

Hate Speech in the Equality Act Following the Constitutional Court Judgment in *Qwelane v SAHRC*

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Abstract

In its judgment in *Qwelane v South African Human Rights Commission* 2022 2 BCLR 129 (CC), the Constitutional Court declared section 10(1) of the *Equality Act* unconstitutional and invalid to the narrow extent that section 10(1)(a) refers to the intention to be "hurtful". The prohibition on hate speech passed constitutional muster in all other respects. In addition, the court purposively interpreted aspects of the application of section 10(1) so as to limit its impact on the right to freedom of expression. This contribution firstly welcomes the court's reliance on the transformative goals of the *Constitution* and the *Equality Act* as its primary framework in interpreting section 10(1). The severance of section 10(1)(a) and the conjunctive reading of sections 10(1)(b) and (c) ("be harmful or to incite harm" and "promote or propagate hatred" respectively) also seem sensible considering the court's broad definition of "harm". The article further emphasises that the terms of section 10 call for a proper consideration of context. In this regard, the court rightly considered the extreme homophobia in the society addressed by Mr Qwelane, the particular vulnerability of the target group and the real threat of devastating imminent consequences to conclude that Qwelane's words were clearly intended to "incite harm" and "propagate hatred". Yet the court's view that the speaker's subjective intention is irrelevant in performing the requisite objective reasonableness assessment from the ambit of section 10(1) is arguably less judicious, as is the categorical exclusion of expression in private. Ultimately, the objective case-by-case reasonableness inquiry under section 10(1) should be whether a reasonable person in the speaker's position should have refrained from making the impugned harmful discriminatory utterances. This inquiry involves a determination of wrongfulness based on the constitutional duty not to discriminate unfairly. It invokes all the aspects of the *Equality Act's* definition of discrimination as well as all the elements of fairness analysis set out in section 14 of the *Equality Act*. Factors to be considered include the value of the particular expression, and the extent of the (potential) harm to individual members of a protected group and to society as a whole, as well as justification considerations such as the respondent's legitimate and *bona fide* exercise of the right to freedom of expression and to privacy.

Keywords

Conjunctive reading; *Equality Act*; expression in private; freedom of expression; harm; hate speech; incitement; referral for prosecution; section 10; unfair discrimination.

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1 Introduction

On 20 July 2008, one Mr Qwelane, a popular columnist of the Media24 newspaper *Sunday Sun*, published an article titled "Call me names - but gay is not okay".¹ In the article, he compared gay and lesbian people to animals and suggested that they were responsible for the rapid degeneration of values in society. Among other things, he wrote:

I do pray that some day a bunch of politicians with their heads affixed firmly to their necks will muster the balls to rewrite the Constitution of this country, to excise those sections which give licence to men 'marrying' other men, and ditto women. Otherwise, at this rate, how soon before some idiot demands to 'marry' an animal, and argues that this Constitution 'allows' it?

The article triggered a public outcry. Having received hundreds of objections, the South African Human Rights Commission (SAHRC) referred a hate speech complaint to the Equality Court. In response Qwelane levelled a constitutional challenge against section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (hereafter the *Equality Act*), which defines and prohibits hate speech as follows:

Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to -

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

In a hearing of the Gauteng high court sitting as the Equality Court,² Qwelane argued that section 10(1) of the *Equality Act* was too broad in that it unjustifiably limited the right to free expression. He also argued that the provision was impermissibly vague. The court dismissed both the overbreadth and vagueness challenges, concluding that Mr Qwelane's words amounted to hate speech.

A dissatisfied Qwelane approached the Supreme Court of Appeal,³ which, to the surprise of many, upheld his appeal and overturned the Equality

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¹ Qwelane *Sunday Sun* 14. A cartoon on the same page depicted a man and a goat kneeling in front of a priest to be "married". The cartoon was captioned "When human rights meet animal rights" and "I now pronounce you man and goat". Qwelane was neither the author nor creator of the cartoon. *Qwelane v South African Human Rights Commission* 2022 2 BCLR 129 (CC) para 4.

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

³ *Qwelane v South African Human Rights Commission* 2020 2 SA 124 (SCA).

Court's judgment. The court held that section 10 was indeed vague and an unconstitutional infringement of the right to freedom of expression. Additionally, the court stated that section 10(1) should be read disjunctively and be interpreted subjectively. Therefore, the Supreme Court of Appeal dismissed the SAHRC's hate speech complaint and referred the matter to the Constitutional Court for confirmation of the order of constitutional invalidity.

In its judgment in *Qwelane v South African Human Rights Commission* (hereafter *Qwelane*),⁴ the Constitutional Court declared section 10(1) of the *Equality Act* inconsistent with sections 1(c) and 16 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*), and thus unconstitutional and invalid, to the extent that section 10(1)(a) refers to the intention to be "hurtful". Apart from this, the hate speech prohibition passed constitutional muster. Moreover, the court purposively interpreted aspects of the application of section 10(1) with the aim of limiting its impact on the right to freedom of expression.⁵

In terms of orders the Constitutional Court made a declaratory order pertaining to the constitutional invalidity of section 10(1), which it suspended for 24 months.⁶ It further declared Qwelane's offending statements "to be harmful, and to incite harm and propagate hatred; and amount to hate speech"⁷ as envisaged in section 10(1) of the *Equality Act* and made a partial cost order against Qwelane.⁸ The Equality Court's order for a personal remedy against Qwelane in the form of an unconditional written apology as well as for referral of the matter to the national police commissioner for further investigation had to fall away, as Qwelane sadly passed away in December 2020.

2 Highlights (and lowlights) of the Constitutional Court judgment

Appraising section 10(1) of the *Equality Act*, the Constitutional Court used the constitutional right to substantive equality⁹ as its principal frame of

⁴ *Qwelane v South African Human Rights Commission* 2022 2 BCLR 129 (CC) (hereafter *Qwelane*).

⁵ *Qwelane* para 162.

⁶ *Qwelane* order para 1.

⁷ *Qwelane* order para 2. Also see para 194. The court stated that, in accordance with the key objectives of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (hereafter the *Equality Act*), rather than punishing the wrongdoer a declaratory order would provide remedies for victims of hate speech and vindicate their constitutional rights.

⁸ *Qwelane* order para 4.

⁹ As provided for in s 9 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*).

reference, and not section 16(2)(c) of the *Constitution*.¹⁰ The court described section 10(1) as "the primary mechanism to prevent or prohibit unfair discrimination caused by expression",¹¹ not least hate speech, which "marginalises and delegitimises individuals based on their membership of a group".¹² As such, section 10(1) is first and foremost a measure designed to protect and advance categories of persons disadvantaged by unfair discrimination as envisaged in section 9(2) of the *Constitution*, and to prevent or prohibit unfair discrimination as provided for in section 9(4).¹³

As I will argue in the sections below, to view the hate speech prohibition in section 10(1) as giving effect to the constitutional obligations of advancing equality and prohibiting and preventing unfair discrimination implies a built-in requirement of unfairness in its terms. It follows, then, that unfairness should be considered in the interpretation of the prohibition, its justification in terms of section 36 of the *Constitution*, as well as its application on a case-by-case basis. Section 14 of the *Equality Act* sets out the relevant considerations in this regard, including the aims and competing rights of the person who discriminates. In the hate speech context, this would mean that the speaker's¹⁴ right to freedom of expression should be included in the analysis.

I support the court's broad definition of the term "harmful"¹⁵ and the consequent severance of section 10(1)(a) and the conjunctive reading of sections 10(1)(b) and (c).¹⁶ Similarly, the court was correct in maintaining

¹⁰ Which excludes "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" from protection under the right to freedom of expression. In *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 2 BCLR 118 (CC), the Constitutional Court stated that s 16(2) of the *Constitution* did not constitute a limitation of free expression and could not have any role to play in determining what constitutes a reasonable and justifiable limitation of free expression. Also see Marais and Pretorius 2015 *PELJ* 901-902.

¹¹ *Qwelane* para 78.

¹² *Qwelane* paras 1 and 78.

¹³ *Qwelane* para 49. Also see para 51 referring to s 7(2) of the *Constitution*, para 52 referring to s 39(2) of the *Constitution*, para 57 referring to s 9 of the *Constitution*, and para 61 referring to s 9(3) and (4) of the *Constitution*.

