



Submission

to the

**Department of Justice and Constitutional
Development**

on the

**DRAFT PREVENTION AND COMBATING OF HATE
CRIMES AND HATE SPEECH BILL**

31 January 2017

1. Introduction

The Catholic Parliamentary Liaison Office (CPLO) welcomes the opportunity to comment on the draft Prevention and Combating of Hate Crimes and Hate Speech Bill.

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.

2. The Need for the Legislation

Hate Crimes

It cannot be denied that crimes motivated 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.

We question, however, whether there is a need to enact a specific category of offences called 'hate crimes', when the underlying offences are all already crimes, under either common law or statute. In addition, the punishments provided in clause 3(2) do not differ from those already available for the underlying offences. In effect, this part of the Bill seems to be aimed at punishing the motive for these crimes; and motive has always been a factor that the courts can and should take into account when imposing sentence.

We note that the Bill seeks to amend the Criminal Law Amendment Act 105 of 1997, and thereby to make 'hate crimes' subject to the prescribed minimum sentencing regime. However, along with many other civil society organisations, we question whether the continuing expansion of the categories of crime which attract minimum sentences achieves anything other than further over-crowding of prisons.

It is therefore not clear why it has been thought necessary to specify 'hate crimes' as a new category. It would be sufficient to direct that courts, when considering sentences for crimes that have been committed as a result of hatred, should take this motivation into account as an aggravating factor.

Hate Speech

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 harm not only the individual(s) against who they are aimed, but the wider social fabric. Indeed, they also demean the persons who utter them.

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.

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.

3. Specific Comments

Clause 3(1): The definition of ‘hate crime’ refers to ‘the victim of the hate crime in question’. In order to avoid being self-referential, this should read ‘the victim of the offence in question’.

The list of characteristics (a) to (q) contains two that refer to medical conditions – HIV status (m) and albinism (p). There are other medical conditions in relation to which people sometimes act with prejudice or intolerance, such as leprosy, epilepsy, and various infectious diseases. We suggest that a characteristic of ‘medical condition’ be added to the list.

Item (n) in the list refers to ‘nationality’. We suggest that this should be broadened to read ‘nationality or citizenship’, since it is possible for a national of one country to have citizenship of more than one; and to be the victim of intolerance as a result.

Clause 4(1): We note, and endorse, the way in which clause 4(1)(a) is phrased such that there must not only be a communication of a certain kind (set out in 4(1)(a)(i)&(ii)), but that there must also be a ‘clear intention’ to cause one of the harmful outcomes referred to in (aa)&(bb). This ought to ensure that inadvertent, innocent or mistaken utterances are not prosecuted, even if they appear to fall under the description in (i)&(ii).

The ‘clear intention’ requirement also creates an important objective test that will ensure that it is primarily the intention of the person who communicates, rather than the subjective – and possibly over-sensitive – feelings of the hearer, that must be assessed.

Despite these safeguards, we submit that the overall phrasing of this clause is far too broad, and that it risks criminalising everyday discourse, especially in the political, social, religious and cultural fields. It also clearly infringes on the right to freedom of expression, and it potentially infringes on the right to freedom of religion, belief and opinion, and the right to freedom of assembly, demonstration, picket and petition.

In particular, the use of terms such as ‘abusive’, ‘insulting’, ‘contempt’ and ‘ridicule’ makes the provisions both too wide and too vague. An insult, for example, can be a very mild thing, nowhere near what most people would consider to be an expression of hatred. Likewise, bringing someone into ridicule encompasses a wide range of expressions, including sarcasm, caricature, exaggeration, and teasing, all of which are regularly used in political and social discourse, among others.

The lower the bar is set – for example, a communication that insults and ridicules a person – the easier it becomes for the subjective feelings of the hearer to be the determinant. This, in turn, undermines the objective safeguard built into the phrase ‘demonstrates a clear intention’.

We submit that the words ‘abusive or insulting’ be removed from 4(1)(a)(ii), and that the words ‘or bring into contempt or ridicule’ be removed from 4(1)(a)(aa).

(It must be mentioned that it is not entirely clear from the layout of clause 4 whether the sub-clauses (aa)&(bb) relate to both (i)&(ii), or to (ii) only. It seems to be capable of being read both ways.)

The use of the words 'stir up' in (bb) adds to the overall vagueness. The common legal term 'incite' would be better.

In the list of grounds that follows (bb) we would submit that, in line with our earlier comment, a ground of 'medical condition' be added to the list, and that 'or citizenship' be added to 'nationality'.

It is noted that the list of grounds does not include 'ideology' or 'political affiliation' or similar words that might allow politicians to claim to be victims of hate speech when, for example, they are caricatured in the media or by their opponents. This omission is strongly supported.

Clause 9: We strongly support the notion that the State has a duty to prevent and combat offences 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.

4. Conclusion

We understand the purpose and intention of the envisaged legislation, and we recognize that some crimes and some communications are motivated by feelings of hatred. We are concerned, however, along with many other civil society groups, that the Bill as it stands is too far-reaching, and that its provisions – especially regarding hate speech – unjustifiably threaten important constitutional rights. We believe that it is possible to construct legislation that outlaws true hate speech, but which does not infringe on people’s right to express themselves robustly and freely, even if in the process they give offence or upset their hearers.

We look forward to commenting on future versions of the Bill.

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