifiable restriction on freedom of expression, the fact that the Act is intended to realise the foundational value and right to equality and non-discrimination will be an important consideration in the context of applying section 36 of the *Constitution*. We did not suggest that the equality consideration should replace or necessarily dominate the section 36 proportionality inquiry in a situation-insensitive manner. We do not maintain, as suggested by Botha and Govindjee, that equality should be disproportionately favoured at the expense of freedom of expression.⁷⁸ We acknowledge that not all discriminatory speech rises to the level of the kind of discriminatory hate speech that would justify the most stringent forms of suppression. We are mindful of Ghanea's caution that in order to ensure that freedom of speech is not unnecessarily restricted in terms of hate speech proscriptions, "states must show that the harm of discrimination cannot be ameliorated by means other than the suppression of protected speech".⁷⁹

⁷⁵ Marais and Pretorius 2015 *PELJ* 902.

⁷⁶ Botha and Govindjee 2017 *PELJ* 11.

⁷⁷ This is what Botha and Govindjee apparently believe that we suggest: Botha and Govindjee 2017 *PELJ* 9, 27-28.

⁷⁸ Botha and Govindjee 2017 *PELJ* 9.

⁷⁹ Ghanea 2010 *IJMGR* 430-431.

Our viewpoint does, however, ensure that the appropriate balance between the rights to freedom of expression and equality is achieved in accordance with the value structure of our *Constitution*, in which the promotion of equality occupies a central place.⁸⁰ Our approach could therefore shape the proportionality inquiry's outcome in a way different from what would have been the case if the hate speech provisions of the Act were primarily intended to give effect to section 16(2)(c) of the *Constitution*. The fact that these provisions are meant to realise the right to and foundational value of equality will, for instance, add considerable weight to the importance of the purpose of the limitation (section 36(1)(b) of the *Constitution*). It may be important enough to outweigh the fact that section 10(1) of the Act is not a mirror image of section 16(2)(c) of the *Constitution*.⁸¹ We expand on this in the following sections.

3.2 *Vagueness and overreach*

Botha and Govindjee believe that section 10(1) of the Act is on constitutionally thin ice, due to both vagueness and overreach.⁸² Their primary concerns are that section 10(1) lacks a rational connection to its purpose and that it disproportionately favours the interests it seeks to protect.⁸³ The chief reason for these defects is that section 10(1) can proscribe hurtful inter-personal speech⁸⁴ that does not require consequential harm and is not specifically group-related, ie resulting in individual as opposed to societal harm.⁸⁵ The textual context for this perceived flaw is that section 10(1) prohibits speech "based on one or more

⁸⁰ See the following *dictum* in *Brink v Kitshoff* 1996 6 BCLR 752 (CC) para 33: "It is not surprising that equality is a recurrent theme in the Constitution. As this court has said in other judgments, the Constitution is an emphatic renunciation of our past in which inequality was systematically entrenched." Also see *S v Makwanyane* 1995 6 BCLR 665 (CC) paras 218, 262, 322; *Shabalala v Attorney-General, Transvaal* 1995 12 BCLR 1593 (CC) para 26; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517 (CC) para 60; *Qwelane* case para 13.

⁸¹ See *Qwelane* case para 64.

⁸² Botha and Govindjee 2017 *PELJ* 27. The constitutional challenge against s 10 of the *Equality Act* on these grounds was rejected in the *Qwelane* case paras 57-59.

⁸³ Botha and Govindjee 2017 *PELJ* 27.

⁸⁴ Although this issue was not specifically raised in the respective articles under discussion, in view of the recent finding of the Equality Court in the *Qwelane* case para 60 in favour of a conjunctive reading of ss 10(1)(a), (b) and (c) of the *Equality Act*, it is worth mentioning that in our view a conjunctive reading will be textually strained and will exclude crucial aspects of hate speech as unfair discrimination from the ambit of s 10(1) of the Act. See the discussion of differing Equality Court approaches to this aspect in SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20&%20Other%20March%202019.pdf>. para 4.2.

⁸⁵ Botha and Govindjee 2017 *PELJ* 15-17.

of the prohibited grounds, against *any person*, that could reasonably be construed to demonstrate a clear intention to be *hurtful* or harmful".⁸⁶ In their view, this implies a misguided emphasis on speech intended "to be hurtful when communicated about any person, as opposed to that which vilifies and ostracises the group". They argue that the purpose of hate speech regulation should not be to safeguard the "emotional well-being of individuals", but to prohibit expression that "reinforces and perpetuates patterns of discrimination and inequality" and which undermines national unity, tolerance and reconciliation in society".⁸⁷

Regarding the first point of concern, Botha and Govindjee claim that the inclusion of hurtful inter-personal speech without a link to resultant harm is not rationally related to the "legislative purpose of addressing the marginalisation and systemic discrimination of groups".⁸⁸ In our view, this line of reasoning is premised on a narrow understanding of the direct and indirect group-related harm inflicted through hurtful speech.⁸⁹ In this respect, Benesch states that hate speech

... directly affects its targets – the people it purports to describe – by frightening, offending, humiliating or denigrating them. This often has the secondary effect of silencing them, by means of fear. Speech can also harm indirectly (but no less severely) by inciting, or pitting members of one group of people against another.⁹⁰

Gelber refers to

... a considerable body of literature that has developed over the last few decades, which discusses how hate speech is expression that materially and substantively harms its targets in the saying of that speech (and not only in terms of a discreet, consequential harm arising from it).⁹¹

According to this literature, the defining features of hate speech are

... that it incurs harms discursively when the hate speech is uttered, and that these harms are analogous to other discriminatory harms, such as denying someone a service or denying them a job on the ground of their race or other relevant attribute.⁹²

⁸⁶ We will return to this aspect later.