The provision in s 15 of the *Equality Act* that in cases of hate speech and harassment s 14 of the Act does not apply, by no means denies the remedial character of these forms of discrimination (see *Qwelane* para 95). On the contrary, it reflects that the relevant provisions capture the fairness considerations set out by the Constitutional Court and incorporated in the *Equality Act* in the terms of s 14 of the Act, so that requiring the additional application of s 14 would be superfluous and uncalled for. See Marais 2021 *PELJ* 4-5.

¹⁴ This contribution uses the term "speaker" to refer to the publisher, propagator, advocate and communicator of expression contemplated in s 10(1) of the *Equality Act*.

¹⁵ *Qwelane* para 154.

¹⁶ *Qwelane* paras 155-157.

that section 10(1) required an objective reasonableness standard.¹⁷ In the final instance, it is also agreed that the High Court duly referred Qwelane's utterances for criminal investigation.¹⁸

Yet the Constitutional Court judgment also contains some interpretations and applications that, in my view, do not duly recognise the unfair discrimination framework, particularly as set out in section 14 of the *Equality Act*. Relevant issues in this regard are the speaker's intention as an element of the reasonableness assessment,¹⁹ the categorical exclusion of expression in private,²⁰ the restrictive interpretation of the term "communicate",²¹ and certain aspects of the application of section 10(1) to the facts of the *Qwelane* matter.²²

In discussing these issues in the paragraphs that follow, I point out key differences between South African and Canadian hate speech jurisprudence, in particular Canadian cases alluded to in the *Qwelane* judgment.²³ I also distinguish between hate speech in the context of section 16(2)(c) of the *Constitution* and section 10(1) of the *Equality Act* respectively. In essence, section 16(2)(c) of the *Constitution* defines extreme hate expression that poses an unjustifiable risk to the constitutional democracy and, therefore, is excluded from protection under the right to freedom of expression. The scope of section 10(1) of the *Equality Act*, being a human rights provision aimed at the promotion of equality and the prevention of unfair discrimination, is decidedly broader. Although section 10(1) does cover and address expression under section 16(2)(c) of the *Constitution*, it predominantly regulates expression that would typically be protected under section 16(1) of the *Constitution*. As I will explain, expression of the kind envisaged in section 16(2)(c) of the *Constitution* should indeed be criminalised, and applicable cases under section 10(1) should be referred for further criminal investigation or prosecution, as provided for in sections 21(2)(n) read together with section 10(2) of the *Equality Act*.

¹⁷ *Qwelane* para 101.

¹⁸ *Qwelane* para 192. It falls outside the scope of this contribution to explore applicable offences. However, the finalisation of a well-specified, narrowly defined hate speech offence is essential and long overdue.

¹⁹ *Qwelane* paras 96-101.

²⁰ *Qwelane* para 118.

²¹ *Qwelane* paras 115-120.

²² *Qwelane* paras 185-193.

²³ *Qwelane* paras 80, 97, 100, 103, 104, 109 and 129.

3 Viewing hate speech within the framework of unfair discrimination

The applicant in *Qwelane* claimed that section 10(1) set a lower threshold for assessing hate speech than section 16(2)(c) of the *Constitution*, and that this unduly infringed the right to freedom of expression that the *Constitution* guarantees in section 16(1). In addressing this claim, the Constitutional Court prudently applied the equality right as its primary norm and frame of reference.²⁴ Doing so, the court opted against predominantly relying on section 16(2)(c) of the *Constitution*, which, together with sections 16(2)(a) and 16(2)(b), narrowly defines expression that falls outside the ambit of freedom of expression provided for in section 16(1).²⁵

The court pointed out that, in seeking to give effect to section 9(2) of the *Constitution*, the *Equality Act* "aspires to heal the wounds of the past", eradicate inequality, transform society and help the nation embrace its diversity.²⁶ The hate speech prohibition found in section 10, the court explained, was one of the ways in which the legislature sought to give effect to this commitment, realising that unfair discrimination could be perpetuated both through conduct and expression.²⁷ The court endorsed the Holocaust Foundation's earlier description of section 10 as "the primary mechanism to prevent or prohibit unfair discrimination caused by expression",²⁸ as well as the Mandela Foundation's contention that section 10(1) is "a statutory delict that innovatively offers, unlike any crime or other delict in our law, specific remedies concerning the right to equality".²⁹

Another striking illustration that fairness considerations are intrinsic to section 10(1), and that the terms of the hate speech prohibition should be interpreted accordingly is the court's reasoning regarding the inclusion in section 10(1) of analogous grounds in the definition of prohibited grounds for discrimination in section 1 of the *Equality Act*.³⁰ To the court, the

²⁴ *Qwelane* para 78.

²⁵ For an example of the application of s 16(2)(c) of the *Constitution* as the primary norm, see *Masuku v South African Human Rights Commission obo South African Jewish Board of Deputies* 2019 2 SA 194 (SCA) paras 13-14. Also see De Vos 2018 <https://constitutionallyspeaking.co.za/supreme-court-of-appeal-gets-the-law-very-wrong-in-a-hate-speech-judgment/>.

²⁶ *Qwelane* para 49.

²⁷ *Qwelane* para 49.

²⁸ *Qwelane* para 78.

²⁹ *Qwelane* para 95.

³⁰ *Qwelane* paras 129-134. The definition reads as follows: "(b) any other ground where discrimination based on that other ground (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)".

analogous prohibited grounds in the *Equality Act* have a function similar to the unfairness requirement espoused in *Harksen v Lane*.³¹

Moreover, in justifying the inclusion of sexual orientation as a prohibited ground in the *Equality Act* the court mentioned the "grotesque nature of unfair discrimination against the LGBT+ community",³² noting that South Africa's *Constitution* was the first in the world to promote equality for members of this community by prohibiting unfair discrimination on the ground of sexual orientation.³³

Commenting on the harm inflicted by hate speech, the court emphasised both the individual injury to human dignity and the broader effect of "undo[ing] the very fabric of our society as envisioned by our Constitution".³⁴ Quoting from *Minister of Finance v van Heerden*³⁵ the court reiterated how marginalising and delegitimising individuals based on their group membership might undermine their dignity, self-worth and social standing, even to the extent of igniting exclusion, hostility, discrimination and violence against them.³⁶ Against this backdrop, the prohibition of hate speech

seeks to protect against the dissemination of hatred that causes or incites harm, in that it undermines the dignity and humanity of the target group and undermines the constitutional project of substantive equality and acceptance in our society.³⁷

Overall, therefore, section 10(1) was designed to protect and promote substantive equality and dignity³⁸ within the framework of the prohibition of unfair discrimination in the *Constitution*, which "provides a bulwark against invasions of the right to human dignity".³⁹ Departing from this premise, the court next considered whether the hate speech prohibition in section 10(1) unduly limited the right to freedom of expression.

4 Considering the right to freedom of expression

Alert to the fact that the unfair discrimination framework in no manner negates the right to freedom of expression, the court described its central

³¹ *Harksen v Lane* 1997 11 BCLR 1489 (CC). *Qwelane* paras 130 and 131.

³² *Qwelane* para 169.

³³ *Qwelane* paras 169-170; para 61 fn. 67. The Constitutional Court did not engage with the issue of extended grounds in s 10(1) of the *Equality Act*, but left it to Parliament to deal comprehensively with this aspect. See *Qwelane* para 128. For a discussion of how target group status affects decisions of the European Court of Human Rights, see Bleich and Al-Mateen 2021 *Mich St Int'l L Rev* 205-206.

³⁴ *Qwelane* paras 1 and 62-66.

³⁵ *Minister of Finance v van Heerden* 2004 11 BCLR 1125 (CC).

³⁶ *Qwelane* para 1.

³⁷ *Qwelane* paras 86 and 130. For a discussion of the immediate disabling effects of a direct racist attack as well as "the indirect longer-lived silencing effects", see West "Words that Silence?" 236-237.

³⁸ *Qwelane* paras 58 and 62.

