



t +27 021 556 5502
a P.O. Box 50110
West Beach
Cape Town 7441
e info@forsa.org.za
www.forsa.org.za

To: The Parliamentary Portfolio Committee on Communications
p/a Mr Thembinkosi Ngoma
per e-mail: tngoma@parliament.gov.za

Re: Comments on the Film and Publication Board (FPB) draft Online Regulation Policy and the Films and Publications Amendment Bill

From: Advocate N L Badenhorst
Legal Counsel, *Freedom of Religion South Africa (FOR SA)*

Date: 8 September 2016

Summary of submissions

1. As an organisation working to protect and preserve religious freedom in South Africa, *Freedom of Religion South Africa (FOR SA)* is concerned that the proposed definition of “hate speech” in the Bill:
 - a. is over-broad and an impermissible limitation on freedom of speech, and for that reason unconstitutional. (In this regard, see **paras 7 – 14** below); and
 - b. could have a major chilling effect on religious freedom, and free speech. (In this regard, see **paras 15 – 21** below).
2. FOR SA recommends that the presumably unintended, but nonetheless unconstitutional, consequences of the current definition of “hate speech” in the Bill, be avoided or eliminated by defining “hate speech” in the Bill exactly as it is defined in s 16(2) of the Constitution. (In this regard, see **paras 22 – 23** below).

Dear Sir,

The above matter refers.

We have been requested by the Association of Christian Media (ACM), to provide a supporting submission, providing legal opinion on the definition of “hate speech” in the Draft Films and Publications Amendment Bill (“the Bill”). This is in response to two queries at the Parliamentary Hearings on 31 August 2016. The first, by Parliamentary Communications Committee Member Mr Rembuluwani Moses Tseli MP, asked for clarification on the legal difference between the definition in the draft Bill and that in the Bill of Rights. The second question, by the Chairman Mr Humphrey Maxegwana, related to the constitutionality of the proposed Bill. We will restrict our comment to the constitutionality of the definition of ‘hate speech’ in the Bill. The Committee Secretary, Mr Thembinkosi Ngoma, kindly provided an extension of time to Friday, 9 September 2016 to make this supporting submission.

We apologise for filing our submissions at this stage only, and kindly request your indulgence in this regard. We did not in fact anticipate that it would be necessary for us to file submissions at all, as we believed that the submissions made by other parties / organisations who work in the same field, would include and adequately address our own concerns. Consequent to the public hearings however, it appears that there may be a need for greater clarity regarding the (legal) concerns raised by multiple parties (including the ACM) with regard to the proposed definition of “hate speech” in the Bill. It is against this background that we make the present submissions, which we trust will aid the Committee in its deliberations of the Bill.

About FOR SA:

1. *Freedom of Religion SA NPC (2014/099286/08) (FOR SA)* is a non-profit, non-denominational Christian organisation, that serves to protect and preserve religious freedom in South Africa.
2. *FOR SA* represents the views of over 5 million Christians from a cross-spectrum of Christian denominations who have authorized *FOR SA* to speak on their behalf (to government and Parliament) to address relevant issues as a united Christian voice.
3. As such, *FOR SA* is a voice for the Christian Church in South Africa on issues affecting our freedom of religion, freedom of religious expression, freedom of association and the rights of religious communities in South Africa. All of these are fundamental rights entrenched in our

Constitution. As such, the State as well as the citizens of South Africa, have an obligation to respect, protect and promote these rights.

FOR SA's interest in the current matter:

4. As already explained, *FOR SA* concerns itself with matters (incl. draft policy and legislation) that may impact upon South Africans' freedom of religion and freedom of religious expression.
5. While we commend the intent the Bill and support the legislative efforts to protect children from the harmful effects of exposure to pornographic material, we are concerned that the proposed definition of "hate speech" in the Bill¹:
 - a. is over-broad and an impermissible limitation on freedom of speech, and for that reason unconstitutional; and
 - b. could have a major chilling effect on religious freedom, and free speech.

