



TEL: +27 (0)74 355 0775

FAX: +27 (0)86 725 0837

EMAIL: INFO@CAUSEFORJUSTICE.ORG

POSTAL ADDRESS: P. O. BOX 12622, DIE BOORD, 7613, SOUTH AFRICA

WEBSITE: WWW.CAUSEFORJUSTICE.ORG

Our Reference: Hate Crimes and Hate Speech Bill

Date: 31 January 2017

The Department of Justice and Constitutional Development

For Attention: T Ross

By email: hatecrimes@justice.gov.za

Dear Sir/Madam,

SUBMISSIONS: PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B - 2016]

- 1 We refer to the abovementioned matter, specifically to the notice published in the Government Gazette of 24 October 2016, calling for public comments in respect of the Prevention and Combating of Hate Crimes and Hate Speech Bill [B - 2016] ("the Bill").
- 2 Cause for Justice ("CFJ/We/our/us/ourselves") hereby want to thank the Department for the opportunity to present you with these written submissions and to participate in the law-making process.
- 3 Thank you also for extending the deadline for comments by two months, which has been helpful to some extent. We point out however that the three months in total, taking into account the December holiday break – over which many institutions, including ourselves, lose around three to four weeks of production – has not been adequate time to prepare comprehensive submissions on the Bill. We have nonetheless tried to address the most pertinent matters, as we see them.

BACKGROUND TO CAUSE FOR JUSTICE

- 4 CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance.
- 5 Four of CFJ's five core values give it a particular interest in the Bill, namely (1) the responsible exercise of freedom, (2) protection and promotion of human worth/value, (3) protection of the vulnerable in society (social justice) and (4) ensuring accountable government action.

**MANAGEMENT COMMITTEE MEMBERS: RYAN SMIT, GENERAL MANAGER | WYNAND VILJOEN, CHAIRPERSON
CRAIG SNYDERS, EX-OFFICIO EXECUTIVE MEMBER | DIETER VON FINTEL, EX-OFFICIO EXECUTIVE MEMBER**

Cause for Justice is a registered public benefit organisation for South African income tax purposes and may issue section 18A receipts, which entitle donors to claim tax deductions in respect of donations made to Cause for Justice. PBO number: 930045148

CONTENT OF SUBMISSIONS

6 Our submissions are structured under the following headings:

- Clause 1 - Meaning of 'harm' (p 2)
- Clauses 3 and 4 - Government's mandate (p 4)
 - Clause 3 – Offense of 'hate crime' (p 4)
 - Clause 4 – Offense of 'hate speech' (p 5)
 - Clause 3 and 4 – Protected grounds/group characteristics (p 8)
- Clause 5 – Impact of the offence on the victim (p 10)
- Clause 9 – Prevention of hate crimes and hate speech (p 11)

CLAUSE 1 - MEANING OF 'HARM'

Submissions: Proposals and comments

7 The wording of the definition of 'harm', as currently contained in the Bill, is broad, which makes it susceptible to both a subjective and an objective interpretation. This is particularly concerning in the context of mental and psychological harm, to the extent that the subjective experiences (hurt feelings or offense) of over-sensitive individuals are treated as harm.

8 CFJ accordingly proposes the amendment of the definition of harm so as to read as:

"harm" includes any physical and economic harm, and any mental and psychological harm **assessed in accordance with the standard of objective reasonableness**;

Grounds for Proposals (Reasoning):

9 Harm in terms of section 16(2)(c) of the Constitution must be concrete.¹ In the hate speech case of *Freedom Front v South African Human Rights Commission*,² the words "kill the boer, kill the farmer", were declared to be hate speech. The Commission held that harm cannot only be limited to physical harm. It must include physical as well as emotional harm.³

10 Whether speech causes harm, must be decided based on an objective standard, "whether a **reasonable person** assessing the advocacy of hatred on the stipulated grounds within its context and having regard to its impact and consequences would **objectively** conclude that there is a real likelihood that the expression causes harm."⁴

¹ Milo et al in Woolman & Bishop 2008, *Constitutional Law of South Africa*. 2nd ed. Kenwyn, SA: Juta & Co.: 53, 42 - 83.