³⁹ *Qwelane* para 62.

task in *Qwelane* as "a delicate balancing exercise between the fundamental rights to freedom of expression, dignity and equality".⁴⁰ So, although having departed from the universal truth "that '[t]o be hated, despised, and alone is the ultimate fear of all human beings'" and that expression can "denigrate, humiliate and destroy", the court also underlined the power of expression to "build, promote and nurture".⁴¹ Therefore, the right to freedom of expression ought to be seen as "an indispensable facilitator of a vigorous and necessary exchange of ideas and accountability"⁴² and "an 'essential and constitutive feature' of our open democratic society" that has "transformative potential".⁴³ Such an interpretation does justice to section 39(2) of the Constitution, which expects courts to "promote the spirit, purport and objects of the Bill of Rights" when interpreting legislation.⁴⁴ It indicates that the guarantee of freedom of expression is not only valued in relation to competing rights. It is also appreciated as a relevant consideration in determining the intrinsic (un)fairness of discriminatory expression envisaged in section 10(1), separating hateful and harmful discriminatory statements that are considered fair because they end up promoting autonomy, dignity and equality, from statements that serve no other purpose but to jeopardise transformation and violate dignity and autonomy. This aspect will resurface throughout this contribution.

5 Contextualised interpretation

The court's attention to context in *Qwelane* is apparent. For instance, it remarked on the unique nature of South African jurisprudence, which contains "strong pronouncements on the transformative nature of the *Constitution* and its aim of eradicating the remnants of our colonial and apartheid past".⁴⁵

In addition the court firmly entrenched section 10(1) in the context of human rights legislation and the framework of unfair discrimination. It emphasised the broad scope of section 10(1), covering expression that might require referral for possible criminal charges as well as expression that calls for the

⁴⁰ *Qwelane* para 2. Such an exercise does not apply in the case of restrictions of expression within the ambit of s 16(2)(c), that categorically do not enjoy constitutional protection.

⁴¹ *Qwelane* para 1.

⁴² *Qwelane* para 68.

⁴³ *Qwelane* para 71.

⁴⁴ Yet it will be argued later that the court's reliance on s 39 of the *Constitution* in support of its categorical exclusion of the communication of hate speech in private did not take proper account of the scope of unfair discrimination, particularly pertaining to discrimination against an individual member of a targeted group.

⁴⁵ *Qwelane* para 168. See Mengistu "Shielding Marginalized Groups from Verbal Assaults" 358, who contends that, because of structural imbalances in society, government *should* regulate the freedom of speech in certain circumstances.

facilitation of reconciliation and healing.⁴⁶ Yet, although this saw the court relate particular terms of section 10(1) to comparable terms in other contexts, it never overruled its primary understanding of the hate speech prohibition as a human rights provision designed to give effect to the constitutional obligation to prohibit and prevent unfair discrimination.⁴⁷

In analysing international law perspectives, in turn, the court was at pains to distinguish between hate speech regulated through civil remedies as opposed to criminalisation. On this basis it justified its interpretation that section 10(1) required an objective test and not the subjective intention that would have been an essential requirement in a criminal offence.⁴⁸

Considering the court's frequent references to Canadian hate speech jurisprudence in various contexts, I start this section with a brief comparative analysis of Canadian and South African hate speech laws. The focus then shifts to the distinct contexts of section 16(2)(c) of the *Constitution* and section 10(1) of the *Equality Act*.

Section 2(b) of the *Canadian Charter of Rights and Freedoms* (hereafter the *Canadian Charter*)⁴⁹ guarantees the right to freedom of expression, but does not expressly exclude extreme antidemocratic hate speech similar to section 16(2)(a), (b) and (c) of the South African *Constitution*. Therefore, in Canada, unlike in South Africa, legislation that prohibits or criminalises hate speech of such a nature needs to be justified in terms of limiting the right to freedom of expression.

Section 15 of the *Canadian Charter* protects the right to equal treatment before and under the law, and equal protection and benefit of the law without discrimination. It does not impose a duty on the state to enact legislation to prohibit and prevent unfair discrimination as that imposed by section 9(4) of the *Constitution*.

Moving on to the *Canadian Criminal Code*,⁵⁰ section 319(1) criminalises the incitement of hatred by communicating statements in any public place against any identifiable group where such incitement is likely to lead to a breach of the peace. Section 319(2), in turn, criminalises the wilful

⁴⁶ The Constitutional Court stated that the inclusion of the concepts "advocacy" and "propagate" in s 10 of the *Equality Act* suggested that the legislature had intended to give effect respectively to Art 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), which is specifically concerned with racist "propaganda", and to the "advocacy" of hatred in terms of s 16(2)(c) of the *Constitution*. See *Qwelane* para 114.

⁴⁷ See for instance *Qwelane* para 135. For a direct comparison between s 10(1) and the hate speech protection in other jurisdictions, see Geldenhuys and Kelly-Louw 2020 *PELJ* 4-5.

⁴⁸ *Qwelane* paras 90-91.

⁴⁹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982.

⁵⁰ *Canadian Criminal Code* RSC, 1985, c C-46.

promotion of hatred against any identifiable group. These provisions were first added to the *Criminal Code* in 1970 at the recommendation of the so-called Cohen Committee, a special parliamentary committee on hate propaganda that was created following events in the 1960s when white supremacist and neo-Nazi groups were active in Canada. The stipulations were intended to prohibit the advocacy of genocide and the incitement of hatred where these activities would likely disturb the (public) peace, restricting their scope to the public domain.⁵¹ In both instances offenders are liable to imprisonment for up to two years.

In *R v Keegstra*⁵² the Supreme Court of Canada stated that "to send out a strong message of condemnation ... will occasionally require use of the criminal law",⁵³ which required "a narrowly confined offence which suffers from neither overbreadth nor vagueness".⁵⁴ In the court's view section 319(2) of the *Criminal Code* (criminalising the wilful promotion of hatred against any identifiable group) met this requirement: "Hatred" was interpreted as only the most severe and deeply felt form of opprobrium; the provision excluded private conversation; the hatred had to be aimed at an identifiable group, and section 319(3) contained specific defences.⁵⁵ However, in contrasting the criminal and human rights contexts the court cautioned against overreliance on a criminal provision to "rid our [Canadian] society of hate propaganda and its associated harms".⁵⁶ Instead, it advocated the use of human rights legislation to achieve the challenging goals of equality and multicultural tolerance,⁵⁷ particularly also given the stigma associated with a criminal conviction as the most severe tool available to the state, and the limited efficacy of criminal legislation in advancing equality and tolerance.

The heinousness of the type of hate speech envisaged in section 319(1) and (2) of the *Canadian Criminal Code* is comparable to that contemplated under section 16(2)(c) of the South African *Constitution*. Like the Canadian provisions, section 16(2)(c) is also historically informed and concerned with extreme forms of hate propaganda. This is clear from the explicit definition "incitement to cause harm", its listing and categorical exclusion from constitutional protection, along with propaganda for war and incitement of imminent violence,⁵⁸ its very specific selection of grounds, and its striking

⁵¹ Walker 2018 https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E_

⁵² *R v Keegstra* 1990 3 SCR.

⁵³ *R v Keegstra* 1990 3 SCR paras 783-785.

⁵⁴ *R v Keegstra* 1990 3 SCR para 700.

⁵⁵ *R v Keegstra* 1990 3 SCR para 700.

⁵⁶ *R v Keegstra* 1990 3 SCR para 784.

⁵⁷ *R v Keegstra* 1990 3 SCR para 784.

⁵⁸ Sections 16(2)(a) and (b) of the *Constitution* respectively.

resemblance to article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR),⁵⁹ which reads:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Yet when criminalising categories of incitement, this should be subject to relatively high thresholds of application. While not in the context of the four listed grounds in section 16(2)(c), this was alluded to in *Economic Freedom Fighters v Minister of Justice and Correctional Services*, when the court said:⁶⁰

There can be no doubt that we need the criminalisation of certain categories of incitement. What also matters is that the nature, extent or effect of what others are being incited to do must be serious to save legislation from invalidation.

