



30 January 2017

To: T Ross
hatecrimes@justice.gov.za

Written submission from the Association for Progressive Communications to the Department of Justice and Constitutional Development in response to the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill

1. About APC

1.1. The Association for Progressive Communications (APC) is an organisation and network with 50 organisational members in 36 countries, with its chief operating office in Johannesburg, South Africa. APC's vision is that all people have easy and affordable access to a free and open internet to improve their lives and create a more just world. Its mission is to empower and support organisations, social movements and individuals in and through the use of information and communication technologies (ICTs) to build strategic communities and initiatives for the purpose of making meaningful contributions to equitable human development, social justice, participatory political processes and environmental sustainability.

1.2. APC has a strong focus on women and LGBTI people, in particular through the APC Women's Rights Programme, and is involved in advocacy against hate speech, online harassment, and online violence against women and girls.

1.3. APC is an active participant in high-level international ICT policy and human rights discussions. APC has consultative status to the United Nations Economic and Social Council (ECOSOC), is engaged with ICT and policy discussions around the continent, played a leading role in the formulation of the African Declaration on Internet Rights and Freedoms,¹ and has trained professionals from the continent through the African School on Internet Governance (AfriSIG), which is convened annually by APC and the African Union's NEPAD Planning Agency.

1.4. APC thanks the Department of Justice and Constitutional Development for

1 <http://africaninternetrights.org>

inviting written representations at this formative stage in the development of the Draft Bill. We would, further, welcome the Department's invitation for further written and/or oral representations in the development of the Bill in keeping with statute and established jurisprudence regulating the public participation process, and hereby declare our availability to make such representations at the appropriate stage in the development process.

2. Summary of written representations

2.1. Since 2008, a year marked by a devastating wave of xenophobic violence, concerned members and groups from South African civil society have been in discussions about a draft hate crimes bill. APC notes the importance of a hate crimes bill in helping to give effect to South Africa's obligations under the Constitution, international law and international human rights instruments and thus welcomes the release of the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill (referred to below as the Draft Bill) for public comment.

2.2. At the same time APC submits that the drafting of such legislation must be approached with great care so as to prevent any potential conflict with other rights as enshrined in the South African Constitution or in international human rights agreements.

2.2.1. To this end, APC calls on the Department to conduct and publish the results of a socioeconomic impact assessment of the potential implications of the enactment of the Draft Bill and subsequent iterations of it.

2.3. This submission intends to point out important themes and recommendations for your consideration, and also provides specific reformulations of the text addressing points of serious concern, including the following:

2.3.1. By criminalising acts of free expression, Section 4 of the Draft Bill would undermine freedom of expression as enshrined by the Bill of Rights in the Constitution.²

2.3.2. Section 4 of the Draft Bill would also have a negative impact on other rights and freedoms, including freedom of belief, opinion and religion, access to information, the right to education, and equality before and equal benefit and protection of the law.

2.3.3. Hate crimes and hate speech each require different approaches to combat. Acts of free speech should be criminalised only in extreme circumstances and, when necessary, in accordance with the principles of necessity and proportionality, and guided by the relevant constitutional provisions.³

2.3.4. The scope of the Draft Bill was originally anticipated to confine itself to the addition of "hate crimes" to the existing criminal legal

2 Section 16, Constitution of the Republic of South Africa, 1996.
www.gov.za/documents/constitution/chapter-2-bill-rights#16

3 Section 36, Constitution of the Republic of South Africa, 1996.
www.gov.za/documents/constitution/chapter-2-bill-rights#36

framework. Civil society groups such as the Hate Crimes Working Group were, therefore, surprised that the Draft Bill included criminalisation of certain forms of speech⁴ – something which, with the exception of criminal defamation, is inconsistent with a constitutional democracy underpinned by freedom of expression and critical debate. The African National Congress, South Africa's governing party, has rightly agreed to this principle and criminalisation of speech has, *inter alia*,⁵ not formed part of South Africa's criminal legal framework in the Constitutional era.