⁸⁷ Botha and Govindjee 2017 *PELJ* 16, with reference to *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC). See *Saskatchewan (Human Rights Commission) v Whatcott* 2013 1 SCR 467 (hereafter the *Whatcott* case) paras 80-82.

⁸⁸ Botha and Govindjee 2017 *PELJ* 16-17.

⁸⁹ See para 2.3.

⁹⁰ Benesch "Defining and Diminishing Hate Speech" 19.

⁹¹ Gelber 2017 *Constitutional Commentary* 620.

⁹² Gelber 2017 *Constitutional Commentary* 621.

The discriminatory effects of hate speech include

... that others were persuaded of negative stereotypes, a conditioning of the environment such that racism was normalized, subordination, silencing, fear, victimization, emotional symptoms, restrictions on freedom, lowering of self-esteem, maintenance of social imbalances of power, and undermining of their dignity.⁹³

Secondly, Botha and Govindjee also draw too stark a line between individually hurtful or harmful speech and speech that "vilifies and ostracises the group". Section 10(1) does not cover hurtful or harmful speech directed at an individual based solely on his or her "uniquely personal characteristics".⁹⁴ Since it requires speech to be based on one or more of the prohibited grounds, only speech aimed at imputed group characteristics is included in the definition of hate speech. Hate speech remains a group-directed attack, even when communicated "against any person". By definition, hate speech does not target the individual in purely individual terms, but as representative of the negative characteristics ascribed to the group. The hurt or harm against which section 10(1) protects does therefore not include the "emotional well-being of individuals" unconnected to their group association. Section 10(1) acknowledges that to the extent that groups are "part of the psychological self",⁹⁵ no stark boundaries distinguish group- and individual-directed hate speech. Stereotypical comments about groups can elicit as strong and intense emotional responses as identical personal comments.⁹⁶ The section 10(1) prohibition of hate speech against an individual is therefore clearly also rationally related to the purpose of proscribing speech that "reinforces and perpetuates patterns of discrimination and inequality", and which "undermines national unity, tolerance and reconciliation in society".

Botha and Govindjee also raise the concern that the inclusion of the word "communicate" in section 10(1) adds a concept so wide that it opens the door to 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".⁹⁷ They propose the insertion of a "publicity" element in section 10(1), "namely that the speech

⁹³ Gelber 2017 *Constitutional Commentary* 623; *Qwelane* case para 65.

⁹⁴ This terminology is used in the *Whatcott* case para 84.

⁹⁵ *Garcia et al* 2006 *Group Process Intergr Relat* 308. Also see *R v Keegstra* 1990 3 SCR 697 746, where Dickson CJ noted: "[a] person's sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded the groups to which he or she belongs".

⁹⁶ *R v Keegstra* 1990 3 SCR 697 746-747.

⁹⁷ Botha and Govindjee 2017 *PELJ* 12.

should occur in the hearing or presence of the public in a public place, or that it should be published or disseminated to the public".⁹⁸

We agree that the section 10(1) hate speech prohibition should not apply to conversation in private.⁹⁹ We argued that section 10 does not clearly exclude private communication, probably owing to bad formulation in particular of the phrase "no person may publish, propagate, advocate or communicate words". Words can be published and used to advocate, propagate and communicate ideas, feelings, opinions and knowledge, but cannot be advocated or propagated themselves. We accordingly proposed that the phrase "no person may publish, propagate, advocate or communicate words" should read, or be amended to read, "no person may publish expressive content¹⁰⁰ that propagates, advocates or communicates ideas or views".¹⁰¹ This formulation will clearly exclude private conversation from the ambit of section 10(1) and will also address the textual anomaly.¹⁰²

We will now further explain our view that section 10(1), subject to the amendment (or interpretation) that we have proposed, despite the broadness of some of its terms, does not unduly infringe upon the right to freedom of expression. This necessitates a closer look at the proviso in section 12 of the *Equality Act*, since it is primarily intended to further clarify and limit the scope of prohibited hate speech in section 10(1). Many of our differences with Botha and Govindjee regarding the *Equality Act's* purported vagueness and over-breadth can be attributed to differing interpretations of the role and terms of the proviso.

⁹⁸ Botha and Govindjee 2017 *PELJ* 12-13.

⁹⁹ Marais and Pretorius 2015 *PELJ* 907-908. See our discussion of the principle laid down in Canadian cases that it is not about "whether the statement is communicated in a setting that is private, but rather whether it is conveyed other than in private conversation".

¹⁰⁰ Botha and Govindjee agree that the term "words" should be replaced. They propose "expression" or "acts of expression". See Marais and Pretorius 2015 *PELJ* para 3.1.1; Botha and Govindjee 2017 *PELJ* para 3.1.

¹⁰¹ Marais and Pretorius 2015 *PELJ* para 3.1.1. We did not argue that the "'publish, propagate, advocate or communicate' phrase 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" as presented by Botha and Govindjee. See Botha and Govindjee 2017 *PELJ* para 3.1.

¹⁰² Marais and Pretorius 2015 *PELJ* para 3.1.1.

3.3 *The role and interpretation of the proviso in section 12 of the Equality Act*

3.3.1 *The function of the proviso¹⁰³ in the context of section 10 of the Act*

Botha and Govindjee 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).