Indeed, the United Nations "Rabat Plan of Action"⁶¹ suggests such a high threshold for the application of article 20 of the ICCPR. It outlines a six-part test that considers (a) the social and political context, (b) the status of the speaker, (c) intent to incite the audience against a target group, (d) the content and form of speech, (e) the extent of its dissemination, and (f) the likelihood, including the imminence, of harm. In relation to intent, the plan states:

Article 20 of the ICCPR anticipates intent. Negligence and recklessness are not sufficient for an act to be an offence under article 20 of the ICCPR, as this article provides for "advocacy" and "incitement" rather than the mere distribution or circulation of material. In this regard, it requires the activation of a triangular relationship between the object and subject of the speech act as well as the audience.⁶²

A similar threshold test designed by article 19⁶³ requires an unambiguous call, in a provocative tone, for violence, hostility or discrimination. The speaker's level of authority or influence over the audience is also relevant, as is the degree to which the audience is already conditioned to take their lead from the inciter. A reasonable probability is required that the speech

⁵⁹ *International Covenant on Civil and Political Rights* (1966).

⁶⁰ *Economic Freedom Fighters v Minister of Justice and Correctional Services* 2021 2 BCLR 118 (CC) para 50.

⁶¹ OHCHR 2020 <https://www.ohchr.org/en/documents/tools-and-resources/one-pager-incitement-hatred-rabat-threshold-test>.

⁶² OHCHR 2020 <https://www.ohchr.org/en/documents/tools-and-resources/one-pager-incitement-hatred-rabat-threshold-test>.

⁶³ ARTICLE 19 is an international organisation that promotes freedom of expression. For more information on its status and work, see ARTICLE 19 date unknown <https://www.article19.org/>.

would incite real action, recognising that such causation should be rather direct.⁶⁴

In the South African context the *Equality Act* provides for the referral of this kind of hate speech for criminal investigation or prosecution.⁶⁵ An indication of subjective intent should naturally be present, and the discretion to refer should be exercised judiciously.

When comparing Canadian and South African hate speech prohibitions in human rights law, one should keep in mind that Canadian discrimination regulation, subject to a reasonableness standard, is generally informed by policy decisions.⁶⁶ According to Walker, all Canadian human rights laws except one contain a provision that prohibits in some or other form the public display, broadcast or publication of messages indicating discrimination or an intention to discriminate, or that incite others to discriminate, based on certain prohibited grounds. In only four Canadian provinces do human rights legislation contain some form of explicit prohibition against the promotion of hatred or contempt.⁶⁷ While the various laws generally achieve similar purposes they differ as to the types of messages and discriminatory practices at stake, whether hatred and contempt are addressed, and whether they require the intent of the author of the message to be considered.⁶⁸

South African law, on the other hand, gives effect to a constitutional obligation to enact legislation that prohibits unfair discrimination against anyone by the state and any individual. In this regard, Kok and colleagues⁶⁹ describe the *Equality Act* as "an omnibus law concretising Section 9(4) of the South African Constitution". Binding the state and all persons, the *Equality Act* prohibits hate speech, harassment and unfair discrimination "in all spheres of South African life, and (at least in theory) reaches into the most intimate and private spaces as well".⁷⁰

Nevertheless, the Supreme Court of Canada's contextual understanding of the terms "hatred" and "contempt" in human rights legislation is rather

⁶⁴ Bukovska, Callamard and Parrmer 2010 <https://www.ohchr.org/sites/default/files/Documents/Issues/Expression/ICCPR/Vienna/CRP7Callamard.pdf>.

⁶⁵ See fn 25. It is clearly problematic that the anticipated criminalisation of such threatening hate speech has not been finalised. See Marais 2019 *JJS* 106.

⁶⁶ Walker 2018 https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E.

⁶⁷ Walker 2018 https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E.

⁶⁸ Walker 2018 https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E.

⁶⁹ Kok *et al* 2020 *Erasmus Law Review* 49.

⁷⁰ Kok *et al* 2020 *Erasmus Law Review* 49.

enlightening. In *Saskatchewan Human Rights Commission v Whatcott* (hereafter *Whatcott*)⁷¹ the court held that "the term 'hatred' in the context of human rights legislation includes a component of looking down on or denying the worth of another".⁷² Hatred, the court said, went "far beyond mere disdain or dislike against the target group", but sought to "abuse, denigrate or delegitimise them, to render them lawless, dangerous, unworthy or unacceptable in the eyes of the audience".⁷³ In a similar vein, the court in *Canada Human Rights Commission v Taylor*⁷⁴ defined hatred as "strong and deep-felt emotions of detestation, calumny and vilification".⁷⁵

As mentioned earlier, the Constitutional Court in *Qwelane* did recognise the importance of considering context in interpreting the terms of section 10(1) of the *Equality Act*. Nonetheless, as I will explain below,⁷⁶ this approach may have let the court down in its findings on expression in private and its disregard for the speaker's intention.

6 A conjunctive reading

A conjunctive reading of section 10(1)(a), (b) and (c) would require the establishment of hurt as well as harm, rendering the separate listing of intentions to be "hurtful" and "harmful" senseless. In a disjunctive reading, on the other hand, sections 10(1)(a) and (b) would not be read together with the section 10(1)(c) intention "to promote or propagate hatred". Ruling in favour of a conjunctive reading, the Constitutional Court correctly pointed out that section 10(1)(c) was an essential aspect of the hate speech prohibition.⁷⁷ Moreover, in the court's view, the terms "hurtful" and "harmful" appeared to have a substantively similar meaning.⁷⁸

In an earlier contribution I suggested an inclusive disjunctive ("and/or") reading to logically combine either section 10(1)(a) "to be hurtful" or section 10(1)(b) "to be harmful" with section 10(1)(c) "to promote or propagate hatred".⁷⁹ However, the court's broad definition of "harmful" and the consequent severing of section 10(1)(a) enable a clearly preferred, straightforward conjunctive reading of sections 10(1)(b) and (c).⁸⁰

⁷¹ *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11.

⁷² *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11 para 43.

⁷³ *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11 para 152.

⁷⁴ *Canada Human Rights Commission v Taylor* *Canada Human Rights Commission v Taylor* 1990 3 SCR 892.

⁷⁵ *Canada Human Rights Commission v Taylor* *Canada Human Rights Commission v Taylor* 1990 3 SCR 892 para 895.

⁷⁶ See paras 7 and 8 of this contribution.

⁷⁷ *Qwelane* paras 103 and 104.

⁷⁸ *Qwelane* para 152.

⁷⁹ Marais 2021 *PELJ* 24-27.

⁸⁰ *Qwelane* paras 144 and 154.

Following this approach, section 10(1) provides for a wide range of hate speech scenarios, namely expression intended to be harmful and to promote hatred, expression intended to incite harm and promote hatred, and expression intended to incite harm and propagate hatred. This is also in line with the broad scope of remedies that the *Equality Act* provides.

7 The reasonableness assessment in terms of section 10(1)

According to the court in *Qwelane*, the requirement that a clear intention be reasonably construed sets an objective reasonable person standard. This standard does not consider mere inferences or assumptions made by the targeted group, but relies on the facts and circumstances surrounding the expression.⁸¹ The court was of the view that a standard based on the subjective perception of the target group would unduly encroach on freedom of expression, while a standard based on the speaker's subjective intention would set too high a threshold for civil liability.⁸²

While I support the application of an objective standard as the court described, the finding that the speaker's subjective intention is irrelevant in the objective analysis requires reassessment. The court referred to *Whatcott*, where "the Supreme Court of Canada underscored the *effects* of hate speech, not the intent".⁸³ It also quoted the following statement from *SAHRC v Khumalo*:⁸⁴

The objective test in section 10(1) implies in the terminology used to articulate it, that an intention shall be deemed if a reasonable reader would so construe the words. Because the objective test of the reasonable reader is to be applied, it is the effect of the text, not the intention of the author, that is assessed.

However, in my view, the ultimate "deemed" intention is, in fact, the speaker's inferred or "construed" subjective intention, determined by means of objective assessment. Had the speaker's intention been irrelevant, a straightforward prohibition of expression in line with section 14(1)(b) of the *Saskatchewan Human Rights Code*⁸⁵ in *Whatcott* would have sufficed.⁸⁶

Furthermore, the proviso in section 12 of the *Equality Act* excludes "bona fide engagement" in certain forms of expression from the scope of section

⁸¹ *Qwelane* paras 96, 100 and 150.