2.3.4.1. APC is of the view that the Draft Bill must confine itself only to dealing with the creation and regulation of hate crimes as defined within South Africa's prevailing criminal legal framework.

2.3.5. Deepening the constitutional prohibition against direct and/or indirect unfair discrimination against persons and the protection of everyone's inherent dignity especially requires that marginalised people in South Africa have equal protection and benefit from the law. Such protection must include the explicit prohibition of and sanctions for – as well as provide adequate recourse against – “hate crimes” and certain constitutionally unprotected speech through laws of general application.

2.3.5.1. APC welcomes the steps taken by the Department to this end, through the development of this Draft Bill, *inter alia*.

2.3.5.2. APC, however, is concerned that certain provisions of the Draft Bill may give rise to the undue limitation of necessary and constitutionally protected rights.

2.3.6. APC encourages the Department to continue with its programme of deep and meaningful consultation with all stakeholders in the development of this Draft Bill, ensuring that any further drafts as well as the final gazetted Bill be made available to the public in an opportune manner, with adequate time for engagement and response, and utilising all necessary and available consultation mechanisms to solicit inputs that would strengthen the final Bill.

2.4. APC's specific responses to specific provisions in the Draft Bill follow in the sections below. Please note that proposed redactions to the original text are marked with [...] and proposed additions are **bold and underlined**.

2.5. *Ad Section 3: Hate Crimes*

2.5.1. APC welcomes the Department's recognition of the importance of codifying condemnation of prejudice, bias or intolerance and providing remedies to all victims of related crimes through the construction of an exhaustive list – in s3(1) of the Draft Bill – of characteristics or perceived characteristics on which basis the offence of a hate crime would be committed.

2.5.2. Acknowledging the Department's aim to implement instruments that will provide for the criminal prosecution of crimes motivated by hate,

4 Collison, C. (2016, 2 November). Hate speech is not a hate crime. *Mail & Guardian*. <http://mg.co.za/article/2016-11-02-00-hate-speech-is-not-a-hate-crime>

5 Thakali, T. (2015, 17 September). ANC agrees to decriminalise defamation. *Independent Media*. www.iol.co.za/news/politics/anc-agrees-to-decriminalise-defamation-1917706

intolerance and/or prejudice, APC wishes to emphasise the importance of conducting a comprehensive assessment of the impact of the enactment of this or any similar legislation.

2.5.2.1. In particular, APC references the Cabinet's 1 October 2015 decision on the need for a consistent assessment of the socioeconomic impact of policy initiatives, legislation and regulations.⁶

2.5.2.2. To this end, APC calls on the Department to conduct and publish the results of a socioeconomic impact assessment of the potential implications of the enactment of the Draft Bill and subsequent iterations of it.

2.5.3. However, APC has noted some tautologies and redundancies in the list.

2.5.3.1. *Sections 3(1)(b) and (o)* appear to make a distinction between "gender" and "gender identity", respectively.

2.5.3.1.1. APC submits that such a distinction entrenches, through statute, the identification of "sex" with "gender", thereby statutorily asserting the binary (male/female) ideology of gender.

2.5.3.1.2. This, we submit, has the manifest effect of expressly endorsing the exclusion of a range of gender non-conforming people including transgender and gender non-binary people whose "gender identity" *is* their "gender", which must necessarily be distinguished from how they are sexed on the basis of their sexual and reproductive organs.

2.5.3.2. *Sections 3(1)(a) and (e)* appear to make a distinction between "race" and "colour", respectively.

2.5.3.2.1. APC submits that such a distinction ignores the social construction of race, and that the attendant racialisation of persons is inherently based on the colour of their skin.

2.5.3.2.2. By making such a distinction, the Draft Bill would be inadvertently statutorily codifying the ideology of "race" as an objective biological fact, and not the social construction that it is.