² *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC).

³ Currie I & De Waal J 2013, *The Bill of Rights Handbook*, 6th ed. Cape Town, SA: Juta & Co.: 358.

⁴ *Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC), 1290.

- 11 In the **common law of delict**, harm is a prerequisite for liability.⁵ In terms of the Aquilian action, harm traditionally consisted in monetary loss sustained due to physical damage to a person or property. In recent times, it also includes monetary loss resulting from injury to the nervous system and pure economic loss.
- 12 Under the action for pain and suffering (*actio iniuriarum*), the harm is intangible - injury to the person, his dignity or reputation.⁶ Psychological harm will justify an award of damages if the plaintiff can prove that the shock caused a physical reaction, such as a stroke which lead to death, high-blood pressure, collapse, a detectable and recognized psychiatric injury that is not passing, anxiety, depression, impaired sleep or emotional trauma.⁷ In order to be successful in a claim for damages for injury to dignity, the claimant must show that the conduct complained of, was subjectively, as well as objectively insulting.⁸

Crimen iniuria is committed by “the unlawful, intentional and serious violation of the dignity or privacy of another”.⁹ This offence can be related to the Roman law concept of “dignitas”, which can be described as “that valued and serene condition in (a person’s) social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt”.¹⁰ Infringement of another’s *dignitas*, must be determined by means of an objective and subjective test.¹¹ With some exceptions, the addressee must be aware of the conduct, but also be humiliated by it. This means that objectively, the conduct must be of such a nature that a reasonable person’s feelings will be offended by it.¹²

The test for determining the infringement of dignity in the common law,¹³ is described as follows by Burchell, as laid down in *Delange v Costa*¹⁴ in the Supreme Court of Appeal, “(a) The plaintiff’s self-esteem must have been actually impaired and (b) a person of ordinary sensibilities would have regarded the conduct as offensive, tested by the general criterion of unlawfulness, namely, objective unreasonableness. This then means that the conduct complained of “must be tested against the prevailing norms of society”.¹⁵ These norms are represented by the values and principles contained in the Constitution.

⁶ Currie & De Waal 2013: 256.

⁷ Max Loubser (ed) *et al*, *The Law of Delict in South Africa* 2009: 299.

⁸ Currie & De Waal 2013: 256.

⁹ Snyman CR, 2008. *Criminal Law*. 5th ed. Durban, SA: LexisNexis Butterworths: 469.

¹⁰ Neethling J, Potgieter JM & Visser PJ 1996. *Neethling’s Laws of Personality*. Durban, SA: Butterworths: 48.

¹¹ “*The Constitutionality of Categorical and Conditional restrictions on harmful expression related to Group Identity*”, Thesis by Dr Maria Elizabeth Marais, January 2014, Department of Constitutional Law and Philosophy of Law, Faculty of Law, University of Free State: 376.

¹² “*The Constitutionality of Categorical and Conditional restrictions on harmful expression related to Group Identity*”, Thesis by Dr Maria Elizabeth Marais: 376.

¹³ Burchell JM & Milton J, 2005. *Principles of Criminal Law*. Landsdowne, SA: Juta & Co.: 749.

¹⁴ *Delange v Costa* (433/87) [1989] ZASCA 6; [1989] 2 All SA 267 (A): par 15-17; Burchell JM & Milton J, 2005: 749.

¹⁵ Burchell JM & Milton J, 2005: 749.

