



ECUMENICAL LEADERSHIP COUNCIL
DEVELOPING LEADERS IN OUR COMMUNITY

20 May 2023

To: Hon Mr Gratitude Magwanishe MP
Chairperson Parliamentary Portfolio Committee on Justice and Correctional Services

Attn: Mr Vhonani Ramaano
Committee Secretary

Email: hatecrimes@parliament.gov.za; vramaano@parliament.gov.za

RE: PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9-2018]

Introduction

The Select Committee on Security and Justice has invited the public to comment on the on the Prevention and Combating of Hate Crimes and Hate Speech Bill of 2018 [B9-2018] (the Bill) by the 25 May 2023.

This submission on the Bill is made by the Ecumenical Leadership Council of South Africa which is a not-for-profit organization founded as an association of church organisations, with over 200 organizational affiliates in South Africa, representing more than 17 000 members in our community. The Ecumenical Leadership Council of South Africa supports church organisations by offering leadership development programs, training resources and networking opportunities for its affiliates.

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Summary of our submissions

Through this submission we will seek to establish that the legislature has failed to define the offence of hate speech with sufficient meticulousness through the Hate Crimes and Hate Speech Prevention and Control Bill (the "Bill"). We will attempt to show how the hate speech offence provided for in the Bill overshoots the mark and falls outside the specific exclusion of hate speech provided for in section 16(2) of the Constitution of the Republic of South Africa, 1996 ("Constitution"), thereby violating the right to freedom of expression.

We believe that if this Bill is successful, our affiliates will face bogus litigation, censorship, legal issues, and harassment as a result of the new legislation. Certain interest groups in court have mischaracterized Christian doctrine on sexuality and marriage as "hate speech" on multiple instances. We further argue that new legislation is neither necessary nor acceptable since current civil and criminal laws, as well as behavioral norms, already protect against "hate speech."

In light of this, we contend that the definition of hate speech provided by the Bill is too broad and unjustified, and that the Bill should be substantially amended because the offence of hate speech it contemplates does not comply with the requirements of section 16 of the Constitution.

The impact of the Bill on freedom of religion

Section 16(1) of the Constitution of the Republic of South Africa, 1996 ("Constitution") expressly states that everyone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity, academic freedom, and freedom of scientific research.

We concede that unlike other rights guaranteed by the Constitution, the right to free expression is not absolute. Section 16(2) of the Constitution states that the right to freedom of expression guaranteed by Section 16(1) does not include propaganda for war, incitement of imminent violence, or advocacy of hatred based on race, ethnicity, gender, or religion, which constitutes incitement to cause harm.

Our Constitutional Court has stated that the inclusion of section 16(2) indicates that expression that falls within the scope of section 16(2), including hate speech, does not merit constitutional protection due to the negative effect on the dignity of others and the harm caused by such expression. Furthermore, the language exclusions listed in section 16(2) of the Constitution are not a limitation and so do not require justification.

The legislation establishes the offenses of hate speech and hate crimes. By requiring that hatred of people due to shared characteristics be regarded as an aggravating factor in sentencing and by prescribing minimum sentences for such crimes despite hatred already being considered an aggravating factor for statutory offenses or under existing common law, it provides for harsher punishment for crimes motivated by hatred. While the necessity to firmly combat hate crimes is widely agreed upon, the issue of "hate speech" in general is significantly more contentious due to the potential effects that the proposed legislation may have on the fundamental right to free expression.

The bill, however, goes far beyond the plain intent of section 16 by increasing the number of protected characteristics from four (race, ethnicity, gender, or religion) to 15 and by defining "harm" in a way that encompasses "emotional, psychological, physical, social, cultural, or economic harm"—a term that is so broad and subject to subjective interpretation as to be almost meaningless.

The Bill allows for subjective and biased considerations to determine liability, as opposed to objective facts, by casting an extremely wide net for potential harm and by including a list of characteristics far broader than those contained in the section 9 Equality provision of the Constitution.

The threat to the right to free speech is increased by the potential three-year prison term for hate speech offenders who are found guilty of their first offense. The mere threat of such a severe punishment would immediately compel religious leaders, Christian media, and online publishing sites to self-censor any viewpoint that would enrage any of the 15 groups of potential victims. This would severely impede open discourse on a wide range of subjects.

The bill does extend a broad exemption from its provisions for:

- Any bona fide artistic creativity, performance or other form of expression;
- Any academic or scientific inquiry;
- Fair and accurate reporting or commentary in the public interest; or
- The bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings.

But what about politicians, religious leaders and ordinary citizens participating in robust political debate?

The truth is that if this Bill passes and becomes law, religious leaders, who make up the majority of our affiliates, will have to cross a potentially combustible minefield in order to preach the Gospel. How do religious leaders preach a biblical scripture that says homosexuality is an abomination without being labeled as hate speech and maybe facing criminal charges?

In the Qwelane case, the court ruled that only the most heinous forms of speech should be punished, and that even speech that shocks, offends, or disturbs another person is a constitutionally protected form of expression. The bill's severe measures to punish hate speech might instead and quite easily be used by those with economic, social, or political power to silence their opponents and put an end to tough discussions about race, gender, religion, and sexuality.

It is worth noting that the constitution does not prohibit the state from sponsoring religion, but it does require the state to treat religion equally. S15 read in conjunction with S31 establishes the right of individuals and communities to free exercise of religion. Thus, in South Africa, there is a free exercise component as well as an equal treatment component. Because freedom of religion entails the lack of compulsion or restriction, this right may be harmed by policies that force persons to act or refrain from acting in ways that are contradictory to their religion.

Conclusion

The hate speech provisions in the Bill, according to the Ecumenical Leadership Council if South Africa, are manifestly unconstitutional. This is a fatal flaw, as they cannot be properly adopted by Parliament. They will also weaken the serious debate required for South Africa's democracy. They are more likely to exacerbate racial polarisation and racial hatred if they are implemented unevenly. Furthermore, if the country requires hate speech laws, the crucial requirement is to narrow those already found in Pepuda rather than pass new ones that are equally unconstitutional. The provisions in the Bill dealing with hate crimes are poorly worded and ambiguous. They are also superfluous because courts already have the ability to consider racial motivation into account as an aggravating factor in deciding sentence.



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We further contend that the Bill is unlawful and superfluous, and that it should be abandoned rather than pursued. Instead, the government should concentrate on putting Pepuda's hate speech legislation in conformity with the Constitution. Section 10 of that Act should be rewritten so that it comes clearly within the scope of Section 16(2).

Prepared by

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