2.5.4. Proposed reformulation

2.5.4.1. APC therefore proposes the reformulation of s3(1) as follows:

*3(1) A hate crime is an offence recognised under any law committed by a person, the commission of which [...] is motivated, **in part or in whole**, on the basis of that person's prejudice, bias or intolerance against the victim of the [...] crime*

6 Socio Economic Impact Assessment System (SEIAS).
www.dpme.gov.za/keyfocusareas/Socio%20Economic%20Impact%20Assessment%20System/Pages/default.aspx

in question because of one or more of the following characteristics or perceived characteristics of the victim or **their** family member:

- (a) Race;
- (b) Gender;
- (c) Sex, which includes intersex persons;
- (d) Ethnic or social origin;
- (e) [...];
- (f) Sexual orientation;
- (g) Religion;
- (h) Belief;
- (i) Culture;
- (j) Language;
- (k) Birth;
- (l) Disability;
- (m) HIV status;
- (n) Nationality;
- (o) [...];
- (p) Albinism;
- (q) Occupation or trade.

2.6. Ad Section 4: Hate Speech

2.6.1 Whereas the Draft Bill seeks to give effect to *Sections 9(3) and (4)* of the Constitution, *inter alia*, APC is concerned that the formulation of *Section 4* of the Draft Bill may unduly limit the constitutional right to freedom of expression as provided for in the Bill of Rights and international and regional human rights frameworks including the African Declaration on Human and Peoples' Rights.

2.6.2. The following provisions of the Constitution have relevance:

2.6.2.1. *Section 14* guarantees everyone the right to privacy, which includes the right not to have the privacy of their communications infringed.⁷

2.6.2.2. *Section 16(1)* guarantees everyone 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, and freedom of academic and scientific research.⁸

2.6.2.2.1 The right, however, is not unqualified and, in *s16(2)*, explicitly prohibits speech that constitutes:

7 Section 14, Constitution of the Republic of South Africa, 1996.

www.gov.za/documents/constitution/chapter-2-bill-rights#14

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

www.gov.za/documents/constitution/chapter-2-bill-rights#16

- a. propaganda for war;
- b. incitement of imminent violence; or
- c. advocacy of hatred based on race, ethnicity, gender or religion, *and*⁹ that constitutes incitement to cause harm.¹⁰

2.6.2.3. *Section 36(1)* of the Constitution or the “limitations clause” provides for the further qualification of this right through the promulgation of laws of general application to the extent that the limitation is *reasonable and justifiable*¹¹ in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. *less restrictive*¹² means to achieve the purpose.

2.6.3. APC is of the view that aspects of *s4* of the Draft Bill do not pass constitutional muster in light of the standard set by *Sections 16* and *36* of the Constitution, respectively, to the extent that it is neither reasonable nor justifiable, and institutes overly restrictive means to achieve its purpose.

2.6.3.1. In its construction of the offence of hate speech, *s4(1)* of the Draft Bill defines the scope of its application to “any communications whatsoever”.

2.6.3.1.1. APC submits that by failing to explicitly limit the scope of its application to “public communications”, the criminal prosecution of any person under this provision would directly infringe upon their constitutional right to the privacy of their personal communications.

2.6.3.2. *Section 4(1)(a)(bb)* of the Draft Bill includes the intention to “bring into contempt or ridicule any person as an element of the offence of hate speech.”

2.6.3.2.1. APC is concerned that the criminal prohibition of such speech as may bring one or more people into contempt or ridicule extends too far, and unconstitutionally so, in the regulation of speech.

2.6.3.2.2. Complainants have adequate statutory and common law remedies available to them where they have fallen victim to utterances which are critical or even disparaging of the receiver to the extent that it brings them

9 Our emphasis.

10 Section 16(2), Constitution of the Republic of South Africa, 1996.
www.gov.za/documents/constitution/chapter-2-bill-rights#16

11 Our emphasis.

12 Our emphasis.

to ridicule or contempt. To this end, plaintiffs have recourse to the Promotion of Equality and Prevention of Unlawful Discrimination Act¹³ (PEPUDA), as well as the remedies provided for in well-established common law governing defamation, which also provides for criminal defamation,¹⁴ which can adequately address harm to reputation and/or dignity.