- 13 **What the discussion above bears out is that the law requires some objectively verifiable consequence/harm that is judged with reference to the sensibilities of the reasonable person, not merely hurt feelings or highly subjective experiences of the victim.** This understanding of harm/consequence is also relevant to the assessment of the impact of the offenses of hate crime or hate speech. See discussion under paragraph 46 here below.
- 14 In terms of **section 10 of PEPUDA (Promotion of Equality and Prevention of Unfair Discrimination Act)**,¹⁶ no person may “publish, propagate, advocate or communicate words...to demonstrate a clear intention to be hurtful, harmful or incite harm and/or promote or propagate hatred”.¹⁷ Currie & De Waal note that sections 10 (and 12) of PEPUDA do not provide the same clarity as section 16(2)(c) of the Constitution and submits that it is “superfluous or widens the scope of the constitutional conception of hate speech.”¹⁸ They further hold that to the extent that the scope of the prohibitions in these provisions are wider than the Constitution’s hate-speech exception, it is a limitation of freedom of expression and will have to be justified.¹⁹ Although the constitutionality of the wording of section 10 of PEPUDA does not need to be considered for present purposes, we note that it does represent no small departure from section 12(2)(c) of the Constitution and the common law, justification of which in our opinion is highly unlikely.

Conclusions

- 15 Under South African law, an objective standard is used to assess harm. This is borne out in case law, the common law of delict and criminal law.
- 16 **In light hereof**, CFJ proposes that the definition of ‘harm’ be amended to clarify that it is to be assessed **objectively according to the standard of the reasonable person**.

CLAUSES 3 AND 4 – GOVERNMENT’S MANDATE

Clause 3 – Offense of hate crime

- 17 Both of the proposed new crimes of ‘hate crime’ and ‘hate speech’ are triggered by a list of protected grounds/characteristics. The definition of ‘hate crime’, as it reads at present, is not clear that it will not also apply to someone who commits the newly created crime of ‘hate speech’.
- 18 There is accordingly a risk of punishing someone who commits hate speech twice, by potentially also finding him/her guilty of a hate crime.

¹⁶ Act 4 of 2000.

¹⁷ Section 10(1).

¹⁸ Currie & De Waal 2013: 360.

¹⁹ Currie & De Waal 2013: 360.

19 We submit, however that the purpose of hate crime offense is to create further criminality for existing (pre-existing) offenses, where hate motive is not already an element of the offense.

20 We accordingly propose that the definition of hate crime in clause 3(1) be amended as follows:

“A hate crime is an offense recognized under any law, **excluding an offense contemplated in section 4...**”

Clause 4 – Offense of hate speech

Submissions: Proposals and comments

21 The definition of the offense in **clause 4(1) of the Bill** is overbroad, unconstitutional and in some instances, unnecessary.

22 CFJ accordingly proposes the **deletion of -**

22.1 **clause 4(1)(a)(ii)**; and of

22.2 the words “**or bring into contempt or ridicule**” in clause 4(1)(a)(bb).

23 Protected freedom of expression should not be chilled by hate speech legislation. CFJ accordingly proposes **the insertion of exemptions/exceptions/defences in keeping the Canadian Criminal Code.**

24 CFJ proposes the **deletion of section 10 of PEPUDA** upon the date on which the Bill enters into force, as section 10 of PEPUDA will **become superfluous** at such date.

Grounds for Proposals (Reasoning):

Liability triggers

25 The proposed liability trigger, “**threatening, abusive or insulting**” contained in clause 4(1)(a)(ii), in our view is an unlawful attempt to broaden the scope of what the Constitution (section 16(2)(c)) considers to be hate speech. We accordingly submit that by attempting to include this further/additional liability trigger, the state is acting outside of its constitutional mandate, i.e. outside the scope of its authority.

The state may of course attempt to cure this unconstitutionality by either –

25.1 Justifying its proposed action by convincingly arguing that all instances of “threatening, abusive or insulting” speech, will in all cases constitute advocacy of hatred. This could for instance be done by a textual amendment to give meaning to the concept “advocates hatred” (“advocacy of

hatred”, as used in the Constitution) or by inserting a definition to this concept in clause 1 (definitions clause).

