



THE UNITING
PRESBYTERIAN
CHURCH
IN SOUTHERN
AFRICA

TO: **The Department of Justice and Constitutional Development**
For attention: Mr T Ross
Per e-mail: hatecrimes@justice.gov.za

RE: **Comments on the Prevention and Combating of Hate Crimes and Hate Speech Bill**

(Comments deadline: 31 January 2017)

FROM: Organisation: Uniting Presbyterian Church in Southern Africa
Name/surname: Lungile Mpetsheni
Capacity: General Secretary
Tel: 011 7273500
E-mail: lpmetsheni@presbyterian.org.za

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INTRODUCTION

1. The Uniting Presbyterian Church in Southern Africa is a Christian denomination with approximately 250 000 members in South Africa, Zambia and Zimbabwe.
2. As a faith-based community, we believe that every human being is created in the image of God and as such, has intrinsic dignity and worth. Because God gives dignity and worth to all people, as human beings we ought to do the same. No person should suffer violence or hatred because of their race, nationality, sex, religion or any other characteristic.

3. As such, we commend the Department of Justice for what we believe to be a *bona fide* effort to prevent and combat hate crimes and hate speech and to create an environment where South Africans can peacefully co-exist, despite our differences.
4. **We are concerned, however, that the Prevention and Combating of Hate Crimes and Hate Speech Bill (hereinafter referred to as “the Bill”), particularly the “hate speech” component, is defined so broadly that it will violate other constitutional rights, including particularly freedom of expression (section 16 of the Constitution) and freedom of religion, belief and opinion (section 15 of the Constitution).**
5. We hereby submit our concerns to you in writing, but would also appreciate the opportunity to appear and make verbal submissions, at the appropriate time.

THE DEFINITION OF “HATE SPEECH” IS OVER-BROAD

6. Section 16(2)(c) of the Constitution limits “hate speech” to speech that amounts to “*an advocacy of hatred ... that constitutes incitement to cause harm*”. In terms of South African case law, the question of whether speech in fact “*advocates hatred*” and further “*incites harm*” (both elements of which need to be present in order to qualify as “hate speech”), is an objective enquiry. It asks whether a reasonable person, assessing the “*advocacy of hatred*” within the particular context, would objectively conclude that there was a real likelihood that the speech in question would cause harm.
7. Section 4(1) of the Bill, however, extends the scope of “hate speech” and lowers the threshold of what qualifies as “hate speech”, to speech that is “*threatening, abusive or insulting*” and which has the potential to “*bring into contempt or ridicule*”. All of the aforementioned terms are undefined in the Bill, and leaves an opening for multiple interpretations and unfair applications. It is further evident that the focus of the impact of “hate speech” is largely subjective. It centers on the feelings and perceptions of the “victim”, who does not even need to be an actual victim. As such, it is in conflict with (and in contrast to) established case law, and it opens up the “hate speech” provisions of the Bill to abuse.

8. In light of the above, we have been advised and submit that the definition of “hate speech” in the Bill is both over-broad and unconstitutional.

ADVERSE IMPACT ON FREE SPEECH

9. The effect of the excessively broad definition of “hate speech” in the Bill is that virtually any speech that anyone could potentially find offensive, could qualify as “hate speech” punishable by a fine and/or up to 3 years’ imprisonment for a first offence and up to 10 years’ imprisonment for a repeated offence (section 4(3) of the Bill).

10. By contrast, section 16 of our Constitution guarantees the right to “freedom of speech” – not the right to “freedom from offence”. This constitutional guarantee is a recognition that we live in a pluralistic society where people who hold diverse beliefs and views on matters should be free to express their views, openly and without fear of punishment. The “price tag” of this freedom is that we need to be willing to tolerate views that are different to our own – even views that we may find to be personally offensive, disturbing or shocking.

11. The right to freedom of expression is a vitally important right in our constitutional democracy, and as such it should be jealously guarded. If certain speech were to be criminalised, the effect would be that freedom of speech would be suppressed due to the fear of someone taking offence at something said and then filing a criminal complaint with the authorities. As a result, debate on issues such as what is true and untrue, right and wrong, just and unjust, would be effectively shut down and the constitutional promise of free speech for all would be reduced to an empty promise on a piece of paper.

