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ASSOCIATION CHRISTIAN MEDIA (ACM) COMMENTS ON THE “HATE SPEECH AND HATE CRIMES BILL (2018)”

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SUMMARY

The definition of ‘hate speech’ in the Bill is overly broad and will likely lead to spurious litigation, criminal charges and threats by special interest groups. We argue that hate speech should not be defined any more broadly than that in Section 16(2) of the Bill of Rights. The definition of publication of hate speech as contained in the Hate Speech Bill would have a ‘chilling effect’ on all reporting and public debate, even in opposition to ‘hate speech’.

The legislation exposes our members to the risk of spurious litigation, censorship, criminal charges and harassment. Certain special interest groups have repeatedly attempted in court and at complaints authorities to misconstrue Christian teaching on sexuality and marriage as ‘hate speech’. This would discourage legitimate discussion on these issues. Existing, civil and criminal law and codes of conduct adequately protect against ‘hate speech’ and there is no need or benefit in new legislation. The revised bill fails to remedy concerns in our previous submission.

INTRODUCTION

The ACM is a non-profit network of Christian media organisations that share a vision of reaching people with the Gospel. The ACM strives to be a unifying force that fosters efficient, effective and sustainable Christian media organizations and a greater representation of the Christian worldview within secular media. The Association of Christian Media’s vision is to extend God’s Kingdom and inspire, serve and support Christian media in Southern Africa. The ACM currently has over 120 members and our members include radio stations, print media, TV channels, electronic media, content providers, churches and individuals involved in mainstream media.

SCOPE OF COMMENTS

These comments only respond to the ‘hate speech’ element of the bill which affects freedom of speech and thus directly affect the core work of the members of the ACM.

DETAILED COMMENTS

The definition of ‘hate speech’ contained in the bill (section 4) is overly broad.

Board

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Categories of 'hate speech'

It captures a mixture of categories of speech including:

The 2016 draft of S4(1)a(i) used the narrow words '*advocates hatred*' correctly following S16(2)(c) of the Bill of Rights. The 2018 draft broadens this to '*promote or propagate hatred*'. The new wording increases the risk of abuse. If the bill is not abandoned, the change should be reversed.

The 2018 draft S4(1) removes the broadly worded S4(1)(a)(ii) 'threatening, abusive or insulting' which is a positive change.

The 2018 draft S4(1) adds '*could reasonably be construed*' which broadens the definition and should be deleted. If the concept of a 'reasonable person's understanding is in any case implied by the common law. Nevertheless the passive 'could' broadens the criterion and is thus dangerous.

The 2018 draft S4(1) broadens the requirement of two criteria 'advocacy' AND 'harm' to one criterion of either 'advocacy' OR 'harm. This increases the risk of abuse. 'AND' is preferred. The 2018 draft bill still defines that: "*“harm” includes any mental, psychological, physical or economic harm*". Psychological 'harm' is extremely broad and open to a stretch of interpretation as anyone who is offended by a statement can argue it affects them psychologically. Thus for example, Christian Bible teaching on marriage and sexuality, which excludes 'same-sex marriage' has been construed as causing 'psychological harm' to homosexuals.

The 2018 draft S4(1) removes S4(1)(ii)(bb) '*stir up violence*': This is a positive change as it is already criminal under existing law for example in the Intimidation Act, 1982 and the Protection from Harassment Act, 2011. It is unnecessary to have a new law criminalising what is already criminal.

The 2018 removes from the 2016 draft S4(1)(ii)bb '*bring into contempt or ridicule*' which is a positive change. This may in certain circumstance be a civil offence under existing law, which may result in a defamation lawsuit with the risk of a financial damages lawsuit. Such speech may also be remedied by complaints to the Broadcasting Complaints Commission or the Press Ombudsman in terms of their codes of conduct.

A criminal sanction (with the risk of a jail sentence) would however; lead journalists and media presenters to err drastically on the side of caution and chill legitimate free speech such as a sarcastic remark or newspaper cartoon. A mathematical and debating method of proving falsehood of a theory is 'reductio ad absurdum'. i.e. Working from the assumptions of a false theory to its absurd conclusions. Proponents of the theory may construe 'reductio ad absurdum' argument as ridicule and thus 'hate speech'. There is a difference between ridicule of an 'idea', which forms part of debate versus ridicule of a 'person' as a human being. Nevertheless, there is no clear distinction in this 'hate speech law'.

The consequences of limiting speech would be unequal, benefitting those special interest lobby groups which are most vociferous in threatening others with criminal 'hate speech' prosecution.