However, we are of the view that such attempt would be futile, for at least two reasons:

- 25.1.1 All instances of “threatening, abusive or insulting” speech, will NOT in all cases constitute advocacy of hatred; and
- 25.1.2 “threatening, abusive or insulting” are overbroad concepts and without properly defining what is meant by them, they will be unconstitutional. Without clearly stating that these concepts must be interpreted objectively and not subjectively with reference to the alleged victim’s personal perception, a door would be opened to potential abuse of the law by over-sensitive and over-zealous individuals and groups who may merely be victims of their own victim-mentality.
- 25.2 Creating a further/additional offense, for example “hate based harassment and crimen iniuria”, to stand apart from the hate speech offence that is in line with the constitution. The constitutional basis for such further offense could be that a limitation of freedom of expression is justified in order to give effect to the rights in sections 9, 10, 15 (equality, human dignity and freedom of religion, belief and opinion) and 12(1)(c) and (e) of the Constitution (freedom and security of the person that includes to be free from all forms of violence and to not be treated in a cruel, inhuman or degrading way.

However, even accepting that such limitation would be justified (which we do not admit without more), such attempt would in our view in any event be futile in that it would be arbitrary (and unconstitutional for that reason) as -

- 25.2.1 South African law already contains criminal offenses for harassment, intimidation and crimen iniuria.
- 25.2.2 Reading the current law with the proposed clause 3 – creation of the hate crime offense – would have the same effect as creating a further “hate based harassment and crimen iniuria” offense.

For the abovementioned reasons, CFJ proposes the deletion of clause 4(1)(a)(ii) of the Bill.

- 26 The liability trigger, “**stir up violence against, or bring into contempt or ridicule**” contained in clause 4(1)(a)(bb), in our view broadens the scope of what the Constitution (section 16(2)(c)) considers to be hate speech. We accordingly submit that by attempting to include this further/additional liability trigger, the state is acting outside of its constitutional mandate, i.e. outside the scope of its authority.
- 27 The potential cures referred to in paragraphs 25.1 and 25.2 above, could be considered *mutatis mutandis* in respect of clause 4(1)(a)(bb).

- 27.1 **Firstly**, the state could attempt to make out the case that triggers such as “stir up violence against” and “bring into contempt or ridicule” come within the meaning of “incitement to cause harm”. We would be open to the idea that to “stir up violence against” falls within the ambit of “incitement to cause harm”, but not “bring into contempt or ridicule”. “Incitement to cause harm” in our opinion has a much narrower meaning than the proposed liability trigger, “bring into contempt or ridicule”. To make fun of or embarrassing someone is a far cry from inciting violence against him/her/them.
- 27.2 **Secondly**, the state could attempt to create a further/additional offense to criminalise speech that is rude or offensive. In our view, such attempt would be flawed in that on the one hand, it would-
- 27.2.1 Constitute an unjustifiable limitation of freedom of expression; and on the other
- 27.2.2 Constitute arbitrary state action, as the existing remedies available in law are appropriate to address the types of rude/offensive speech contemplated, namely crimes of harassment, intimidation, crimen iniuria and delictual claims for defamation.
- 28 For the abovementioned reasons, CFJ proposes the deletion of clause 4(1)(a)(bb) of the Bill, or at least the words “or bring into contempt or ridicule”.

Protection of freedom of expression

- 29 Hate speech legislation carries the grave risk of chilling all forms of speech in ways that are disproportionate to the risks of harm. It is accordingly necessary to limit the application of hate speech offense so as not to restrict freedom of speech more than is necessary to achieve the purpose of the intervention.
- 30 CFJ proposes the inclusion of exemptions/exceptions/defenses in line with the Canadian criminal code.

Section 319 of the Canadian Criminal Code criminalises hate speech:

- 31 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.
- 32 (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or (b) an offence punishable on summary conviction.