2.6.3.2.2.1 Instead of criminalising such speech as may be considered bringing one or more persons into contempt or ridicule, the Department would be better served widening the scope of the PEPUDA's application to avail remedies to people falling or perceived to be falling within the categories provided for in s3(1) of this Draft Bill, and the Equality Court further strengthened and better resourced to address complaints lodged under the PEPUDA more efficiently and effectively.

2.6.3.2.3. Furthermore, APC must underscore that the impact of the criminalisation of speech NOT constituting unprotected speech in terms of s16(2) of the Constitution or expressly prohibited in line with s16(2) by established statutory and common law instruments supporting this constitutional provision, would have a chilling effect on the enjoyment of the right to freedom of expression.¹⁵

2.6.3.2.3.1. Unfortunate as it may sometimes be, critique and robust speech that may cause offence or be disparaging – even to the extent that it brings a person or group of persons into contempt or ridicule – is an inherent part of the enjoyment of freedom of expression in an open and democratic society based on human dignity, equality and freedom. To legislate against such offence, as this provision of the Draft Bill would, would have a chilling effect on the right to differ and debate as well as all manner of social, political, academic and creative expressions and dialogue that contribute to the diversity of thought, belief and conviction that underpins our democracy.

2.6.3.2.3.2. We need to be able to criticise politicians in order to hold them accountable. We need to be able to criticise members of professions that may perpetrate social and economic injustices, such as unfairly or

13 Act 4 of 2000. www.justice.gov.za/legislation/acts/2000-004.pdf

14 APC continues to remain critical of the criminalisation of defamation as noted in paragraph 2.3.4.

15 APC further wishes to draw the Department's attention to the European Court of Human Rights' judgement in *Jersild v Denmark*, No 15890/89, which expounds further on these principles, has direct relevance for the South African context, and would prove instructive for the Department in its obligation to have due regard for international law where it may apply. <https://www.article19.org/resources.php/resource/2456/en/jersild-v.-denmark>, <http://hudoc.echr.coe.int/eng?i=001-57891>

illegally exploiting the poor for profit. Such criticism in whatever form it may take, be it comedy, satire, art, political or cultural critique, journalism or research, is essential to a healthy and functioning democracy.

2.6.3.3. Criminalising the mere electronic communication or distribution of content that constitutes hate speech without qualification, as *s4(1)(b)* seeks to do, has the manifest effect of alienating persons' constitutional right to freedom of expression as contemplated in *s16(1)*.

2.6.3.4. APC can offer any number of scenarios in which there may be legitimate or justifiable electronic communication of speech constituting "hate speech" which would be criminalised by *s4(1)(b)*.

2.6.3.4.1. By way of example, media outlets republishing electronic communications such as Facebook posts, tweets and YouTube videos exhibiting the commission of hate speech by offending individuals would be held criminally liable for merely reporting on this as an issue of arguable public interest. This would clearly be an undesirable outcome, and interfere directly with the media's role of informing the public and facilitating dialogue on issues of public interest.

2.6.3.4.2. Similarly, the republication of the offending communication for the purposes of academic study, advocacy or even merely alerting people and institutions to the commission of the offending speech online would also be criminalised.

2.6.3.5. APC is also concerned that in its formulation of *s4(1)(b)*, the Draft Bill does not appear to have fully contemplated the dynamics of the publication and distribution of user-generated content on social media platforms, and would unintentionally and unreasonably expose users of these platforms to criminal liability.

2.6.3.5.1. By way of example, as was seen in the case of the racist utterings made by Penny Sparrow¹⁶ on Facebook in early 2016, an overwhelming number of users of various social media platforms shared links to and images of the offending post out of outrage and with the intent of holding her and those who supported her views accountable. As a direct result:

a. Sparrow was reported to, convicted and fined by the South African Human Rights Council;

b. National public debate about the extent of and strategies to combat racism and other forms of prohibited speech in South Africa was catalysed; and

c. The Department accelerated its efforts to combat constitutionally unprotected forms of speech through the

16 eNCA. (2016, 4 January). #PennySparrowMustFall: Estate agent feels Twitter wrath after racist post. eNCA. <https://www.enca.com/south-africa/penny-sparrow-feels-twitter-wrath>

development of this Draft Bill, *inter alia*.