⁸² *Qwelane* para 99.

⁸³ *Qwelane* para 100.

⁸⁴ *SAHRC v Khumalo* 2019 1 SA 289 (GJ); *Qwelane* para 97.

⁸⁵ *Saskatchewan Human Rights Code* SS 1979, c S-24.1(b) "that exposes or tends to expose to hatred any person or class of persons on the basis of a prohibited ground".

⁸⁶ See the discussion of intention as a requirement for a specific form of unfair discrimination in Marais and Pretorius 2019 *PELJ* 5-7.

10(1).⁸⁷ By implication, therefore, section 10(1) targets only *mala fide* (malicious) engagement in these forms of expression.⁸⁸ For instance, the *bona fide* display in a gallery of a painting depicting the cruel mistreatment of slaves would not constitute hate speech, regardless of its impact on visitors, even if it causes psychological harm in some viewers or evokes racist feelings in others. On the other hand, leaving the same painting on the doorstep of a black person who has recently moved into an unwelcoming, exclusively white neighbourhood or, conversely, on the doorstep of a white person new to a hostile black neighbourhood could reasonably be construed as demonstrating a clear intention to harm and promote hatred as envisaged in section 10(1). Had the painting been sold and then been delivered at such a person's home in error, I would firstly argue that the incorrect delivery did not occur on the ground of race, and therefore did not comply with the definition of discrimination as differentiation based on a prohibited ground. Secondly, using the terms of section 10(1), the delivery could not reasonably be construed to demonstrate a clear intention to achieve any of the required harms or to promote or propagate hatred, even if looking at the painting caused the recipients to experience hurt or harm relating to their group identity or provoked them to promote or propagate hatred.

In the first instance, this raises the question whether intention can, in principle, be an element of a prohibition of unfair discrimination. I see no reason why a specific prohibition of unfair discrimination cannot require intention. The importance of the purpose (and, by implication, the intent) of the discrimination in question is one of the pertinent fairness indicators mentioned in section 14 of the *Equality Act*. In *City Council of Pretoria v Walker*,⁸⁹ the Constitutional Court confirmed that the inquiry into fairness allows one to consider the purpose of the relevant conduct or action.⁹⁰ And in *Harksen v Lane* the apex court held that the purpose of a discriminatory provision that "is manifestly not directed, in the first instance, at impairing the complainants ..., but is aimed at achieving a worthy and important societal goal" may be a significant consideration in determining fairness.⁹¹ Conversely, in certain circumstances a clear intention to harm on the basis of group identity could decisively tilt the scales in the opposite direction.

⁸⁷ See the discussion of the proviso in Marais and Pretorius 2019 *PELJ* 24-26.

⁸⁸ The attributes of malice in the law of defamation were described in *The Citizen 1978 (Pty) Ltd v McBride* 2011 8 BCLR 816 (CC) paras 104-105, where the court quoted with approval that "malice indicates an abuse of right, which makes unlawful that which would otherwise have been lawful".

⁸⁹ *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC).

⁹⁰ *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 44.

⁹¹ *Harksen v Lane* 1997 11 BCLR 1489 (CC) para 50.

The matter of a subjective intention requirement in hate speech regulations was also explored in *Canada Human Rights Commission v Taylor*. Here, the Canadian Supreme Court stated:

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.⁹²

Secondly, the application of an objective standard to determine a reasonably construed intention requires examination.

The Constitutional Court in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*⁹³ referred to the finding of the Equality Court that "the tenor and explicitness" of the impugned threats would have indicated to a reasonable reader that the intention of the speaker, Mr Masuku, was to cause harm.⁹⁴ The court stated that

(w)hile the Equality Court proceeded to ignore Mr Masuku's subjective intention on this score, the same result would have arisen if the Equality Court had taken into account contextual factors, including his possible subjective intention. There were no contextual factors that indicated that Mr Masuku was unaware of the meaning or likely effect of his words so that a reasonable person might conclude that he had no clear intention for his words to have their effect.⁹⁵

Unawareness of the meaning or likely effect of the words undeniably relates to the subjective intention of the speaker. Moreover, the speaker is expected to refrain from, and the relevant intention extends to, uttering words which might likely have the relevant effect.

The development of *dolus eventualis* in South African law offers a useful conceptual parallel from a criminal law perspective. According to Hoctor, it has been established that the test for intention in criminal law matters is

⁹² *Canada Human Rights Commission v Taylor* *Canada Human Rights Commission v Taylor* 1990 3 SCR 892 paras 931-932. The dictum refers to the now repealed s 13(1) of the *Canadian Human Rights Act* RSC, 1985, c H-6 which applied to all expression "likely to expose a person or persons to hatred or contempt".

⁹³ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 7 BCLR 850 (CC).

⁹⁴ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 7 BCLR 850 (CC) para 158.

⁹⁵ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 7 BCLR 850 (CC) para 159.

invariably subjective. However, at some point, South African criminal law judgments accepted an objective test for intention in the form of *dolus eventualis*. In terms of this assessment, the crucial question was not, as required by a subjective test, whether the accused actually foresaw the harm, but whether the accused ought to have foreseen it.⁹⁶ This caused an overlap between intention and negligence, which was rather unacceptable in the criminal law context. In the context of section 10(1), however, this result fits the aim of giving effect to the constitutional duty to respect others, while also protecting the right to freedom of expression.

In *Qwelane* the court draws a comparison with the objective reasonableness standard of wrongfulness in the law of delict.⁹⁷ Apart from the establishment of wrongfulness relating to a legal duty, a claim founded in delict also requires the establishment of fault in the form of either *dolus* or *culpa*, as well as harm, and a causal connection between such harm and the conduct that gave rise to the complaint.⁹⁸ In essence, however, the wrongfulness inquiry in the law of delict, as in human rights law, "is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability".⁹⁹

In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng*,¹⁰⁰ the Constitutional Court held that the presence of fault-related elements such as motive to cause harm was not necessarily a prerequisite for, but may be relevant to, establishing wrongfulness.¹⁰¹ In *Carmichele v Minister of Safety and Security* (hereafter *Carmichele*),¹⁰² in turn, the court ruled that a duty-based reasonableness standard considered

whether the defendant ought reasonably and practically to have prevented harm to the plaintiff: in other words, is it reasonable to expect of the defendant to have taken positive measures to prevent the harm.¹⁰³

And in *Minister of Safety and Security v Van Duivenboden*,¹⁰⁴ where a delictual claim had been brought following an omission relating to a legal duty, the Supreme Court of Appeal stated that the inquiry to determine the existence of a relevant "legal duty to avoid negligently causing harm"

⁹⁶ Hoor 2008 *Fundamina* 15.

⁹⁷ *Qwelane* para 97.

⁹⁸ *MTO Forestry (Pty) Ltd v Swart* 2017 5 SA 76 (SCA) para 12.

⁹⁹ *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) para 53.

¹⁰⁰ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2014 12 BCLR 1397 (CC).

¹⁰¹ *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2014 12 BCLR 1397 (CC) para 40.

¹⁰² *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC).

¹⁰³ *Carmichele v Minister of Safety and Security* 2001 10 BCLR 995 (CC) para 42. See the discussion of wrongfulness in *Minister: Western Cape Department of Social Development v BE obo JE* 2021 1 SA 75 (SCA).

¹⁰⁴ *Minister of Safety and Security v Van Duivenboden* 2002 3 All SA 741 (SCA).

included whether a reasonable person in the defendant's position would have foreseen the harm.¹⁰⁵

In the light of the above *dicta*, it is my view that the intention requirement in section 10(1) reflects the constitutional commitment to the healing of society and, flowing from it, the explicit constitutional duty on all members of society to prevent and refrain from acts of unfair discrimination against others.¹⁰⁶ It also duly reflects the related commitment to freedom, in particular freedom of expression. Considering the purpose or intention behind even harmful expression diminishes the chilling effect of the prohibition of *bona fide* expression that unintentionally hurts or harms or promotes or incites hatred. The objective assessment of construed intention therefore achieves a sound balance.