We do not agree. In our view when expression falls within the ambit of the proviso, it is a clear indication that it essentially does not meet the section 10(1) requirements. To use the phrasing of the Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority*,¹⁰⁴ albeit in a different context, the proviso "defines the boundaries beyond which" the section 10(1) prohibition "does not extend". It describes expression with characteristics that essentially fall outside the section 10 definition of hate speech.¹⁰⁵ We described the proviso as a "modifier" in the sense of "a word or phrase that makes specific the meaning of another word or phrase".¹⁰⁶ The Supreme Court of Canada illustrates our point in the *Whatcott* case.¹⁰⁷ The issue was the constitutionality of a hate speech provision of the *Saskatchewan Human Rights Code*¹⁰⁸ that resembles section 10(1) of the *Equality Act*, albeit without a provision similar to the section 12 proviso. The Court nonetheless considered that "in the normal course of events, expression that targets a protected group in the context of satire, or news reports about hate speech perpetrated by someone else, would not likely constitute hate speech".¹⁰⁹ In our view, the section 12 proviso simply excludes these and other forms of expression explicitly from the prohibition.

¹⁰³ Section 12 of the *Equality Act* is quoted in para 2.

¹⁰⁴ In *Islamic Unity Convention v Independent Broadcasting Authority* 2002 5 BCLR 433 (CC) para 30 the Constitutional Court describes s 16(2) of the *Constitution* as "definitional" in the sense that it "defines the boundaries beyond which the right to freedom of expression does not extend".

¹⁰⁵ In our view this clarification saves s 10 of the *Equality Act* from what the Equality Court referred to as "impermissible vagueness". See the *Qwelane* case paras 56 and 59.

¹⁰⁶ Botha and Govindjee 2017 *PELJ* 18; Marais and Pretorius 2015 *PELJ* 911. See Merriam-Webster Dictionary 2011 <https://www.merriam-webster.com/dictionary/modifier>.

¹⁰⁷ See Botha and Govindjee 2017 *PELJ* 8, 10, 13, 15, 16, 27, 28.

¹⁰⁸ *Saskatchewan Human Rights Code* 1979 Ch S-24.1 s 14(1)(b).

¹⁰⁹ *Whatcott* case para 53.

The perception that hate speech that complies with the essential terms of section 10(1) is potentially justifiable is inaccurate and confusing. It should be clearly understood that even visual art, poetry, newspaper articles and scientific and academic publications may constitute or contain hate speech as contemplated by section 10(1) of the *Equality Act*. In the *Saskatchewan* case it was argued that the absence of defences of truth and sincerely held belief rendered the provision overbroad. The Court held that

... in not providing for a defence of truth, the legislature has said that even truthful statements may be expressed in language or context that exposes a vulnerable group to hatred.¹¹⁰

The same reasoning applies to the forms of expression listed in the section 12 proviso of the *Equality Act*.

Botha and Govindjee's main criticism of our approach that the proviso does not provide defences to justify hate speech is that it increases the burden that is placed on a complainant.¹¹¹ According to them it requires a complainant to prove a negative (that the expression does not fall under the proviso) and denies the respondent the benefit of a defence. This effect, in their view, contradicts the principle that in unfair discrimination cases a complainant is required to make out only a *prima facie* case of unfair discrimination, as well as the *Equality Act's* purpose to provide the victims of hate speech and unfair discrimination with accessible forums to pursue complaints.¹¹² We do not agree that our approach affects the burden of proof. The same overall onus of proof on the applicant and the onus of rebuttal on the respondent will apply, regardless of whether the proviso operates as descriptive of the prohibited conduct or as a complete defence in justification of prohibited conduct.¹¹³ The shifting of the burden of proof in an unfair discrimination matter in terms of section 6 of the Act is related to the presumption of fairness that comes into operation once discrimination on a listed ground is established.¹¹⁴ As a categorical prohibition not subject to fairness testing in terms of section 14 of the Act, section 10 clearly does not involve a presumption of unfairness.¹¹⁵

¹¹² *Whatcott* case paras 141-142.

¹¹¹ Botha and Govindjee 2017 *PELJ* 19-29.

¹¹² Botha and Govindjee 2017 *PELJ* 19.

¹¹³ Schwikkard and Van der Merwe *Principles of Evidence* 572-573.

¹¹⁴ Schwikkard and Van der Merwe *Principles of Evidence* 499-500.

¹¹⁵ Section 15 of the *Equality Act* provides that in cases of hate speech and harassment s 14 does not apply.

3.3.2 "*Bona fide engagement*"

3.3.2.1 The textual reading

Botha and Govindjee contend that the "*bona fide engagement*" requirement qualifies the forms of expression enumerated in the proviso with the exception of the "publication of any information, advertisement or notice". They consider this interpretation to be based on grammatical correctness.¹¹⁶ This interpretation entails various problems, as also pointed out by Botha and Govindjee and addressed in our following response.