Subsection (3) contains a number of exemptions/exceptions/defenses to the crime of hate speech:

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

Clause 3 and 4 – Protected grounds/group characteristics

Submissions: Proposals and comments

- 34 In order to test the constitutionality, legality and rationality of the state's proposed expansion of the four grounds in section 16(2)(c) of the Constitution (to 17 in total), we hereby formally request the Department to provide us with its reasons for such decision(s), as well as all working papers, minutes of meetings, reports, research findings, correspondence and all other material/information in document form (whether hard copy or electronic) that may be relevant or pertains to the state's decision on the chosen protected grounds/characteristics.²⁰

Grounds for Proposals (Reasoning):

- 35 Clauses 3(1) and 4(1)(a) each contain a list of 17 protected group characteristics. The decision on which characteristics to include in hate crime and hate speech legislation is one of the most important policy considerations in determining the scope of such legislation.
- 36 The **Organisation for Security and Cooperation in Europe (OSCE)** provide guidance on selecting appropriate protected group characteristics for each state/country in its '*Hate Crime Laws" A Practical Guide*',²¹ listing a number of factors to consider in the decision-making process. The main factors/indicators are:
- 36.1 Markers of group identity (fundamental characteristics);

²⁰ In this regard, reliance is placed on the decision in *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* (818/11) [2012] ZASCA 115 (14 September 2012), para [42] – [46].

²¹ Available on the internet at <http://www.osce.org/odihr/36426>.

- 36.2 Societal fissure lines – divisions that are embedded in the social and cultural history (social and historical context); and
- 36.3 Whether measures are implementable (implementation issues).
- 37 The OSCE indicated that at the time of issuing the guidance (2009), 37 of its participating countries had hate crime legislation –
- 37.1 Almost all of which included ‘religious’ and ‘racial’ hatred;
- 37.2 11 included ‘sexual orientation’;
- 37.3 Seven included ‘disability’; and
- 37.4 Six included ‘gender’.
- 38 In respect of ‘**hate speech**’, section 16(2)(c) of the Constitution contains the selected protected group characteristics applicable to South Africa in respect of which no limitation of freedom of expression is necessary, as no-one has the right to express hate speech on these grounds. There are four grounds, namely ‘race’, ‘ethnicity’, ‘gender’ and ‘religion’. (Except for ‘gender’, these are also the most commonly protected characteristics identified by the OSCE.)
- 39 If the state were to include further characteristics in legislation criminalising speech, constitutional rights will be infringed and the inclusions would have to be defended as being reasonable and justifiable infringements of:
- 39.1 the right to **freedom of expression**, and
- 39.2 in the case of religious expression – the right to **freedom of conscience, religion, thought, belief and opinion**, and
- 39.3 in the case of political speech – the **right to make political choices**, and
- 39.4 in the case of citizens who has an occupation requiring him/her to impart very specific (even peculiar) information and ideas – the **right to freely choose a trade, occupation or profession**.
- 40 In order to test the constitutionality, legality and rationality of the state’s proposed expansion of the four grounds in section 16(2)(c) of the Constitution (to 17 in total), we hereby formally request the Department to provide us with its reasons for such decision(s), as well as all working papers, minutes of meetings, reports, research findings, correspondence and all other material/information in document form (whether hard copy or electronic) that may be relevant or pertains to the state’s decision on the chosen protected grounds/characteristics.²²

²² In this regard, reliance is placed on the decision in *Judicial Service Commission v Cape Bar Council (Centre for Constitutional Rights as amicus curiae)* (818/11) [2012] ZASCA 115 (14 September 2012), para [42] – [46].