Indeed, section 10(1) is unquestionably concerned with harm resulting from the malicious communication of disrespect, scorn or hatred on the basis of group characteristics. What is excluded, though, is harm that a speaker cannot be reasonably expected to have foreseen and avoided.

In conclusion, I would suggest that an objective focus to establish the presence of the required intention to bring about the relevant harm requires consideration not only of the context of the event, the nature and level of vulnerability of the audience, and the nature of the ensuing harm. To determine whether a reasonable person in the speaker's position should have refrained from making the impugned utterances, one also needs to consider the speaker's circumstances, the reasonableness of the speaker's alleged aims, and the reasonable foreseeability of harm.

In ultimately determining whether Qwelane's article "could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred", the court correctly thought it important to examine, among other matters, who the speaker was, the context and impact of the utterances, and the likelihood of inflicting harm and propagating hatred.¹⁰⁷ Yet I believe the legitimacy and reasonableness of the speaker's objectively construed subjective intention in the light of his right to freedom of expression should also have been included as a relevant consideration.

¹⁰⁵ *Minister of Safety and Security v Van Duivenboden* 2002 3 All SA 741 (SCA) para 12.

¹⁰⁶ See Marais 2021 *PELJ* 14-16.

¹⁰⁷ *Qwelane* para 176.

8 Hate speech in private

The court firstly held that section 10(1) "plainly requires that the speaker transmit words to a third party".¹⁰⁸ This understanding the court based on its interpretation of the terms "promote" and "propagate" in section 10(1)(c) to mean a type of exchange that does "not fit the notion of communicating in private".¹⁰⁹ This led the court to conclude that, even though the term "communicate" could apply to both public and private conversation, it should in this instance be restrictively interpreted to exclude conversation in a private setting.

Secondly, the court relied on the requirements of section 39(2) of the *Constitution* as further justification for its restrictive interpretation of "communicate".¹¹⁰ In the court's view, to extend hate speech prohibitions, even those that incur civil liability, to private communications "would be incongruent with the very purpose of regulating hate speech",¹¹¹ which is

to remedy the effects of such speech and the harm that it causes, whether to a target group or to the broader societal well-being. The speech must expose the target group to hatred and be likely to perpetuate negative stereotyping and unfair discrimination.¹¹²

And this, the court said, was an effect that few private conversations would probably have,¹¹³ which strikes one as a rather vague and unsubstantiated assumption to serve as a convincing basis for categorically excluding expression in private from the ambit of section 10(1).

Had the prohibition of the publication, propagation, advocacy or communication of hate speech in section 10(1) indeed only applied to expression in public, the unqualified inclusion of "communication" would be superfluous, confusing and arguably also unconstitutional. Instead, I believe the legislature's inclusion of this broad term in addition to "publish" indicates a clear intention to include conversation in private. Furthermore, the term "promote" in a provision of the *Equality Act* can surely extend to unfair discrimination against an individual in private, especially considering that the primary aim of the *Equality Act* is to "promote" equality in all spheres. In fact, the court itself later states that "hate speech *may be directed at an*

¹⁰⁸ Qwelane para 116.

¹⁰⁹ Qwelane para 116.

¹¹⁰ Qwelane para 116.

¹¹¹ Qwelane para 118.

¹¹² Qwelane para 118.

¹¹³ Qwelane para 118.

individual but impact not just that individual, but the group to which that individual belongs".¹¹⁴

Moreover, summarily excluding expression in private from the ambit of section 10(1) seems out of keeping with the duty imposed by section 39(2) of the *Constitution* to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. It also appears unresponsive to the uniquely "strong pronouncements on the transformative nature of the Constitution and its aims" in South African jurisprudence.¹¹⁵

In addition, as mentioned earlier in the discussion of contextualised interpretation,¹¹⁶ restrictions of "hate speech" in distinguishable contexts cannot and should not be employed as a basis to categorically declare hate speech provisions in the context of the *Equality Act* unconstitutional. Yet the court related its statement that "true hate speech presupposes a public dissemination of some sort" to Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),¹¹⁷ which requires that member states "declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, or incitement". The court had earlier also stated that the inclusion of the concepts "propagate" and "advocate" was meant to give effect to Article 4 of the ICERD and section 16(2)(c) of the *Constitution* respectively. These provisions are respectively concerned with racist "propaganda" and the "advocacy" of hatred that warrant criminalisation. However, the scope of section 10 clearly exceeds these narrow prohibitions of extreme expression. Therefore, I would argue that the fact that section 10(1) covers the kind of hate speech envisaged in section 16(2)(c) of the *Constitution*, and, for that matter, in the ICERD, does not provide sufficient grounds for a categorical exclusion of expression in private from its extended ambit. On the contrary, the primary concern of the *Equality Act* and of section 10(1) in particular is to prohibit and protect against unfair discrimination and promote substantive equality on a much broader basis.¹¹⁸ This is why section 10(2) explicitly provides for the referral of this kind of expression to an authority equipped to deal with it.

The key constitutional issue at stake when addressing the application of section 10(1) to expression in private is how such an application would affect the right to privacy, which is explicitly protected in section 14 of the

¹¹⁴ *Qwelane* para 122, own emphasis. The reference to s 16(2) of the *Constitution* in para 122 of the judgment clearly does not apply and was probably meant to be a reference to s 9(2).

¹¹⁵ See *Qwelane* para 168.

¹¹⁶ Under para 5 of this contribution.

¹¹⁷ *International Convention on the Elimination of All Forms of Racial Discrimination* (1965). See *Qwelane* fn 158.

¹¹⁸ *Qwelane* paras 1, 78 and 95.

Constitution, in conjunction with the right to freedom of expression. In addressing this aspect I will first make a few necessary comments on the impact of discrimination against an individual as a member of a protected group before I circle back to the right to privacy.

By definition, hate speech based on group characteristics does not target the individual in purely individual terms, but as a representative of the negative features ascribed to the group. The inflicted harm is also not experienced as individual suffering, but is akin to injury to a limb of the body.¹¹⁹ Therefore, hate speech remains a group-directed attack, even when communicated to, or levelled at, a member of a targeted group in private.

As stated in *City Council of Pretoria v Walker*, however, "(n)o members of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration'".¹²⁰ To tolerate this would directly go against the obligations in sections 9(2) and (3) of the *Constitution*. Therefore, should an employer tell a black employee in private that she is useless because she is as dumb as all blacks are, and even more so because she is female, this would not be less defiant of the constitutional aim of substantive equality because it occurs in the absence of a third person. Ultimately, section 4(2) of the *Equality Act* requires those who apply it to recognise and take into account:

- (a) The existence of systemic discrimination and inequalities, particularly in respect of race, gender and disability in all spheres of life as a result of past and present unfair discrimination, brought about by colonialism, the apartheid system and patriarchy; and
- (b) the need to take measures at all levels to eliminate such discrimination and inequalities.

Systemic unfair discrimination particularly thrives in private communication with vulnerable members of protected groups, and the Equality Court should be available to publicly mediate or expose and condemn conduct of this nature, as provided for in section 19(2) of the *Equality Act*.¹²¹ As the Constitutional Court stated in relation to the declaratory order condemning Qwelane's publication, the key objectives of the *Equality Act* are "to provide remedies for victims of hate speech and to vindicate their constitutional rights".¹²² To categorically rule out this opportunity where hate speech in private is concerned flies in the face of the explicit commitment to the eradication of systemic discrimination in the preamble to the *Equality Act*. It

¹¹⁹ See the discussion in this regard in Marais and Pretorius 2019 *PELJ* 19.

¹²⁰ *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) para 81.

¹²¹ Section 19(2) of the *Equality Act* provides that "(a)ll proceedings before the court must be conducted in open court, except in so far as the court may direct otherwise in the interests of the administration of justice".

¹²² *Qwelane* para 194.

also negates the phrase "against any person" as contained in sections 9(3) and (4) of the *Constitution* and captured in section 10(1) of the *Equality Act*.