We interpreted the "*bona fide engagement*" phrase as qualifying each of the forms of expression enumerated in the proviso. We also linked these forms of expression with the specified freedoms enumerated in terms of section 16(1) of the *Constitution*, namely the freedom of the press, the freedom to receive information, the freedom of artistic creativity, academic freedom and the freedom of scientific research. We concluded that the proviso essentially covers *bona fide engagement* in all forms of expression that enjoy constitutional protection in terms of section 16(1) of the *Constitution*.¹¹⁷ This understanding makes it clear that section 10 is concerned with expression that is not in good faith (malicious).¹¹⁸ We contended that expression will not be in good faith when it abuses the freedoms that are stipulated in terms of section 16(1) of the *Constitution*, with the aim to hurt and harm or to promote or incite hatred related to group identity as contemplated in terms of section 10(1).¹¹⁹ An academic article on homosexuality referring to homosexual people in degrading terms serves as an example. The primary aim of the abusive remarks will be reasonably perceived to be intended to hurt and harm homosexual people and not to communicate or publish scientific information, regardless of whether the scientific view approves or condemns homosexuality.¹²⁰

Botha and Govindjee acknowledge that our suggestion that the "*bona fide engagement*" phrase applies to all the forms of expression enumerated in terms of the proviso "offers a potential solution to the over-breadth problem" that they have identified.¹²¹ They do not, however, consider this

¹¹⁶ Botha and Govindjee 2017 *PELJ* 20.

¹¹⁷ Hate speech defined in terms of s 16(2)(c) of the *Constitution* can by no means be *bona fide* and is therefore categorically excluded from the proviso. See the discussion of the phrase "in accordance with section 16 of the Constitution" in para 3.6.3.

¹¹⁸ See para 3.3.2.2.

¹¹⁹ See para 3.3.2.2.

¹²⁰ Marais and Pretorius 2015 *PELJ* paras 3.2.3-3.2.6.

¹²¹ Botha and Govindjee 2017 *PELJ* para 4.3.1.

interpretation as a viable option as, in their view, "it is strained and not textually sound".¹²² They argue that 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 ...". Their version, however, does not reflect our proposal. We will now clarify our textual reading by using brackets, highlighting the relevant phrase, and underlining the respective listed forms of expression as follows:

Provided that *bona fide* engagement [in **artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest**¹²³ or **publication of any information, advertisement or notice**] in accordance with section 16 of the Constitution, is not precluded by this section.

We do not agree that this reading is textually strained. On the contrary, as will be corroborated by the further analysis of the terms of the proviso, it fits in effortlessly with an overall logical understanding of all the different aspects of the proviso within the context of section 10 of the Act, and it is compatible with the constitutional imperative to uphold the right to freedom of expression.

3.3.2.2 The meaning of "*bona fide*"

Botha and Govindjee do not entirely differ from our interpretation of the phrase "*bona fide*", but find our reference to the "subjective conviction" of the speaker confusing. They submit that it should rather 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".¹²⁴ The confusion relates to their sole consideration of the *bona fide* nature of the forms of expression enumerated in the proviso, and not also the *bona fides* of the speaker's "engagement". "(B)ona fide engagement" in the proviso is in contrast to the

¹²² Botha and Govindjee 2017 *PELJ* para 4.3.1.

¹²³ An interpretation that the group of speech forms before the "or" and the category of speech after it (namely the "publication of any information, advertisement or notice in accordance with section 16 of the Constitution") are separated by the "or", in our view requires a comma before the "or". On the other hand, the absence of a comma is in accordance with the generally acceptable approach that a serial comma is not required before the last item of a list with three or more items. See Fowler and Butterfield *Fowler's Dictionary of Modern English Usage* 30.

¹²⁴ Botha and Govindjee 2017 *PELJ* 21.

malicious intention required in terms of section 10(1).¹²⁵ We will now explain our understanding of this aspect in more detail.

The Collins Thesaurus of the English Language¹²⁶ provides the following synonyms for "*bona fide*": "genuine; real; true; legal; actual; legitimate; authentic; honest; veritable; lawful; on the level". The online Cambridge English Dictionary describes "genuine" as follows: "If something is genuine, it is real and exactly what it appears to be... If people or emotions are genuine, they are honest and sincere." We applied these descriptions respectively to determine the *bona fides* of the speaker and the *bona fide nature* of the relevant forms of expression.

The proviso is concerned with *bona fide*, in the sense of honest and sincere, engagement in *bona fide*, in the sense of authentic, protected forms of expression.¹²⁷ The proviso makes it clear that when a speaker *bona fide* (honestly or sincerely) engages in, for instance, artistic creativity, the work of art will not fall under section 10(1) even if it hurts or harms related to group identity. *Bona fide* engagement in expression is the opposite of the malicious abuse of expression.¹²⁸ An example of the malicious abuse of a *bona fide* form of expression will be when an authentic painting depicting the flogging of a slave is placed on the doorstep of a black person who has moved into a white neighbourhood. It is rather obvious that the promotion of hatred will never be *bona fide*.

The determination of malicious intent by means of a reasonableness assessment addresses Botha and Govindjee's concern that "at this level the focus should be on remedying the harm caused by hate speech, as opposed to the subjective intention of the hater".¹²⁹ Hate speech regulation is

¹²⁵ The online Cambridge English dictionary describes "engage in something" as "to take part in or do something" (Cambridge Dictionary 2016 <http://dictionary.cambridge.org/dictionary/english>).

¹²⁶ Collins *Thesaurus of the English Language*.

¹²⁷ See Botha and Govindjee 2017 *PELJ* 21.

¹²⁸ These attributes of malice are reflected in the following dictum in *The Citizen 1978 (Pty) Ltd v McBride* 2011 8 BCLR 816 (CC) paras 104-105: "Counsel for Mr McBride insisted that the Citizen's comments were malicious. Counsel submitted that the Citizen published the articles out of personal spite and ill-will towards Mr McBride, and not out of any wish to engage in public debate about his suitability for the post. Counsel indeed contended that the articles manifested hatred towards Mr McBride that went beyond the bounds of fair comment. This goes so far as to suggest that the views the Citizen expressed were not honestly held. The question is whether the evidence established, first, that the Citizen's view as to Mr McBride's suitability for appointment was genuinely held and, second, if it was, whether the Citizen abused its right to express that view, 'for malice indicates an abuse of right, which makes unlawful that which would otherwise have been lawful'."

