



t +27 21 556 5502
a P.O. Box 50110
West Beach
Cape Town 7441
e info@forsa.org.za
www.forsa.org.za

To: The Select Committee on Security and Justice
For attention Mr Gurshwyn Dixon
Per e-mail: gdixon@parliament.gov.za

Re: Comments on the Cybercrimes Bill [B 6B-2017]

From: Advocate N L Badenhorst
Legal Counsel, *Freedom of Religion South Africa (FOR SA)*
Per e-mail: legal@forsa.org.za

Date: 8 March 2019 (**Deadline for comment: 8 March 2019**)

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1. We refer to the invitation by the Select Committee on Security and Justice (“the Committee”) for written submissions on the Cybercrimes Bill [B 6B-2017] (“the Bill”).
 2. While the revised Bill (which opened for comment on 5 February 2019) is certainly a welcome improvement on the initial version of the Bill, we remain concerned that clauses 14 and 15 (under PART II: “Malicious Communications”) are unnecessary in light of existing legislation and existing legal remedies (such as interdictory relief, and damages claims for defamation and/or economic harm) which can be employed to prevent or sanction “malicious communications”.
 3. We further remain concerned that the same clauses are broader than s 16(2) of the Constitution, and as such potentially open to a constitutional challenge.
 4. We would appreciate the opportunity to make verbal submissions with regard to the Bill, if and when such opportunity presents itself.

ABOUT FOR SA, AND OUR INTEREST IN THE BILL:

5. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a non-profit organisation, working to protect and promote the constitutional right to religious freedom in South Africa. *FOR SA*

currently has an endorsement base of religious leaders representing 6 million+ people in South Africa. Its constituency spans across various denominations, churches and faith groups in South Africa.

6. *FOR SA's* interest in the Bill lies therein that it may criminalise constitutionally protected speech.

SUBSTANTIVE OBJECTIONS:

7. Clauses 2(1), 2(2), 3(2) and 3(3) criminalise whistle-blowers and journalists:

7.1. Our concern with these clauses, is that one could potentially be guilty of an offence simply for being unable to provide a satisfactory explanation for possessing certain data. This poses a massive risk to freedom of expression for especially the press and media, which is quintessential for an open and transparent democratic society.

7.2. In the circumstances, we recommend the inclusion of a public interest defence.

8. Clauses 13 to 15:

8.1. Clause 14 of the Bill criminalises data messages that incite damage to property, or violence (defined in clause 13 as meaning “bodily harm”) against a person or group. Clause 15 of the Bill criminalises data messages that threaten damage to property, or violence against a person or group.

8.2. Section 16(2) of the Constitution states that the following speech is not protected by the Constitution (“unprotected speech”):

- (i) Propaganda for war;
- (ii) Incitement of **imminent** violence; or
- (iii) **Advocacy of hatred** that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.¹ [Own emphasis.]

8.3. In contrast with section 16(2) of the Constitution, the Bill broadens the category of unprotected speech, to speech made with the intention to incite:

- (i) damage to corporeal and incorporeal property; or
- (ii) bodily harm.

¹ Section 16(2) of the Constitution of the Republic of South Africa, 1996.

8.4. In contrast further with section 16(2) of the Constitution, the Bill:

- (i) does not require the incitement of “*imminent*” violence;
- (ii) does not require the advocacy of hatred; and
- (iii) requires the “*intention to incite*”² whereas the Constitution requires actual incitement to take place. (The Bill therefore also causes legal uncertainty as the test in the Constitution is an objective one: is the speech as understood by the reasonable listener in the context inciting harm? On the contrary, the test in the Bill is subjective: did the person have the “*intention to incite*”³?)

8.5. The conduct referred to in clauses 13 to 15 of the Bill, are already criminalised by the *Intimidation Act*,⁴ and covered also by the *Protection from Harassment Act*.⁵

8.6. The inclusion and further criminalisation of such speech in the Bill are therefore unnecessary, serving only to complicate and convolute legislation.


RECOMMENDATION:

9. In the circumstances, we recommend that:

9.1. A public interest defence be inserted in the section entitled “Part 1: Cybercrimes” of the Bill; and

9.2. Clauses 14 and 15 be deleted from the Bill.

We trust that this submission will be assistance to you. Should you have any queries, please do not hesitate to contact us.

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ADV N.L. BADENHORST

Legal Counsel

Freedom of Religion South Africa (FOR SA)

E-mail: legal@forsa.org.za

² Clause 14 of the Bill.

³ Clause 14 of the Bill.

⁴ Act 72 of 1982. Section 1(b) states that a person who publishes words that reasonably causes a person to fear for his safety or the safety of his property is **guilty of an offence**.

⁵ Act 17 of 2011. Section 10(1) empowers courts to issue **protection orders** in respect of harassment (which is defined as either causing mental, psychological, physical or economic harm, or inspiring the reasonable belief that such harm will be caused to the complainant or a related person) and section 11(1) mandates courts who issue (interim) protection orders to simultaneously issue a **warrant of arrest**, which warrant is suspended subject to the offender's compliance with the protection order.