Sections in the Bill relating to "hate speech"

6. The sections in the Bill that relate to "hate speech" (and for which the definition of "hate speech" is thus relevant), are as follows:
 - a. *"1. Section 1 of the Films and Publications Act, 1996 (Act No. 65 of 1996) (hereinafter referred to as the principal Act), is hereby amended—*
 - (i) *by the insertion after the definition of "game" of the following definitions: 'hate speech' includes any speech, gesture, conduct, writing, display or publication which is prohibited in terms of section 16(2) of the Constitution of the Republic of South Africa, 1996, which propagates, advocates or communicates words against any person or identifiable group, which words could reasonably be construed to demonstrate a clear intention to be harmful, to incite harm and promote or propagate hatred against the said person or identifiable group;";*
 - b. *"16. Section 16 of the principal Act is hereby amended –*
...
 - (f) *by the substitution in subsection 4(a)² for subparagraph (ii) of the following subparagraph:*

¹ S 1(i) of the Bill

(ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within the context, the publication is [, except with respect to child pornography,] a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest in which event the publication shall be classified with reference to the guidelines relating to the protection of children from exposure to disturbing, harmful or age-inappropriate materials."

c. "19. The following sections are hereby inserted in the principal Act after section 18:

18H. Prohibition against propaganda for war, incitement of violence and hate speech

*No person may distribute through any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, **or advocates hate speech***".

d. "27. The following sections are hereby inserted in the principal Act after section 24C:

24G. Prohibitions, offences and penalties on propaganda for war, incitement of violence and hate speech

*Any person who knowingly distributes, in any electronic medium including the internet and social networking sites, any film, game or publication which advocates propaganda for war, incites violence, **or advocates hate speech**, shall be guilty of an offence and liable upon conviction, to a fine not exceeding R150,000 or to imprisonment for a period of not exceeding two years or to both a fine and such imprisonment."*

e. "28. Section 27A of the principal Act is hereby amended –

(a) by the substitution for subsection 2 of the following subsection:

² Section 16(4)(a) of the principal Act provides as follows:

"(4) The classification committee shall, in the prescribed manner, examine a publication referred to it and shall—

(a) classify that publication as a "refused classification" if the publication contains—

(i) child pornography, propaganda for war or incitement of imminent violence; or

(ii) the advocacy of hatred based on any identifiable group characteristic and that constitutes incitement to cause harm, unless, judged within context, the publication is, except with respect to child pornography, a bona fide documentary or is a publication of scientific, literary or artistic merit or is on a matter of public interest;

(b) ..."

- (2) *If an [Internet] service provider has knowledge that its services are being used for the hosting or distribution of child pornography **or advocating racism and hate speech**, such [Internet] internet service provider shall – ...”*
(providing for the penalties that shall apply).

The Bill’s definition of “hate speech” is over-broad, and vague:

7. Section 16 of the Constitution guarantees freedom of speech as a fundamental human right.
8. In terms of s 16(2), the only speech that is not protected by this guarantee (i.e. that amounts to “hate speech”), is:
- a. *“Propaganda for war;*
 - b. *Incitement of imminent violence; or*
 - c. *Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.”*

9. The current definition of “hate speech” in the Bill reads as follows:

*“**hate speech** includes any speech, gesture, conduct, writing, display or publication which is prohibited in terms of s 16(2) of the Constitution of the RSA, 1996, which propagates, advocates or communicates words against any person or identifiable group, which **words could reasonably be construed to demonstrate a clear intention to be harmful**, to incite harm and promote or propagate hatred against the said person or identifiable group”³*

10. Comparing the definition of “hate speech” in the Constitution and the Bill, it is clear that the definition in the Bill is much wider:
- a. In terms of the Constitution, speech will only qualify as “hate speech” if it amounts to “advocacy of hatred”. This implies more than just a neutral or casual statement. It includes a coercive element, deliberate intent and effort to convince another to adopt a particular attitude or position. It requires “calling for” or “making a case for” hatred, and is therefore a higher threshold than the mere “*communication of words*” (as required by the Bill);