¹²⁹ Botha and Govindjee 2017 *PELJ* 15.

essentially concerned with the affront to human dignity caused by the exposure to another's contempt of the addressee's group characteristics. Determination of the presence of malicious intention in the form of contempt, scorn or hatred can therefore not be excluded from the analysis.¹³⁰

3.3.3 "[I]n accordance with section 16(1) of the Constitution"

Botha and Govindjee contend that "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".¹³¹ They understand the phrase to require a case by case analysis to determine whether or not the form or forms of expression to which it applies should have been excluded from the prohibition in the first place.¹³² However, they concede that to categorically exclude a form of expression from prohibition, and then to require the said case by case analysis, does not make sense. In an attempt to address or minimise this problem, they reason that the phrase "in accordance with section 16(1) of the Constitution" qualifies only the last-mentioned form of expression enumerated in terms of the proviso, namely "publication of any information, advertisement or notice", and that this phrase in turn specifically refers to the prohibition of the publication or display of any advertisement or notice in terms of section 12(b) of the Act. They speculate that "the drafters attempted to reproduce the essence of section 12 of the Act¹³³ and then to exclude such forms of expression from liability if published 'in accordance with section 16 of the Constitution'". They finally reiterate that this interpretation does not solve the problem of distinguishing expression "in accordance with section 16(1) of the Constitution" from expression outside the ambit of the proviso.¹³⁴

Our understanding of the phrase "in accordance with section 16(1) of the Constitution" is that it simply excludes expression under section 16(2), in particular section 16(2)(c), of the *Constitution*, which is expression not in accordance with the *Constitution*,¹³⁵ from the ambit of the proviso. The exclusion makes perfect sense, because expression that incites harm as

¹³⁰ See para 3.3.2.2.

¹³¹ Botha and Govindjee 2017 *PELJ* 22. See our discussion on the nature of expression under s16(2)(c) of the *Constitution* in para 3.1.

¹³² Botha and Govindjee 2017 *PELJ* 22, 24-25.

¹³³ Section 12 of the *Equality Act* reads as follows: "Subject to the proviso in section 12, 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."

¹³⁴ Botha and Govindjee 2017 *PELJ* 24.

¹³⁵ See para 3.1.

envisaged in terms of section 16(2)(c) of the *Constitution* can never constitute *bona fide* engagement in expression that enjoys constitutional protection and should not be treated as if constitutional compliance were a possibility.¹³⁶

We also have substantial textual problems with Botha and Govindjee's linking of the phrase "in accordance with section 16(1) of the *Constitution*" to "publication of any information, advertisement or notice" only. The proviso explicitly applies to both sections 10 and 12 and the latter covers not only the publication or display of any advertisement or notice but also the dissemination or broadcast of any information.

In line with our reasoning that the forms of expression listed in the proviso relate to the freedoms in terms of section 16(1) of the *Constitution*, we contend that in the context of the proviso "the publication of any information, advertisement or notice" gives effect to the "freedom to receive or impart information or ideas".¹³⁷ Furthermore, considering the broad definitions of the terms "inform" and "information" that we referred to,¹³⁸ we concluded that the exclusion of *bona fide* engagement in the "publication of any information, advertisement or notice" from the ambit of section 10(1) narrows it down significantly.

This interpretation also addresses Botha and Govindjee's concern that the media protection afforded in terms of the proviso is too narrow.¹³⁹ We insisted that not only the proviso's "fair and accurate reporting in the public interest" can be linked with the guarantee of media freedom in section 16(1)(a) of the *Constitution*, but other listed forms of expression too.¹⁴⁰ It can hardly be denied that publication of information, artistic creativity and academic and scientific enquiry occur in the media.

¹³⁶ Marais and Pretorius 2015 *PELJ* para 4.3.2.

¹³⁷ Marais and Pretorius 2015 *PELJ* para 3.2.4.

¹³⁸ The definitions and interpretations included that "to inform someone about or of something" means "to give them knowledge or information about it" or "to tell them about it", that the right to inform includes the right "to offend, shock or disturb" and that free expression is also generally understood to include the dissemination of incorrect information or of an understanding or view that is based on a misconception.

¹³⁹ Botha and Govindjee 2017 *PELJ* 24; Marais and Pretorius 2015 *PELJ* 925 (not 926 as indicated) and 912.

¹⁴⁰ Marais and Pretorius 2015 *PELJ* 925.

4 The authors' proposal

Botha and Govindjee, in summary, express concern that the communication of hurtful words on a prohibited ground against any person falls within the ambit of section 10 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 fide* engagement in fair and accurate reporting in the public interest. They claim that the proviso thus limits the broad effect of sections 10 and 12, but does not "temper the fact that these prohibitions limit the freedom of expression in terms more extensive than section 16(2) of the Constitution". They add that even if they are incorrect in their view that the latter part of the proviso ("the publication of any information, advertisement or notice in accordance with 16 of the Constitution") applies only to section 12 of the Act, the meaning is vague and causes uncertainty to the extent that the limitation to freedom of expression cannot be justified in terms of section 36 of the *Constitution*.¹⁴¹ They therefore suggest the following amendment to section 10:

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.¹⁴²

The phrase "against any person" is removed.¹⁴³ They also extend the application beyond the four prohibited grounds mentioned in section 16(2)(c) of the *Constitution*, to include all the prohibited grounds.¹⁴⁴ Instead of section 16(2)(c) of the *Constitution's* restriction to advocacy as the relevant means of communication, the terms "publish, propagate, or advocate" are used. The demonstration of a clear intention to promote hatred is required, as well as a likelihood that harm will follow. Incitement to harm is not required.

