



Submission

to the

Portfolio Committee on

Justice and Correctional Services

on the

PREVENTION AND COMBATING OF

HATE CRIMES AND HATE SPEECH BILL

(B9 – 2018)

15 February 2019

Introduction

1. The Catholic Parliamentary Liaison Office (CPLO) welcomes the opportunity to comment on the Prevention and Combating of Hate Crimes and Hate Speech Bill (B9 – 2018).
2. The CPLO is an office of the Southern African Catholic Bishops' Conference. It is tasked with liaising between the Church and Parliament/Government, commenting on issues of public policy, and making submissions on legislation.

Hate Crimes

Hate Crimes: Broad concerns

3. It cannot be denied that crimes motivated or exacerbated by hatred occur in South Africa. We think immediately of certain xenophobic attacks, carried out for no reason other than the 'foreignness' of the victims; and of 'corrective rape', which stems from the perpetrator's intolerance of the victim's sexual orientation.
4. It is correct that the criminal justice system should take cognizance of this, and that those who make themselves guilty of such crimes should be punished.
5. However, no persuasive argument has been put forward as to why it is necessary to create a special class of crime – 'hate crimes' – when the only difference between these crimes and existing common-law and statutory crimes is the question of motive. Clause 3(1) of the Bill defines a hate crime as "an offence recognized under any law, the commission of which is motivated by [...] prejudice or intolerance..." Hate crimes are thus not new crimes, but simply existing crimes + a special motive.

6. In this regard they differ from, for example, certain kinds of cyber-crimes or crimes arising from new technology. Such crimes may well need to be codified and defined in new criminal legislation. But that is not the case here.

7. In addition, the punishments provided in clause 6(1) do not differ from those already available for the underlying offences – imprisonment, fines, correctional supervision, etc.

8. In effect, therefore, the part of the Bill dealing with ‘hate crimes’ is aimed at highlighting a particular motive for certain crimes; and at ensuring that such a motive is given appropriate weight when it comes to sentencing.

9. We therefore submit that there is no need to create this new class of crime, with all the administrative and prosecutorial burdens that it occasions. All that is necessary is to amend the Criminal Procedure Act, 1977, in such a way as to require courts to consider the motives of prejudice or intolerance as being aggravating factors for purposes of sentence.

10. Similarly, the Criminal Law Amendment Act, 1997, could be amended (as is broadly set out in the schedule to the Bill) so as to include the motives of prejudice or intolerance as factors that attract a minimum prescribed sentence.

Hate Crimes: Specific concerns

11. If it is decided that it is indeed necessary to proceed with the creation of this new class of crime, then we would like to draw attention to a number of words and phrases in clause 3(1) that are difficult to define or which could result in uncertainty and vagueness:

- Does ‘family member’ refer to immediate family or extended family, and if the latter, to what degree?
- It is not clear why it is only ‘family members’ and not, for example, friends, associates, business or romantic partners, etc., whose characteristics come under consideration.
- What is meant by ‘association’ and ‘support’ in the phrase “the victim’s association with, or support for, a group of persons...”?
- It is not clear why a victim’s “association with, or support for” should apply only to a “group of persons who share [certain] characteristics” and not to an individual person who happens to bear such characteristics.
- It is not apparent why marital status, conscience and pregnancy – all of which are prohibited as grounds for unfair discrimination in Section 9(3)&(4) of the Constitution – have been left out of the list of characteristics in clause 3(1). If it is argued that these are not strictly ‘characteristics’ in the sense of immutable features such as race, age, sex, etc., then it is submitted that neither ‘political affiliation or conviction’ nor ‘occupation or trade’ should be on the list.

12. Finally, regarding hate crimes, we support the provision in clause 3(3) to the effect that prosecutions for such crimes must be authorized by the relevant Director of Public Prosecutions. The overall provisions of clause 3 should be invoked sparingly and only when there is clear evidence that a crime has been committed due to a motivation of prejudice or intolerance.

Hate Speech

Hate Speech: Broad concerns

13. When it comes to hate speech, once again the prevalence of hurtful and insulting outbursts, often on social media, cannot be denied. Expressions of hatred and derogatory remarks violate the dignity of the individual(s) against who they are aimed, and damage the wider social fabric. Indeed, they also demean the persons who utter them.

14. But we respectfully question whether criminal legislation is an appropriate or effective way of combating what is essentially an attitudinal problem. In addition, as many have argued, any law that restricts what people say (as distinct from acts that they carry out) risks violating fundamental freedoms such as freedom of belief and opinion, and freedom of expression.

15. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (section 10) and section 16(2) of the Constitution of the Republic of South Africa, 1996, (the latter by implication) already outlaw speech which advocates hatred or which is intended to be harmful or to incite violence. Admittedly, section 10 of Act 4 of 2000 refers to hate speech based on limited grounds (race, gender, disability), but this could easily be remedied by an amendment. Likewise, if it is considered that criminal sanctions beyond the existing offence of *crimen injuria* are necessary, these could also be provided for by way of amending Act 4 of 2000.

16. It is to be noted that there have already been a number of successful convictions under the Equality Act. There is no reason why this statute should not be used more aggressively in the battle against hate speech.

17. In addition, it is well known that even fairly narrow prohibitions can have far-reaching and unintended consequences – this is known as the ‘chilling effect.’ It is easy to see how this is likely to play out in terms of speech and expression: people will shy away from expressing controversial ideas, or thoughts that may be open to misinterpretation, for fear of being accused of hate speech.