2.6.3.5.2. It is clear that were the republication of this offending content criminalised in the same way that *s4(1)(b)* purports to in the case of hate speech, the necessary outcomes outlined in the paragraph above would not be achieved, and it would have a manifest chilling effect¹⁷ on expression and robust debate and dialogue in a society that is still grappling with the contemporary effects of historical oppressions.

2.6.3.6. As a result, *s4(1)(b)* of the Draft Bill must clarify whether its application speaks only to the initial publication of the offending electronic communication or extends to the republication of such communication.

2.6.3.7. Further, where its application is intended to extend to the republication of such offending communications, the Draft Bill *must* clarify the instance and context in which such republication may be justified in order to prevent unreasonable criminal prosecution and conviction as would ensue in the examples offered above.

2.6.3.8. APC, therefore, proposes the removal of *s4* from the Draft Bill altogether; *or*

2.6.3.9. The reformulation of the section.

2.6.4. **Proposed reformulation**

*4(1)(a) Any person who intentionally, by means of any **public** communication whatsoever, communicates to one or more persons in a way that –*

(i) ...

(ii) ...

and which demonstrates a clear intention, having regard to all the circumstances to –

(aa) ...

*(bb) stir up violence against [...] any person or group of persons **and/or their property**, based on **the characteristics or perceived characteristics provided for in s3(1)(a)-(q)** is guilty of the offence of hate speech.*

(b) [...]

(c) ...

2.7. Ad Section 6: Sentencing

2.7.1. Under Article 19 of the International Convention on Civil and

¹⁷ It is worth noting that this chilling effect may take various forms, including situations wherein members of the general public, as well as artists, researchers and journalists, may be too afraid to create and share certain content which may not constitute hate speech as provided for due to a perceived risk that it would be considered as such.

Political Rights¹⁸ to which South Africa is a signatory and has ratified, when restricting free speech governments must demonstrate that the restrictions undertaken meet legitimate aims and are necessary to achieve these aims.

2.7.1.1. The punishment for offences should also be proportionate to the offence.

2.7.1.2. Furthermore, imprisonment for hate speech should only be a last resort in punishment of hate speech offences and only imposed in rare cases

2.7.2. APC submits that whereas the criminal intention to “stir up violence” or “incite harm” may warrant a prison sentence as provided for in prevailing statute and common law, the Draft Bill’s provision for imprisonment of offenders for the speech itself is neither necessary for dealing with the offences nor proportionate in their punishment of these offences for the same reasons outlined in paragraph 2.3, above.

3. Conclusion

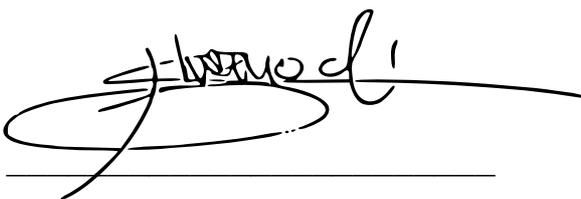
3.1 APC reiterates its thanks to the Department of Justice and Constitutional Development for inviting written representations at this formative stage in the development of the Draft Bill.

3.2 In keeping with its commitment to an open and consultative process towards the further development and strengthening of this Draft Bill, we call on the Department to make available all submissions, through online or other means, to further engender its culture and practice of openness, transparency and dialogue.

3.3. APC further calls on the Department, at the final stage of the development process of this Draft Bill and prior to the tabling of a finalised Bill before Parliament, to publish a reasons paper consolidating the arguments presented by all engaging in the public consultation process and articulating its reasons for adopting the positions it will have in the final Bill.

3.4. APC would, further, welcome the Department’s invitation for further written and/or oral representations in the development of the Bill in keeping with statute and established jurisprudence regulating the public participation process, and we hereby declare our availability to make such representations at the appropriate stage in the development process.

Yours sincerely,



Sekoetlane Phamodi

18 United Nations General Assembly. (1966). International Covenant on Civil and Political Rights. www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

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