Botha and Govindjee contend that a restriction of 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. They do not relate their

¹⁴¹ Botha and Govindjee 2017 *PELJ* paras 4.6 and 5.

¹⁴² Botha and Govindjee 2017 *PELJ* 28.

¹⁴³ See the discussion of this aspect in para 3.3.

¹⁴⁴ See Marais 2015 *SAPL* 475-476, where the author recommends the extension of the listed grounds in s 16(2)(c) of the *Constitution* in the context of the criminalisation of extreme hate speech.

recommendation as such to any sources and do not conduct a reasoned justification analysis in terms of section 36 of the *Constitution*.¹⁴⁵ However, their proposal contains elements of both sections 319(1) and, in particular, 319(2) of the Canadian *Criminal Code*¹⁴⁶ and invites reference to the judgment in *R v Keegstra*. Section 319(1) prohibits incitement which is likely to lead to a breach of the peace, and section 309(2) prohibits the wilful promotion of hatred.¹⁴⁷ In both instances offenders are liable to imprisonment.¹⁴⁸

The Supreme Court of Canada in *R v Keegstra* found section 319(2) not to be overly broad or vague. The reasoning was that its definitional limits ensure that it will capture only expressive activity which is openly hostile to the objective of preventing pain to the target group and reducing racial, ethnic, and religious tension and, perhaps, violence. The majority stated that Canada's international obligations and Charter sections 15¹⁴⁹ and 27¹⁵⁰ emphasise the importance of this objective and concluded that the objective was of sufficient importance to warrant overriding a guaranteed right.¹⁵¹

The Court took into account that the word "wilfully" restricts the reach of the section by requiring proof of either an intent to promote hatred or knowledge

¹⁴⁵ Botha and Govindjee 2017 *PELJ* 28 fns 121-124 are concerned with the absence of a "truth" defence.

¹⁴⁶ *Criminal Code* RSC 1985 c C-46 (the Canadian *Criminal Code*).

¹⁴⁷ Section 319 of the Canadian *Criminal Code* reads as follows: "(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction. (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction."

¹⁴⁸ The main difference is that s 319 of the Canadian *Criminal Code* requires direct intent, while the recommended amendment requires a reasonable inference that the required intention is present. This difference does not refute our general argument. It is also difficult in any case to envisage that the promotion of hatred by means of publication, propagation, or advocacy of expression (sic) in public against an identifiable group of persons on one or more of the prohibited grounds which is likely to cause harm can be unintentional.

¹⁴⁹ Section 15(1) provides as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." *Canadian Charter of Rights and Freedoms: Constitution Act 1982 c 11* (the *Canadian Charter*) Schedule B.

¹⁵⁰ Section 27 of the *Canadian Charter* provides as follows: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

¹⁵¹ *R v Keegstra* 1990 3 SCR 697 para VII.C. (iv).

of the substantial certainty of such a consequence. The word "hatred" further reduces the scope of the prohibition. This word, in the context of the section, must be construed as encompassing only the most severe and deeply felt form of opprobrium. Further, the exclusion of private communications from the scope of the section, the need for the promotion of hatred to focus upon an identifiable group, and the presence of the section 319(3) defences,¹⁵² which clarify the scope of section 319(2), all support the view that the impugned section creates a narrowly confined offence.¹⁵³

It falls outside the scope of our original contribution as well as of this response to formulate a detailed comparative analysis of Botha and Govindjee's proposal and, in particular, section 319(2) of the Canadian *Criminal Code*. It suffices to point to the resemblance to the proposed recommendation and the outcome of the proportionality analysis performed by the Supreme Court of Canada. Clearly, considering the reasoning of the Supreme Court of Canada, not only the prohibition but the criminalisation of the expression contemplated by the recommended prohibition can arguably be substantiated, subject to the explicit inclusion of a direct intention requirement.

Our point is that this does not entail that section 10(1) is unconstitutional. Section 10(1) does not create a criminal offence to protect society against the harmful effects of the extreme forms of hate speech described in section 319 of the Canadian *Criminal Code* or the proposed amendment. (Section 10(2) makes provision for hate speech that constitutes a criminal offence to be referred for prosecution in terms of section 21(2) of the Act.)¹⁵⁴ Section 10(1) is rather primarily aimed at compliance with the constitutional obligation in terms of sections 9(3) and (4) of the *Constitution*, as well as international obligations, to protect and promote human dignity and equality.

¹⁵² Section 319(3) of the Canadian *Criminal Code* provides as follows: "No person shall be convicted of an offence under subsection (2):] (a) if he establishes that the statements communicated were true; (b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text; (c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or (d) if, in good faith, he intended to point out, for the purpose of removal, matters producing or tending to produce feelings of hatred toward an identifiable group in Canada."

¹⁵³ *R v Keegstra* 1990 3 SCR 697 para VII.D (iii) a.

¹⁵⁴ See Marais 2015 SAPL 467-472. See *South African Human Rights Commission v Khumalo* 2019 1 SA 289 (GJ) para 113, where it was stated that the threshold for exercising the discretionary power envisaged in s 21(2)(n) of the *Equality Act* is that a crime "might have been committed".