- 41 The constitutional justifications required in the context of a widening of the grounds of unprotected hate speech would not be required in the context of 'hate crimes'. This is because hate crimes criminalise the motive/bias for committing some existing crime (the base crime).
- 42 The decision regarding which protected characteristics to include for purposes of the hate crime definition, however still has to comply with the basic test of legality, which requires adherence to the rule of law, authority for all state action, **rationality** in state action in relation to legitimate government purposes, **prohibition of arbitrariness**, procedural fairness and laws that are **clear, accessible and not vague or overbroad**.
- 43 Section 9(3) of the Constitution provides a list of 16 prohibited grounds, based upon which neither the state nor any other person may unfairly discriminate.
- 44 Four of these grounds have not been included in the lists contained in clauses 3(1) and 4(1)(a) of the Bill, namely 'pregnancy', 'marital status', 'age' and 'conscience'. In order to understand why this has been done and be satisfied that these exclusions do not amount to irrational or arbitrary state action, we hereby repeat our request in paragraph 40 above.
- 45 There are also five grounds included in clauses 3(1) and 4(1)(a) of the Bill that do not form part of the grounds listed in section 9(3) of the Constitution. In order to understand why this has been done and be satisfied that these additions do not amount to irrational or arbitrary state action, we hereby repeat our request in paragraph 40 above.

CLAUSE 5 – IMPACT OF THE OFFENCE ON VICTIM

- 46 In terms of clause 5 of the Bill, the impact of the offence on the victim may be taken into account for purposes of sentencing, by way of a sworn statement/affidavit be made by the victim or someone authorised by the victim to do so, which reflect the "physical, psychological, social, financial or any other consequence of the offence for the victim and his or her family member".
- 47 **CFJ's main concerns are:**
- 47.1 The inclusion of "and his or her family member". If the consequences relevant for sentencing purposes are expanded to effects on third persons, even family members of the victim, it will not be possible to limit the application of the Bill to the real harm done (bias motive) by the perpetrator. The Bill will be overbroad and accordingly unconstitutional on account thereof. If further measures can be proposed by the state to limit the scope of effects on family members that may be taken into account, this proposal can be reconsidered.
- 47.2 The interpretation and therefore also the application of "psychological ... consequences". Without clear wording requiring such consequences to be objectively verified, there is a very real risk that subjective feelings – of hurt (for example) – could play a disproportionate role in the determination of the impact of the offense on the victim. As has been related previously hereinabove, some

victims may be overly sensitive, while others may be more thick-skinned. CFJ submits that an objective test or assessment standard should be required and inserted in the Bill to offset the risk of punishing perpetrators unreasonably/disproportionately to their offense.

- 48 In our discussion of the meaning of harm hereinabove, we pointed out how harms (harmful consequences) are to be assessed. The submission regarding the need for an objective reasonableness standard to be expressly included in the wording of the Bill, similarly apply here.

CLAUSE 9 – PREVENTION OF HATE CRIMES AND HATE SPEECH

- 49 Clause 9(1) and (2) of the Bill places a duty on the Ministers of Justice, Police, Communications, Basic Education, Higher Education and Training, Home Affairs and Labour to develop and conduct educational programmes and training interventions to prevent and combat hate crimes and hate speech.

- 50 CFJ respectfully notes that the abovementioned duty (duties) creates a risk of opening a door for individuals, groups or officials to do propaganda for their own agendas/ideologies with the force of the state behind them. The risk of state capture and ideological totalitarianism is accordingly in our view real and should be guarded against with all diligence.

CONCLUSION

- 51 We trust that the above submissions are of assistance to the Department and look forward to your response thereto (if any) in due course. CFJ remains at the Department's disposal to assist in the further development and/or amendment of the Bill to effectively achieve its intended purposes.

- 52 We accordingly hereby respectfully request the Department to –

- 52.1 In light of the restricted time frame to prepare and submit comment, to allow us an opportunity to augment the current brief written submissions with more detailed comprehensive submissions at a later stage; and/or

- 52.2 Give us an opportunity to make oral submissions (representations) to the Department at an opportune time to augment these brief written submissions.

Yours faithfully,

Michelle Davin (Preparer)
Legal Administrator and Media Liaison

and

Ryan Smit (Reviewer)
Legal Counsel

ON BEHALF OF CAUSE FOR JUSTICE: MANAGEMENT COMMITTEE