In her discussion of racist hate speech and silencing, West defines racist hate speech as the expression of

derogatory feelings about, or attitudes towards, people on the basis of their race in order (1) directly to inflict psychological injury on them (in the case of face to face encounters) or (2) to incite in third parties hostility towards or hatred for them, or both.¹²³

West also points out that there are particular instances where counter-speech is not an option for the targeted, such as when they are confronted in a secluded or isolated location. She contends that "being subjected to racist verbal abuse reduces the self-esteem of targets, especially when individuals are targeted repeatedly",¹²⁴ and that, ultimately, these targets might withdraw from participation in public discourse, thus depriving society of their input.¹²⁵

Nevertheless, the private nature of a conversation might be relevant in establishing wrongfulness and compliance with the requirements of section 10(1). For instance, in considering the reasonableness of prohibiting the sharing of hateful ideas by a husband and wife or by friends in private, the rights to privacy and freedom of expression will most likely trump an equality claim. An intention to harm and to promote or incite hatred as required by section 10(1) would probably not be established. On the other hand, the above example of the attack on the employee, or hateful homophobic utterances made at a private neighbourhood meeting attended by one or more homosexual neighbours would indeed disadvantage protected groups and promote hatred, and would certainly be society's business. Expression of this nature should not be saved by its private setting.

With regard to the right to privacy, the court in *Qwelane* referred to *Bernstein v Bester*,¹²⁶ where the Constitutional Court ruled that free communication in one's private and personal sphere was part and parcel of the "inner sanctum of the person" and of "the truly personal realm".¹²⁷ However, the court also emphasised:

This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.¹²⁸

¹²³ West "Words that Silence?" 232.

¹²⁴ West "Words that Silence?" 235.

¹²⁵ West "Words that Silence?" 235-237.

¹²⁶ *Bernstein v Bester* 1996 4 BCLR 449 (CC).

¹²⁷ *Qwelane* para 117.

¹²⁸ *Bernstein v Bester* 1996 4 BCLR 449 (CC) paras 67 and 77.

Therefore, *Bernstein v Bester* for one did not in principle support a categorical exclusion of communication in private from the ambit of hate speech regulation.

Also of relevance in this regard is Kok and colleagues' remark that "South Africa's history and a transformative Constitution demand that the state positively interfere in inhabitants' lives based on constitutional values."¹²⁹ In their view,

South Africa offers a distinct case study as its Constitution implicitly mandates the legislature to proactively and positively put measures in place to facilitate the influencing of the hearts and minds of South African inhabitants – values, morals and mindsets.¹³⁰

A paper submitted by the Canadian Bar Association (CBA) in October 2020 presented a similar argument.¹³¹ The CBA recommended removing the exception of private communication from the criminal offence defined in section 319(2) of the *Criminal Code*. They contended that the exemption of private conversation was overbroad and that "the right to privacy should not trump the right to freedom from incitement to hatred".¹³² Like all competing rights, these too should be balanced, taking account of the circumstances of the case.¹³³

As for the right to freedom of expression, the fact that the offence *crimen injuria* extends to discriminatory expression in private¹³⁴ refutes an argument that a prohibition of hate speech in private would necessarily disproportionately infringe the right to freedom of expression.

In summary, therefore, rather than categorically excluding the private sphere of human life from the application of section 10(1) of the *Equality Act*, it is my view that section 39 of the *Constitution* requires the private setting to be included in the ambit of the hate speech prohibition, subject to the relevant wrongfulness assessment.

9 Assessment of the Constitutional Court's application analyses

In its application of section 10(1) of the *Equality Act* to the facts of *Qwelane*, the Constitutional Court had to determine (a) whether Qwelane's article

¹²⁹ Kok *et al* 2020 *Erasmus Law Review* 50-51.

¹³⁰ Kok *et al* 2020 *Erasmus Law Review* 50-51.

¹³¹ CBA 2020 <https://www.cba.org/CMSPages/GetFile.aspx?guid=a92e68a9-5338-471f-9694-9f0ef887ca05>.

¹³² CBA 2020 <https://www.cba.org/CMSPages/GetFile.aspx?guid=a92e68a9-5338-471f-9694-9f0ef887ca05> 14.

¹³³ CBA 2020 <https://www.cba.org/CMSPages/GetFile.aspx?guid=a92e68a9-5338-471f-9694-9f0ef887ca05> 14, 18-19.

¹³⁴ Obviously subject to compliance with all the essential requirements for the offence. Snyman *Criminal Law* 469; Milton *South African Criminal Law and Procedure* 492.

constituted hate speech, (b) whether he should be held liable in terms of section 10(1), and (c) the appropriate form of relief.

9.1 Hate speech and liability¹³⁵

As contended in this contribution, the elements of discrimination as defined in section 1 of the *Equality Act* as well as the standard to determine fairness set out in section 14 of the *Equality Act* are all intrinsically part of section 10(1) and should be considered on a case-by-case basis. Section 10(1) also covers various forms and levels of hate speech along with corresponding remedies. It provides for referral for mediation as well as for referral to appropriate institutions for possible criminal prosecution. This meant that, having established that the remarks indeed amounted to hate speech, the court also had to make a finding on the nature of the hate speech, the extent to which it violated the equality right, and appropriate relief.

The court's analysis is well in line with the definition of hate speech in section 1 of the *Equality Act* and with the first part of the fairness assessment in section 14.¹³⁶ However, as I explain below, the second part of the assessment¹³⁷ does not seem to have received much attention. This would have required the court to consider the purpose of the discrimination, the extent to which the discrimination achieved such purpose, the availability of less restrictive and less disadvantageous means to achieve the purpose, and steps taken by the respondent to address the disadvantage that resulted from the discrimination.

The court found that harm had indeed been established, thus satisfying the requirement to establish disadvantage relating to group identity as an element of discrimination as per section 1 of the *Equality Act*. It held that Qwelane's article undeniably had a negative impact on members of the LGBT+ community,¹³⁸ having "fuelled the already burning anti-LGBT+ fire ... and galvanised further discrimination, hostility and violence against the LGBT+ community".¹³⁹ It considered that the article was written by a respected journalist, was widely read and severely denigrated the dignity of the target group, thereby jeopardising the creation of an inclusive society based on the values of equality, dignity and acceptance.¹⁴⁰ The court reiterated that hate speech prohibitions as civil remedies do not require a proven causal link between the hateful expression and actual harm.¹⁴¹ In

¹³⁵ *Qwelane* paras 164-183.

¹³⁶ Subsections 14(1)(a) and 14(3)(a) to (e) of the *Equality Act*.

¹³⁷ Subsections 14(3)(f) to (i) of the *Equality Act*.

¹³⁸ *Qwelane* para 165.

¹³⁹ *Qwelane* para 188.

¹⁴⁰ *Qwelane* paras 181, 190.

¹⁴¹ *Qwelane* para 187.

my view, this observation to a great extent explains the enactment of a separate hate speech provision.

The liability analysis that followed strikingly reflects the first part of the fairness analysis in section 14 of the *Equality Act*. The consideration of various contexts aligns with section 14(2)(a). The court had regard to the reality of historical, systemic and present homophobia in South African society.¹⁴² It also considered the fact that Qwelane had aligned his views with remarks made by former Zimbabwean President Robert Mugabe, who said that gays and lesbians were animals and subhuman, could be compared to pigs and dogs, and should be handed over to the police if seen in the street.¹⁴³ The court also took into account the current extraordinarily high frequency of violent attacks against members of the LGBT+ community.¹⁴⁴ Another important consideration was the identity and status of the speaker, a seasoned and trusted journalist, "a veteran of the liberation struggle", whose views were taken seriously by the township audience at a time when it was "hard to be gay and stay in a township".¹⁴⁵ In accordance with section 14(2)(b) and 14(3)(a), (b) and (c) of the *Equality Act*, the court also went on to consider the impairment of the target group's dignity and the (likely) impact of the discrimination on the LGBT+ community, being a particularly vulnerable group in society who suffers from patterns of disadvantage.¹⁴⁶ In accordance with section 14(3)(d), the court specifically considered the nature and extent of the discrimination and its systemic nature. Having examined all these objective facts, the court concluded that there was a clear intent on Qwelane's part to instigate hatred towards the LGBT+ community among his audience.¹⁴⁷

Disappointingly, though, the court left unanswered the questions captured in sections 14(3)(f) to (i) of the *Equality Act*. Did Qwelane have a legitimate aim with the offensive remarks? Could this aim have been achieved by less disadvantageous means? Did he take reasonable steps to address the disadvantage and accommodate diversity? In an attempt to pick up where the Constitutional Court left off, these questions may be thought through as follows: Qwelane's right to freedom of expression allowed him to publish his views on same-sex marriages in the press. However, the impugned article included remarks that attacked and degraded homosexual people instead of communicating a sincerely held view. As stated by the Supreme Court of

¹⁴² *Qwelane* para 168.