³ Section 1(i) of the Bill

- b. In terms of the Constitution further, the “advocacy of hatred” must be based on one of the listed grounds, namely race, ethnicity, gender and religion. (This list is a closed list, and does not extend to other grounds). In terms of the Bill however, the “hate speech” is not restricted to the listed grounds; and
- c. In terms of the Constitution further, it is not enough for a reasonable person to believe that the speech has the “*intention to be harmful*” (as required by the Bill). What is required, in terms of the Constitution, is that the speech actually “constitutes incitement to cause harm”, i.e. that there is a pressing, or stirring up, of someone to act in a violent or physically harmful manner. This is an objective enquiry, a question of fact. What the Bill requires, is something quite different and with respect, vague and confusing as, on the one hand, it requires an enquiry into the intention of the speaker (thereby including a subjective element in the enquiry), but on the other hand, an enquiry into what a reasonable person would have inferred from the speech (thereby including an objective element in the enquiry).
11. It is clear that this definition of “hate speech” in the Bill places greater limitations on freedom of speech than the Constitution itself (in s 16(2)(c)), as such is over-broad and for this reason, unconstitutional.
12. Likewise, s 16(f) of the Bill⁴ goes further than the Constitution, in that it does not restrict the scope of prohibited grounds to the closed group in s 16(2)(c) of the Constitution, but broadens the scope to “*advocacy of hatred based on any identifiable group characteristic*”⁵.
13. In this regard also, we mention that an application challenging the constitutionality of the “hate speech” section in the Equality Act (s 10) which, likewise, is broader than the Constitution, is currently pending before the Johannesburg High Court (**DJ Qwelane v Minister for Justice & Others**, Case number 36314/2013). The matter was enrolled for hearing, commencing on 29 August 2016 but was postponed *sine die* given the Applicant’s ill health.
14. Should the current definition of “hate speech” in the Bill be allowed to remain, we respectfully submit that it is very possible that the provisions of the Bill, likewise, will be challenged for being over-broad and for that reason, unconstitutional and invalid.

⁴ Para 6(b) above

⁵ As defined in s 1 of the principal Act

Chilling effect on religious freedom, and free speech:

15. A second problem with the current definition of “hate speech” in the Bill, is the chilling effect that it could have on the fundamental rights of religious freedom, and free speech.
16. In this regard, we respectfully remind the Committee that the right to free speech (including religious speech) is an exceptionally important right in the Constitution, and indeed a cornerstone of a democratic society like ours.
17. While the Constitution clearly prohibits “hate speech” (as narrowly defined in s 16(2)(c) of the Constitution), it does not prohibit speech which individuals, or indeed certain groups in society, may find unfavourable or even offensive for e.g. holy texts from the Bible or the Koran.
18. Should the current definition of “hate speech” in the Bill be allowed to remain, it could have a chilling effect on religious freedom and free speech, in that the definition could be employed to muzzle, and/or have the unintended effect of muzzling, believers across the different faith groups from expressing (through “film”, “publication”⁶ and now also on “social media”⁷, as defined in the Act and in the Bill) their sincerely held religious convictions and beliefs, which may be interpreted by those who hold to different convictions and beliefs, as unfavourable, offensive or “(intending to be) harmful” to them.
19. As a result of the current definition of “hate speech” in the Bill, believers would be placed in the impossible situation of exercising a choice between obeying their religious convictions or beliefs, or obeying the law, with the threat of punishment (in the form of financial penalties) should they choose to obey their religious convictions rather than the law. No person should ever have to exercise such an unconscionable choice, and the State (as a protector and defender of the Constitution) should protect its citizens from having to do so.
20. By way of example, should the current definition of “hate speech” in the Bill be left unaltered, activists who drive an anti-religion agenda will no doubt rely on the prohibition to target religious groups and people of faith, in an effort to stop or hinder the publishing (in print form, or online through the internet or social media) of content of a religious nature, which they (the secularists) regard as unfavourable, offensive or “(intending to) be harmful” to their own cause. This is already happening overseas, and also in South Africa in the context of other equality and hate speech provisions.

⁶ See s 1(n) of the Bill, broadening the already broad definition of “publication” in s 1 of the principal Act

⁷ See s 1(p) of the Bill, including and defining “social media” in s 1 of the principal Act

21. In fact, should the current definition of “hate speech” in the Bill be left unaltered, those who oppose a Christian worldview will potentially use that very definition to argue that the Bible contains Scriptures relating to sexual immorality which are unfavourable, offensive or “(intending to be) harmful” to them or to their cause. As such, the Bible contains “hate speech” and is prohibited, in terms of the Act, from being printed, distributed or published online in South Africa. (The same argument could apply in respect of the Koran, or any other holy text). This is an extreme example, but explains the unintended and absurd consequences that the definition (in its current form) could have.

Proposed solution:

22. We submit that the presumably unintended, but nonetheless unconstitutional, consequences of the definition of “hate speech” in its current form, can be avoided or eliminated by defining “hate speech” in the Bill, exactly as it is defined in s 16(2) of the Constitution.

23. In the context of the Bill, the amended definition of “hate speech” would then read as follows:

“hate speech includes any speech, gesture, conduct, writing, display or publication which amounts to:

- a) the incitement of imminent violence; or*
- b) the advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm, as contemplated by s 16(2) of the Constitution”*

THE END.