ADVERSE IMPACT ON RELIGIOUS FREEDOM

12. Section 15 of our Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion. According to our Constitutional Court, this right includes *“the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination” (S v Lawrence, 1997).*

13. The over-broad definition of “hate speech” in the Bill poses a severe threat to religious freedom because it could be employed to muzzle (and/or have the unintended effect of muzzling) believers across the different faith groups from expressing (whether to a public or private audience) their sincerely held religious convictions and beliefs. The expression of these beliefs may be perceived or experienced by those who hold to different convictions and beliefs as “*threatening, abusive or insulting*” and intending to “*bring [them] into contempt or ridicule [them]*”.
14. By way of example, in terms of the proposed definition of “hate speech” (section 4(1) of the Bill):
- 14.1. If a pastor were to say from the pulpit that prostitution (or abortion, or euthanasia) is wrong, it is entirely possible that he/she could be charged with “hate speech” based on his/her perceived intolerance towards a particular “*occupation or trade*” and, if found guilty, be sentenced to 3 years in jail;
- 14.2. If a believer were to have a conversation with a person of a different faith or someone who does not share or accept his/her religious beliefs and convictions (on, for example, the way to salvation, creationism, gender issues, marriage, procreation, discipline of children, etc), and that person were to take offence in any way, the believer could potentially face a charge of “hate speech” based upon a perceived prejudice towards the other person’s “*religion*” or “*belief*”;
- 14.3. If someone were to share a post on social media that says that while God loves all people, He does not approve of sex outside of marriage (whether heterosexual or homosexual), that person could potentially be charged with “hate speech” based on his/her perceived intolerance of another person’s “*sexual orientation*”, even where there is no actual victim!

15. Experience in the USA, UK and other Western democracies has shown that liberal activists, driving anti-religion and anti-natural family agendas, frequently employ “hate speech” laws to hinder or stop the teaching, preaching and publishing of religious content which they regard as unfavourable, offensive or “harmful” to their cause. In fact, “hate speech” legislation in Europe has become so problematic that even mainstream Christian beliefs and values expressed publically and privately have led to arrest and prosecution, fines, imprisonment, loss of employment, being barred from entering various professions, etc.
16. This Bill, which seeks to broaden the definition of “hate speech” and thereby limit the right to freedom of speech, is deeply problematic in a democracy. True democratic freedom demands individual freedom. Citizens cannot be truly free unless they are able to say what they believe and to live according to their beliefs, freely and without fear of harassment or punishment by the State. In a proper democracy, religious convictions and beliefs should be respected and accommodated, not suppressed or punished. No one should be forced to choose between obeying their conscience or obeying the law, especially where they face the penalty of harsh consequences if they choose to obey their conscience or religious convictions. Should it be passed in its current form, this is exactly the negative consequence that this Bill will achieve.
17. In light of the above, we are advised and submit that, should the “hate speech” provisions in the Bill remain, it will be both appropriate and necessary to insert a “religious exemption clause” in order to protect adequately and give effect to the constitutional right to freedom of religion, belief and opinion. (In this regard, we draw attention to the *proviso* in section 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (“the Equality Act”) as an example of a legislative exemption on the “hate speech” and unfair discrimination prohibitions in section 10 and 12 of the same Act).

ADDITIONAL “HATE SPEECH” LAWS ARE UNNECESSARY

18. We have been advised and submit that “hate speech” is already prohibited in South African law and can therefore be dealt with effectively in terms of the Equality Act and the common law crime of *crimen iniuria* (willful injury to someone’s dignity).
19. As such, it is unnecessary to create an additional law that will have the effect of placing further strain (in terms of time, effort and money) on our already burdened courts and on the police, who will be tasked with the investigation of “hate speech” charges and obliged to make arrests, etc in terms of the Bill.
20. It is submitted that, if there is a genuine need for additional measures to deal with “hate speech”, this result can be effectively achieved by amending the Equality Act and/or further empowering the bodies or forums responsible for enforcing the “hate speech” laws which are already in place.

CONCLUSION

21. While the objectives of the Bill are commendable, we submit that the “hate speech” provisions in the Bill are over-broad and also in conflict with the rights to freedom of expression and freedom of religion guaranteed by the South African Constitution. We further submit that since “hate speech” is already prohibited in South African law, an additional law is unnecessary.
22. In the circumstances, we appeal to government / Parliament to:
- 22.1. Omit the “hate speech” provisions from the Bill altogether and, only if necessary, amend and improve the “hate speech” provisions in the Equality Act; and

22.2. In the event that the “hate speech” provisions remain in the Bill:

22.2.1. Limit the definition and scope of “hate speech” in the Bill to bring it in line with s 16(2) of the Constitution; and

22.2.2. Insert a religious exemptions clause that adequately protects the constitutional right to freedom of religion and religious expression;

Should you have any questions, please do not hesitate to contact us. Please also keep us informed of future developments and invite us to any future discussions in relation to this issue.

Yours faithfully,

R Munthali



Rt Rev Dr Robert Munthali
Moderator

Rev Lungile Mpetsheni
General Secretary