We reiterate that it should be understood in the light of the commitment in the preamble of the *Equality Act* to "facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom".¹⁵⁵ In a comparative analysis it would be more appropriate to draw from and compare section 10(1) of the *Equality Act* to provisions in various human rights codes of Canadian provinces than to criminal offences in terms of section 319 of the Canadian *Criminal Code*¹⁵⁶ (hence our references to the *Whatcott* case).¹⁵⁷

We agree that the ambit of section 10(1) is broader than that of section 16(2)(c) of the *Constitution*. It is also broader than the scope of the proposed amendment. In our view, this is lawfully so. Our concern is that the aspects that Botha and Govindjee propose should be removed from the scope of section 10¹⁵⁸ were purposely designed to address the very forms of "less serious" hate speech that they call attention to when they make the following statement:¹⁵⁹

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. For criminal liability it is emphasised that the speaker must intend to incite harm against the target group...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.

Section 9(4) of the *Constitution* requires legislation to prevent and prohibit unfair discrimination. In our view the relevant question is whether section 10(1) of the Act gives effect to this obligation without unduly infringing upon

¹⁵⁵ See para 2.

¹⁵⁶ See *British Columbia Human Rights Code* RSBC 1996 c 210. Also see s 3 of the *Alberta Human Rights Act* RSA 2000 c A-25.5 and s 14(1) of the *Saskatchewan Human Rights Code* 1979 Ch S-24.1. To quote but one example, s 7 of the *British Columbia Human Rights Code* reads as follows: "(1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that (a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or (b) is likely to expose a person or a group or class of persons to hatred or contempt because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or that group or class of persons. (2) Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise permitted by this Code."

¹⁵⁷ See para 3.3.1.

¹⁵⁸ Botha and Govindjee 2017 *PELJ* para 3.3.

¹⁵⁹ Botha and Govindjee 2017 *PELJ* 15.

the right to freedom of expression. By restricting section 10 to cover hate speech that warrants criminalisation, Botha and Govindjee negate this obligation.

5 Conclusion

We reconsidered and reaffirmed the premise of our understanding and analysis of section 10(1) of the *Equality Act*, that the expression that it prohibits unjustifiably affects the human dignity of those targeted related to their group identity, thus constituting a form of unfair discrimination. We reiterated that the most appropriate constitutional framework within which section 10(1) of the *Equality Act* should be interpreted and assessed is sections 9 and 10 of the *Constitution*. Subject to our recommended purposive reading or amendment of the first phrase of section 10(1), which we regard as poorly formulated,¹⁶⁰ we confirmed the viability and constitutional soundness of the purposive interpretation of section 10(1) that we have offered. We criticised Botha and Govindjees' proposal on the basis that it negates the Act's primary aim, which is to give effect to the obligation in section 9(4) to prevent and prohibit unfair discrimination. Overall, having carefully considered the arguments raised by Botha and Govindjee, we maintain our view that section 10, subject to the said amendment or interpretation, duly limits the right to freedom of expression in giving effect to the obligation in section 9(4) of the *Constitution* to prevent and prohibit unfair discrimination.

Bibliography

Literature

Albertyn and Fredman 2015 *Acta Juridica*

Albertyn C and Fredman S "Equality beyond Dignity: Multi-dimensional equality and Justice Langa's Judgments" 2015 *Acta Juridica* 430-455

Benesch "Defining and Diminishing Hate Speech"

Benesch S "Defining and Diminishing Hate Speech" in Taylor P (ed) *State of the World's Minorities and Indigenous Peoples 2014: Events of 2013* (Minority Rights Group International London 2014) 18-25

¹⁶⁰ See para 3.2.

Botha and Govindjee 2017 *PELJ*

Botha JC and Govindjee A "Hate Speech Provisions and Provisos: A Response to Marais and Pretorius and Proposals for Reform" 2017 *PELJ* 1-32

Collins *Thesaurus of the English Language*

Collins Dictionaries *Thesaurus of the English Language* 12th ed (HarperCollins Glasgow 2014)

Cooper 2002 *ILJ*

Cooper C "Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination" 2002 *ILJ* 1-44

Crenshaw 1991 *Stan L Rev*

Crenshaw K "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" 1991 *Stan L Rev* 1241-1299

Crenshaw 1989 *U Chi Legal F*

Crenshaw K "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" 1989 *U Chi Legal F* 139-167

Fowler and Butterfield *Fowler's Dictionary of Modern English Usage*

Fowler HW and Butterfield J (ed) *Fowler's Dictionary of Modern English Usage* 4th ed (Oxford University Press Oxford 2015)

Fredman *Discrimination Law*

Fredman S *Discrimination Law* (Oxford University Press Oxford 2002)

Fredman 2014 *Int J Law Context*

Fredman S "Reversing Roles: Bringing Men into the Frame" 2014 *Int J Law Context* 442-459

Garcia *et al* 2006 *Group Process Intergr Relat*

Garcia AL *et al* "Thanks for the Compliment? Emotional Reactions to Group-Level versus Individual-Level Compliments and Insults" 2006 *Group Process Intergr Relat* 307-324

Gelber 2017 *Constitutional Commentary*

Gelber K "Hate Speech: Definitions and Empirical Evidence" 2017 *Constitutional Commentary* 619-662

Ghanea 2010 *IJMGR*

Ghanea N "Minorities and Hatred: Protections and Implications" 2010 *IJMGR* 423-446

Goldberg 2011 *Yale LJ*

Goldberg S "Discrimination by Comparison" 2011 *Yale LJ* 728-812

Himonga, Taylor and Pope 2013 *PELJ*

Himonga C, Taylor M and Pope A "Reflections on Judicial Views of Ubuntu" 2013 *PELJ* 371-429