¹⁴³ *Qwelane* paras 178 and fn 205.

¹⁴⁴ *Qwelane* para 178.

¹⁴⁵ *Qwelane* para 177.

¹⁴⁶ *Qwelane* para 179.

¹⁴⁷ *Qwelane* para 177.

Appeal, Qwelane "gave vent to his bigotry".¹⁴⁸ Refraining from this attack, as he was bound to do in terms of his constitutional duty to respect others, would not have restricted his right to state an opinion on the matter. Had he shared his opinion through *bona fide* engagement in the press, the section 12 proviso would have applied to his publication. Even though it might have offended and hurt members of the LGBT+ community, it would not have constituted hate speech in terms of section 10(1). Yet the flagrant comparison to animal behaviour did not constitute *bona fide* engagement in a protected form of expression. It disproportionately harmed both the target group and society as a whole, and promoted hatred. Briefly put, his attack was unlawful.

While in *Qwelane* the answers to these questions might be apparent, future cases may not be as clear-cut. In those cases, this reasoning will ensure that section 10(1) is not categorically applied without also considering the speaker's right to freedom of expression.

9.2 *Appropriate relief*

In considering appropriate relief the Constitutional Court examined, among other things, the precedent of *Vejdeland v Sweden*,¹⁴⁹ which was heard by the European Court of Human Rights.¹⁵⁰ The matter concerned a group of four individuals who had distributed some 100 leaflets arguing against homosexuality at an upper secondary school by leaving the leaflets in or on the learners' lockers. The school principal eventually intervened and made them leave the premises. Of relevance before the European Court was a stipulation of the *Swedish Penal Code*, which provided:

A person who, in a disseminated statement or communication, threatens or expresses contempt for a national, ethnic or other such group of persons with allusion to race, colour, national or ethnic origin, religious beliefs or sexual orientation, should be convicted of agitation against a national or ethnic group.¹⁵¹

The offence carried a penalty of up to two years' imprisonment. The European Court judges "reluctantly"¹⁵² agreed that a conviction under this provision for the distribution of the homophobic leaflets did not violate the four individuals' right to freedom of expression¹⁵³ entrenched in Article 10(1)

¹⁴⁸ *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services* 2018 2 SA 149 (GJ) para 76.

¹⁴⁹ *Vejdeland v Sweden* App No 1813/07 (ECtHR, 9 February 2012).

¹⁵⁰ See Bleich and Al-Mateen 2021 *Mich St Int'l L Rev* 205-206.

¹⁵¹ Chapter 16, art 8 of the *Swedish Penal Code (Brottsbalken SFS 1962:700)*.

¹⁵² *Vejdeland v Sweden* App No 1813/07 (ECtHR, 9 February 2012) 14 para 1; 15 para 6.

¹⁵³ *Vejdeland v Sweden* App No 1813/07 (ECtHR, 9 February 2012) 15 para 6.

of the *European Convention*¹⁵⁴ and could arguably be justified under Article 10(2).¹⁵⁵ The court took into account that the leaflets had been left in the lockers of young people who were at an impressionable and sensitive age and who had no option of declining to receive the material.¹⁵⁶ It also considered that the very real problem of homophobic and transphobic bullying and discrimination in education settings might warrant a restriction of freedom of expression under Article 10(2) of the *European Convention*.¹⁵⁷

In *Qwelane* the Equality Court's referral of the matter for criminal investigation clearly indicates that it perceived Qwelane's offensive utterances as similarly threatening and *prima facie* subjectively intended.¹⁵⁸ The Constitutional Court specifically held that the utterances incited harm and propagated hatred.¹⁵⁹ The court did not use the more general term "promote". Earlier, it had observed that the use of the term "propagate" (as well as "advocate") in section 10(1) "suggests that the intention is to give effect to article 4 of the ICERD and section 16(2)(c) of the Constitution respectively".¹⁶⁰ This observation evidently extends to comparably serious hate speech on the ground of sexual orientation. As in *Vejdeland*, the Constitutional Court in *Qwelane* related its finding that the utterances constituted such extreme hate speech to the current homophobia in the society to whom the article was addressed, the extreme vulnerability of the targeted group, and the real and imminent threat of devastating consequences.¹⁶¹

It seems that, had Qwelane not passed away, the Constitutional Court would have upheld the Equality Court's order that he should apologise as well as the referral for criminal investigation. The court might have even added other civil sanctions provided for in section 21 of the *Equality Act*.

I strongly believe that a finding of incitement of harm or propagation of hatred under section 10(1) should be restricted to threatening hate speech that warrants criminalisation as in *Qwelane*. The broader application of hate speech intended to harm and promote hatred under section 10(1) should be related to the recognition that

¹⁵⁴ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (1950).

¹⁵⁵ *Vejdeland v Sweden* App No 1813/07 (ECtHR, 9 February 2012) 17 para 7. The relevant parts of art 10 of the *European Convention* read as follows: "2. The exercise of these freedoms, ... may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, ... for the protection of the reputation or rights of others ...".

¹⁵⁶ *Vejdeland v Sweden* App No 1813/07 (ECtHR, 9 February 2012) 16 para 6.

¹⁵⁷ *Vejdeland v Sweden* App No 1813/07 (ECtHR, 9 February 2012) 17 para 7.

¹⁵⁸ *Qwelane* paras 165-169.

¹⁵⁹ *Qwelane* order para 2(d).

¹⁶⁰ *Qwelane* para 114.

¹⁶¹ *Qwelane* para 188.

our society's systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.¹⁶²

Section 10(1) represents our commitment to progressively redress these conditions so that our society can heal.¹⁶³ Therefore, hate speech under section 10(1), being a human rights provision, should to the greatest extent possible be addressed by means of mediation as provided for in section 21(4)(b). Receptive respondents should be invited to explain their intentions so that they can be guided towards introspection, insight and empathy. Equality Court judgments should also recognise these aspects and give guidance to society as a whole. If not, we could have simply relied on the criminal law to address hate speech in our society.

10 Conclusion

The Constitutional Court in *Qwelane* cannot be faulted for its choice to use the transformative goals of the *Constitution* and the *Equality Act* – instead of section 16(2)(c) of the *Constitution* – as its primary framework in applying the hate speech prohibition in section 10(1). The court's findings on the constitutional invalidity and severance of section 10(1)(a), the broad definition of harm in the context of section 10(1)(b) and the conjunctive reading of sections 10(1)(b) and (c) are all supported.

Nevertheless, section 10(1) incorporates all the aspects of section 14 of the *Equality Act*. Therefore, a perfectly diligent and thorough determination of hate speech using the reasonableness assessment required in section 10(1) should include objective consideration of the speaker's subjective purpose and perspectives in making the impugned utterances. Moreover, as shown in this contribution, private conversations can also constitute hate speech, which exposes the court's categorical exclusion of private expression from the ambit of section 10(1) to criticism.

Finally, section 10(1) covers both extreme forms of hate speech liable to criminal prosecution, and hate speech that calls for mediation and the facilitation of healing. Therefore, the terms of section 10 call for contextualised interpretation and application. In this regard, the Constitutional Court duly based its finding that Qwelane's utterances demonstrated a clear intention to incite harm and propagate hatred on relevant contextual circumstances. These included the extreme homophobia in the society he had addressed, the particular vulnerability of the targeted group, and the real and imminent threat of devastating consequences.

¹⁶² Preamble to LSSA *Legal Services Sector Charter*.

¹⁶³ Preambles to the *Equality Act* and the *Constitution*.

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List of Abbreviations

CBA	Canadian Bar Association
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
JJS	Journal for Juridical Science
LGBT+	lesbian, gay, bisexual, and transgender and more
LSSA	Law Society of South Africa
Mich St Int'l L Rev	Michigan State International Law Review
OHCHR	Office of the United Nations High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission