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MEDIA BRIEFING:

PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

Cause for Justice ("CFJ") on 31 January 2017 submitted its preliminary comments and proposals on the ***Prevention and Combating of Hate Crimes and Hate Speech Bill*** ("***the Hate Speech Bill***") to the Department of Justice and Constitutional Development (DoJCD).

CFJ is a non-profit human rights and public interest organisation founded in 2013 to advance constitutional justice in South Africa, primarily through participation in the legislative process and governmental decision-making structures, litigation and through creating public awareness on matters of public importance. To read more about the work we do, visit: <http://causeforjustice.org/> and our involvement in the Hate Speech Bill: <http://causeforjustice.org/protection-of-free-speech-cause/>

To view the Bill, follow this link: <http://causeforjustice.org/newsitev2/wp-content/uploads/2016/11/Hate-Crimes-and-Hate-Speech-Bill.pdf>.

To view CFJ's submissions, follow this link: http://causeforjustice.org/newsitev2/wp-content/uploads/2016/01/Hate-Crime-and-Hate-Speech-Bill_Cause-for-Justice-submission_31.01.2017.pdf

Overview of the Bill

The Bill purports to create two new criminal offences in South African law, namely "hate crime" and "hate speech". In terms of the Bill, the penalty for "hate speech" is a fine and/or up to 3 years' jail time for a first offence, and 10 years for a repeat offence.

Overview of CFJ's submissions on the Bill

1. Many definitions in the Bill are over-broad and will have severe implications for FREEDOM OF SPEECH and other freedoms, notably also FREEDOM OF RELIGION. The Bill has the potential to prohibit people to communicate their convictions, thoughts and opinions, no matter how deeply held and objectively supported these may be.
2. It also proposes to criminalise many forms of communication that individuals or groups may experience as "threatening, abusive or insulting".
3. Because the Bill purports to criminalise speech, people may end up going to jail for saying something that is not "politically correct", EVEN IF THEY DO NOT ADVOCATE HATRED OR INCITE HARM AGAINST ANYONE.

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4. The current wording of the Bill is therefore open to a very subjective understanding of core concepts causing criminal liability, resulting in the risk of focusing disproportionately on the feelings and perceptions of the potential receiver of communication, with no objective standard whereby it can be measured for reasonableness.¹

In our submissions, we also made recommendations as to how the DoJCD may attempt to remedy the concerns regarding the Bill and how the ostensible unconstitutionality of the Bill may be cured. **We provide a short overview of the most pertinent recommendations in an annexure hereto.**

For more information about the organisation, e.g. CFJ's mission, vision, and a short background on SA's first euthanasia court case and CFJ's involvement therein, please refer to the CFJ website: <http://causeforjustice.org/causes/>

For all further queries, contact Ms Michelle Davin

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Yours sincerely,

Per: **M Davin**

Legal Administrator and Media Liaison

Sent on behalf of Cause for Justice: Management Committee

¹ Two examples are the definition of 'harm' and 'the wording of the impact of the offense on the victim', as currently contained in the Bill, is broad, which makes it susceptible to both a subjective and an objective interpretation. This is particularly concerning in the context of mental and psychological harm, to the extent that the subjective experiences (hurt feelings or offense) of over-sensitive individuals are given disproportionate weight in determining the consequences of unprotected speech.

CFJ'S RECOMMENDATIONS TO THE DOJCD FOR REMEDIAL ACTION:**(a) The definition of the word “harm” and ‘the wording of the impact of the offense on the victim’**

We propose that the definition of ‘harm’ and ‘the wording of the impact of the offense on the victim’ be clarified to make it clear that these consequences have to be assessed objectively according to the standard of the reasonable person.

(b) The government’s mandate relating to the offense of “hate crime”

As it reads at present, the definition of ‘hate crime’ does not give clarity on whether it will not also apply to someone who commits the newly created crime of ‘hate speech’. There is accordingly a risk of punishing someone who commits hate speech twice, by also finding him/her guilty of a hate crime.

We accordingly propose that the definition of ‘hate crime’ should be amended to specifically not apply to the situation where the ‘base crime’ is hate speech.²

(c) The definition of the offense of “hate speech”

This definition in the Bill is overbroad, unconstitutional and in some instances, unnecessary. Certain liability triggers in the Bill go beyond the description of ‘hate speech’ in section 16(2)(c) of the Constitution.³ South African law already contains –

- criminal offenses for harassment, intimidation and crimen iniuria (the wilful injury to someone’s dignity), as well as
- civil law actions for injury to dignity, damage to person and property and defamation claims.

We accordingly propose the deletion of these liability triggers from the definition of the offense of “hate speech”, as the existing remedies available in law are appropriate to address rude/offensive speech.

(d) Protection of freedom of expression

Hate speech legislation carries the grave risk of chilling all forms of speech in ways that are disproportionate to the risks of harm. It is accordingly necessary to limit the application of hate speech offense so as not to restrict freedom of speech more than is necessary to achieve the purpose of the intervention.

CFJ proposed the inclusion of exemptions/exceptions/defenses in line with the Canadian criminal code, which amongst others provide that a person will not be guilty of hate speech –

- if he establishes that the statements communicated were true;
- if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;
- if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true.

² A hate crime involves punishment for prejudicial motive or bias in selecting a victim of an existing criminal offense. A person who kills someone because he belongs to a specific faith, will be guilty of the ‘base offense’ MURDER and would additionally be found guilty of ‘HATE CRIME’ as his motive was prejudice/bias against the victim’s religious persuasion.

³ These include: “threatening, abusive or insulting” and “bring into contempt or ridicule”.