Marais 2015 *SAPL*

Marais ME "Does the Constitution Call for the Criminalisation of Hate Speech?" 2015 *SAPL* 456-483

Marais and Pretorius 2015 *PELJ*

Marais ME and Pretorius JL "A Contextual Analysis of the Hate Speech Provisions of the *Equality Act*" 2015 *PELJ* 901-942

Pretorius, Klinck and Ngwena *Employment Equity Law*

Pretorius JL, Klinck ME and Ngwena CG *Employment Equity Law* (Butterworths Durban 2001)

Schwikkard and Van der Merwe *Principles of Evidence*

Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 3rd ed (Juta Cape Town 2009)

Sturm 2001 *Colum L Rev*

Sturm S "Second Generation Employment Discrimination: A Structural Approach" 2001 *Colum L Rev* 458-568

Thornberry "Forms of Hate Speech and ICERD"

Thornberry P "Forms of Hate Speech and ICERD" Paper presented at the *Expert Seminar on the Links between Arts 19 and 20 of the ICCPR* facilitated by the UNHRC (2-3 October 2008 Geneva) 1-24

Case law

Canada

Alberta (Aboriginal Affairs and Northern Development) v Cunningham 2011 2 SCR 670

Canada (Human Rights Commission) v Taylor 1990 3 SCR 892

Miron v Trudel 1995 2 SCR 418

R v Kapp 2008 SCC 41

R v Keegstra 1990 3 SCR 697

Saskatchewan (Human Rights Commission) v Whatcott 2013 1 SCR 467

International Criminal Tribunal for Rwanda

Nahimana v The Prosecutor ICTR-99-52-A

South Africa

Afri-forum v Malema 2011 6 SA 240 (EqC)

Brink v Kitshoff 1996 6 BCLR 752 (CC)

City Council of Pretoria v Walker 1998 3 BCLR 257 (CC)

Harksen v Lane 1997 11 BCLR 1489 (CC)

Islamic Unity Convention v Independent Broadcasting Authority 2002 5 BCLR 433 (CC)

Liberty Group Limited v M 2017 10 BLLR 991 (LAC)

Minister of Finance v Van Heerden 2004 6 SA 121 (CC)

Municipality of the City of Port Elizabeth v Rudman 1998 4 BCLR 451 (SE)

National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 12 BCLR 1517 (CC)

President of RSA v Hugo 1997 6 BCLR 708 (CC)

S v Makwanyane 1995 6 BCLR 665 (CC)

Shabalala v Attorney-General, Transvaal 1995 12 BCLR 1593 (CC)

South African Human Rights Commission v Khumalo 2019 1 SA 289 (GJ)

South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services 2018 2 SA 149 (GJ)

The Citizen 1978 (Pty) Ltd v McBride 2011 8 BCLR 816 (CC)

Van der Walt v Metcash Trading Ltd 2002 4 SA 317 (CC)

Legislation

Canada

Alberta Human Rights Act RSA 2000 c A-25.5

British Columbia Human Rights Code RSBC 1996 c 210

Canadian Charter of Rights and Freedoms: Constitution Act 1982 c 11

Criminal Code RSC 1985 c C-46

Saskatchewan Human Rights Code 1979 Ch S-24.1

South Africa

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

International instruments

CERD *General Recommendation No 15 on Article 4 of the Convention* (1993)

CERD *General Recommendation No 35: Combating Racist Hate Speech* (2013)

International Convention on the Elimination of All Forms of Racial Discrimination (1965)

International Covenant on Civil and Political Rights (1966)

UNHRC *General Comment No 18: Non-discrimination* (1989)

Internet sources

Cambridge Dictionary 2016 <http://dictionary.cambridge.org/dictionary/english>

Cambridge Dictionary 2016 *Cambridge English Dictionary* <http://dictionary.cambridge.org/dictionary/english> accessed 20 October 2018

SAHRC 2019 <https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20%20Other%20March%202019.pdf>
 South African Human Rights Commission 2019 *Findings of the SAHRC Regarding Certain Statements made by Mr Malema and Another Member of the Economic Freedom Fighters*
<https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20%20Other%20March%202019.pdf> accessed 2 May 2019

Merriam-Webster Dictionary 2011 <https://www.merriam-webster.com/dictionary/modifier>

Merriam-Webster Dictionary 2011 *Modifier* <https://www.merriam-webster.com/dictionary/modifier> accessed 20 October 2018

Thornberry Date unknown https://www.ohchr.org/Documents/Issues/Racism/IWG/Session15/CERD_GR35.docx

Thornberry P Date unknown *CERD General Recommendation (GR) 35 on Combating Racist Hate Speech: A Short Comment*
https://www.ohchr.org/Documents/Issues/Racism/IWG/Session15/CERD_GR35.docx accessed 20 September 2018

List of Abbreviations

CERD	Committee on the Elimination of Racial Discrimination
Colum L Rev	Columbia Law Review
Group Process Intergr Relat	Group Processes and Intergroup Relations
ICCPR	International Convention on Civil and Political Rights
ICERD	International Covenant on the Elimination of all Forms of Racial Discrimination
IJMGR	International Journal on Minority and Group Rights
ILJ	Industrial Law Journal
Int J Law Context	International Journal of Law in Context
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SAPL	Southern African Public Law
Stan L Rev	Stanford Law Review
U Chi Legal F	University of Chicago Legal Forum
UNHRC	United Nations Human Rights Committee
Yale LJ	Yale Law Journal