18. This will effectively undermine the fundamental rights contained in Section 16 of the Constitution, especially the freedom to impart information or ideas. This freedom, along with media, academic and artistic freedom, is crucial for the health of any democracy.

Hate speech: Direct unconstitutionality

19. Apart from the chilling effect, we submit that clause 4 of the Bill may well be directly unconstitutional, since it clearly limits the right to freedom of expression contained in Section 16 of the Constitution, without at the same time satisfying the conditions for such limitation set out in Section 36 of the Constitution.

20. In particular, the Bill uses the concept of ‘harm’ as one of the two criteria for judging whether speech qualifies as hate speech. Clause 4(1)(a)(i) refers to communications that have a clear intention to be harmful or to incite harm. In turn, ‘harm’ is defined in clause 1 as “any emotional, psychological, physical, social or economic harm”. The word ‘any’ in this definition indicates that even very minor or trivial degrees of harm would qualify as hate speech.

21. Consequently, anyone who feels hurt, upset, or offended because of something someone else has said, would be able claim that they had been ‘harmed’ emotionally and possibly psychologically. This in effect turns the intended prohibition of hate speech into a positive right not to be offended or upset; and there is no such right in our Constitution.

22. It also very clearly places a major restriction/limitation on the right to freedom of expression. Section 36(1)(c) of the Constitution implies that the greater the extent of the limitation of a right, the less likely it is to be justifiable in an open and democratic society.

23. Furthermore, Section 36(1)(e) of the Constitution implies that the limitation of a right is only justifiable if there are no other, less restrictive, means to achieve the purpose. We submit that this requirement could be satisfied by qualifying the word ‘harm’ in such a way that excludes minor or trivial instances; and which makes it clear that the fact that someone takes offence at the words of another is not sufficient to establish harm or harmfulness.

Hate speech: specific concerns

24. We note that clause 4(2) excludes certain activities from the strict prohibitions contained in clause 4(1). These exclusions include artistic creativity; academic enquiry; reporting and commentary; and religious interpretation and proselytizing.

25. Two of these categories – artistic creativity and religious interpretation and proselytizing – are instead held to the standard set out in Section 16 of the Constitution: nothing may be done/said that “advocate[s] hatred that constitutes incitement to cause harm.” The same seems to apply to the media, while academic/scientific enquiry is not made subject to any limitations other than good faith’.

26. To put this another way, it appears that the Bill is prepared to recognize the constitutional rights of the media and the artistic, academic and religious communities, while denying the same rights to other communities. To illustrate: a priest may be allowed to express a view concerning same-sex marriage that, in the mouth of an atheist, would constitute hate speech.

27. On the one hand, this kind of exception might well violate Section 9(1) of the Constitution, since it makes different categories of people unequal before the law. But, on the other, it also illustrates the untenability of trying to restrict free speech in the way the Bill seeks to do it. The drafters have recognized four categories of activity that – in their view – ought to be exempted from the full force of the Bill’s restrictions, but there is no apparent reason for selecting only these four. The selection is, in fact, arbitrary. (We could ask, for example, why politicians, espousing their *bona fide* beliefs or principles should not enjoy the same protections that the Bill offers to actors and priests.)

28. We submit that the only answer to the problem is to subject all speech, regardless of who utters it, to the test set out in Section 16(2) of the Constitution. To do this, clause 4(1)(a) could simply be re-written as follows:

“4. (1) (a) Any person who intentionally publishes or propagates anything or communicates [anything] to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to advocate hatred that constitutes incitement to cause harm, based on one or more of the following grounds:

(aa) age;

.....”

29. We note, in passing, that the characteristics of ‘occupation or trade’ and ‘political affiliation or conviction’, which may be grounds for the offence of hate crime, are not included in the list of characteristics that could be grounds for the offence of hate speech. We assume that these omissions are intentional and that they reflect a desire to allow the freest possible discourse and exchange of views in the political field. We support the idea that political discourse should be as free as possible (in other words, subject only to the implied restrictions of Section 16 of the Constitution), but we

again question why only these two categories have been excepted. In legal terms, the exception seems to be arbitrary.

30. Finally, regarding hate speech, if the Bill is to be proceeded with, we support the provision in clause 4(3) to the effect that any prosecution or hate speech must be authorised by the relevant DPP.

Prevention of Hate Crimes and Hate Speech

31. We firmly endorse the notion that the State has a duty to prevent and combat acts and behaviour involving hate. As has been noted, hate crimes and hate speech stem from an attitudinal problem on the part of the perpetrators. Appropriate awareness and educational programmes ought to go some way to changing the kinds of attitudes that result in such behaviour. We therefore strongly support clause 9 of the Bill.

Conclusion

32. We acknowledge that both crimes motivated by hatred, and hate speech, are serious issues in South Africa, and that urgent steps need to be taken to deal with them. However:

- We do not believe that the creation of a separate category of crime, known as ‘hate crimes’ is necessary or desirable, since existing criminal law is quite capable of dealing effectively with such crimes. In effect, all that is needed is for the motive of hatred to be considered as an aggravating factor in sentencing.

- We submit that, as it stands, the Bill limits the right to freedom of expression to a degree that is not justifiable in terms of the limitations clause of the Constitution.
- We submit, further, that while the exceptions provided for in clause 4(2) may at first sight be thought to satisfy the objections of certain sectors of society (including the religious sector, to which we belong) they actually only illustrate the unconstitutionality of the free speech restrictions contained on clause 4(1).
- We support clause 9, which imposes duties of prevention, education and information upon the State and various agencies and officers of the State.

33. We wish the Committee well in its deliberations, and we would appreciate the opportunity to address the Committee orally.

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