

Oral Submissions

on the
Prevention and Combating of
hate Crimes and Hate Speech
Bill, 2018

Portfolio Committee on Justice and
Correctional Services

17 May 2022



Content

- 1. Exemption from criminal liability***
- 2. Definition of harm***
- 3. Hate speech – conjunctive reading***
- 4. “To incite harm”***
- 5. New offences: Protected grounds/characteristics***
- 6. Support***
- 7. Ad hoc matters***



Introduction

Background to Cause For Justice (CFJ)

- CFJ core values:
 - Responsible exercise of freedom.
 - Promotion of human dignity/inherent worth of all human beings.
 - Protection of the vulnerable in society (social justice).
 - Protection of the family against destructive outside and inside forces.
 - Ensuring accountable exercise of state power.

Exemption from criminal liability for hate speech

Clause 4(2) – Paras 64 – 93, CFJ written submissions

- Clause 4(2) contains four exemptions from criminal liability for hate speech.
- The clear purpose of clauses 4(2)(a) to (d) is to provide protection from criminal prosecution for **bona fide** expressions that have artistic, literary, academic or scientific merit, are on a matter of public interest, are part of reporting or providing commentary, or is part of a religious or conscientious engagement.
- Clauses 4(2)(a) and (d), need to be amended in order to be effective in its purpose and application.

Exemption from criminal liability for hate speech

Clause 4(2)(a)

- Deletion of the self-defeating proviso
 - The proviso at the end of clause 4(2)(a), which reads “*to the extent that such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)*”, renders the envisaged protection of bona fide artistic and literary works, performances and similar expressions, worthless and of no effect.
- **We propose that it be deleted.**

Exemption from criminal liability for hate speech

Clause 4(2)(d)

- Deletion of the self-defeating proviso
 - The proviso at the end of clause 4(2)(d), which reads *“to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a)”*, renders the envisaged protection of bona fide religious or conscientious engagement worthless and of no effect.
- **We propose that it be deleted.**

Definition of harm (clause 1)

- What is the meaning of “social harm”?
 - Even in academic circles, “social harm” is still an emerging and highly contentious issue. Inclusion of “social harm” carries a real risk of rendering a person criminally liable for ambiguous, unverifiable and/or unmeasurable alleged subjective experiences/consequences of supposed victims.
- Qwelane judgment, Constitutional Court (CC), 2021:
 - “harmful” can be understood as *emotional* and *psychological harm* that severely undermines the dignity of the targeted group as well as *physical harm* (para [155])
- Proposal to address risk of unjustifiable infringement on freedom of expression: **(para 13 – 20, CFJ submissions)**
 - Delete reference to “social harm” from the definition of “harm” (clause 1); or
 - Insert definition of “social harm” in clause 1.

Hate speech - conjunctive reading

Clause 4(1)(a) – Paras 58 – 63, CFJ submissions

to demonstrate a clear intention to—
(i) be harmful or to incite harm; or
(ii) promote or propagate hatred,

- Qwelane judgment, CC confirmed: (paras [102] – [104])
 - To be constitutionally compliant, the two elements, i.e. inciting harm and advocating hatred, must be read conjunctively. It requires the use of “and”, not “or”, to pass constitutional muster.
- Proposal:
 - Remove “or” and replace with “and”.
- Indefensible consequences of not remedying.

“To incite harm”

Section 16(2)(c) of the Constitution

- **Paras 58 – 63, CFJ submissions**
- The Constitution requires that the particular hateful expression incites “harm”. This means that, when objectively observed from the outside, the expression will motivate others to perpetrate “harm” on the intended victim(s).

“To incite harm”

Clause 4(1)(a)(i)

- The harmfulness or not of speech is irrelevant for purposes of hate speech. What is required is the incitement of others to cause harm. Therefore, clause 4(1)(a)(i) should only refer to a clear intention to “incite harm”, but not to “be harmful”.

“To incite harm”

Proposal

- Amend clause 4(1)(a)(i) and (ii) to read:
 - (i) ~~be harmful or to~~ incite harm; **and**
 - (ii) promote or propagate hatred,

New offences: protected grounds/characteristics

Clause 3 and 4 of the Bill

- **Paras 34 – 53, CFJ submissions**
- Various characteristics, which can form the basis for a hate crime, are listed in clause 3(1). The list contains **23** characteristics.
- Clause 4(1)(a), on the other hand, lists **19** grounds which can form the basis of the offence of hate speech.
- **Question:** Why do these two lists differ?