Exception clauses

The 2018 draft bill S4(2) introduces a list of exceptions which is a positive change and offers some protection. Nevertheless, these exceptions are too narrow and do not offer adequate protection.

The protections of S2(a) 'artistic creativity' and S2(d) 'religious' are limited by an apparent circular reference to the previous prohibition criteria in S(1). The risk is that this can be interpreted to protect only view expressed in religious meetings and not religious expression of opinion in a public arena such as the street or in broadcasting. It also fails to protect those who hold the same views on an issue such as morality, but do not hold to a formal religious affiliation and belief. A narrow definition of 'hate speech' based on S16(2) of the Bill of Rights is a better remedy than exception clauses, but failing this broader exceptions are needed. The addition of the words 'judged within context' to would strengthen the protection of artistic, media and religious speech. 'Context' can include for example other statements the same person has made on the same topic.

List of criteria

Both the 2016 and the 2018 draft use a long list of offence categories in S3. The short list in the Bill of Rights S16(2) has less risk of abuse. The change from the 2016 to the 2018 draft is the change of 'belief' to 'political affiliation or conviction' and the addition of 'migrant or refugee status'. There are 'beliefs' that do not fit neatly into either the category of 'religion' or 'political conviction'. A long list increases risk of abuse. The 2018 version omits 'political affiliation and conviction' and 'occupation or trade' from the definition of 'hate speech' (S4) but includes it in 'hate crime' (S3). Thus politically motivated crimes may carry higher penalties than other crimes. This reduces the risk of political statements becoming entangled in criminal courts. It is simpler and safer to omit the political criterion and punish crime equally regardless of alleged political motive.

Broad definition of publication of 'hate speech'

Subsections 4(b) and (c) then categorise as an offence, not only the person who utters the words of 'hate speech', but also anyone who communicates it (b) "(b) Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph ... (c) Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which that person knows constitutes hate speech as contemplated in paragraph (a), which is accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence." The change in the 2018 draft is the need for the person to know the words are 'hate speech'. How this would be proven is unclear since the definition of hate speech is already unclear and open to interpretation.

This would put at risk of criminal sanction not only those 'advocating hate speech' as unprotected speech in terms of Clause 16(2)(c), but also anyone reporting on 'hate speech' or hosting a debate with an advocate of 'hate speech' or quoting 'hate speech' even in criticising the 'hate speech'.

As a case example, in June 2016 national news media reported a man claiming the Bible taught that black people were inferior and must be servants. His statements were not only racially offensive, but factually misrepresenting the Bible. He then accepted a challenge to debate this on an ACM member radio station, but was unable to substantiate his claims from scripture. The audio recording was posted on the internet, shared and reported on by other news media. The public debate discredited his claims and resolved the matter. Had this 'Hate speech bill' been law, the radio station, the organisation posting the debate and the news media sharing and reporting on it all would have been at risk of criminal sanctions.

Sanctions

Section 6 of the bill provides for up to three years in prison for a first offence and up to five years for a subsequent offence. This threat of sanction would discourage legitimate free speech in South Africa, in a different manner to a civil financial penalty.

The Qwelane lawsuit on alleged 'hate speech', which has been ongoing for eight years, during which time this journalist has not been able to practice his profession. Even if ultimately he is vindicated, the effect of inhibiting free speech on himself and other journalists has already been severe. With the threat of jail sentence, the effect would be greater.

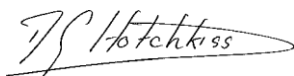
Failure to address the stated motivation of the bill

A proposal for a 'hate speech bill' was considered and abandoned due to strong objections in 2004. At the start of 2016 certain offensive statements published by individuals on the social media platform 'twitter' were shared by thousands of people (offended by it) and then repeated in other public media. These led to calls criminalise 'hate speech', and this history has been cited by certain political leaders as motivation for this bill. Prior to social media, statements of little known individuals would not have gained widespread publicity. It would be impossible to prosecute thousands of individuals sharing on Twitter, but the bill as it stands would put broadcasting and print media at risk.

CONCLUSION

This bill would create a chilling effect on legitimate free speech and debate. There is no need for it as existing law and Codes of conduct at Complaints authorities adequately deal with the matter. The bill should be abandoned. If the state is unwilling to abandon the bill entirely, then the risks can be reduced by narrowing the definition of hate speech in the bill to speech unprotected by section 16(2) of the Bill of rights. If the state is unwilling either to abandon the bill or narrow the definition of hate speech, then the exceptions should be substantially strengthened.

Mandated to sign on behalf of the Board of the Association of Christian Media.



David Hotchkiss



Dave Hotchkiss – Interim Administrator.