Protected Grounds/Characteristics					Overlapping consensus (Strong agreement)	Overlapping consensus (Less strong agreement)	No consensus	Short-comings of the Bill
	The Bill	Constitution: Hatespeech (section 16(2))	Constitution: Non- discrimination (section 9(3))	PEPUDA				
1	age		age	age		age		
2	albinism						albinism	
3	birth		birth	birth		birth		
4	colour		colour	colour		colour		
5	culture		culture	culture		culture		
6	disability		disability	disability		disability		
7	ethnic origin or	ethnicity	ethnic origin	ethnic origin	ethnic origin			
8	social origin		social origin	social origin		social origin		
9	gender or	gender	gender	gender	gender			
10	gender identity						gender identity	
11	HIV status						HIV status	
12	language		language	language		language		
13	nationality						nationality	
14	migrant status						migrant status	
15	refugee status						refugee status	
16	occupation or						occupation or	
17	trade						trade	
18	political affiliation or						political affiliation or	
19	political conviction						political conviction	
20	race	race	race	race	race			
21	religion	religion	religion	religion	religion			
22	sex, which includes intersex		sex	sex		sex		
23	sexual orientation		sexual orientation	sexual orientation		sexual orientation		
24			pregnancy	pregnancy				pregnancy
25			marital status	marital status				marital status
26			conscience	conscience				conscience
27			belief	belief				belief

New offences: protected grounds/characteristics

- In contradiction to the non-discrimination grounds in section 9(3), Constitution and PEPUDA, the Bill does not include *pregnancy, marital status, conscience, and belief*.
- **Question:** Why were the four grounds not included in the Bill?
- **Question:** What is the justification for including new grounds?
- This will effectively limit freedom of expression as protected in section 16 of the Constitution.

New offences: protected grounds/characteristics

- **Question:** What has changed since 1996, when the final Constitution was passed? The Constitutional Assembly, knowing of all the non-discrimination grounds in section 9(3), chose to only include four grounds in section 16(2)(c).
- During the DoJCD process in respect of the 2016 Bill, we requested the DoJCD to provide explanations/motivations for the discrepancies noted above, but our requests in this regard have to date not been answered.
- **We request the Committee to interrogate the DoJCS in respect of these discrepancies, in order to establish whether there is any rational basis to these departures from section 16(2)(c) and from current law, that passes the limitations test in section 36 of the Constitution (the limitations clause).**

We Support

- Current version of clause 4(1)(b) and (c)
 - The Bill now requires an informed intention to communicate “hate speech” on the part of distributors of hate speech, through the qualifying wording “intentionally” and “which that person knows”.
- Narrowing of **definition of “communication” (clause 1)**
 - Agree with the removal of words “without limitation”
 - Qwelane judgment, CC confirmed: Only **public** communications, excluding private communications (paras [115] – [120])
- Agree with deletion of crimes of incitement, attempts and conspiring in respect of “hate crimes”
 - Formerly included as clause 3(2)(b) and (c) in previous version of the Bill)



We Support

- Clause 4(2): Inclusion of reasonable exemptions from criminal liability for hate speech, subject to proposed changes in respect of clause 4(2)(a) to (d)

Ad hoc matters (covered in CFJ written submissions)

- Absence of a clause to prevent double criminality
- Drafting proposals for Victim Impact Statements
- Commission for the Promotion and Protection of the Rights of Cultural, Religious, or Linguistic Communities' exclusion
- Social context training
- Uniformity of definitions
- International Law vs International Instruments
- **Legislative drafting capacity on CFJ Board of Directors (Prof Malherbe, UCT Legislative Drafting course)**

In summary

- 1. Exemption from criminal liability***
- 2. Definition of harm***
- 3. Hate speech – conjunctive reading***
- 4. “To incite harm”***
- 5. New offences: Protected grounds/characteristics***
- 6. Support***
- 7. Ad hoc matters***

Thank you

E: info@causeforjustice.org

T: +27 (0)84 687 2006

