



NAB
National Association of Broadcasters

**NAB WRITTEN SUBMISSION TO THE DEPARTMENT OF
JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE
PREVENTION AND COMBATING OF HATE CRIMES AND
HATE SPEECH BILL**

31 JANUARY 2017

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1. Introduction

- 1.1. The National Association of Broadcasters (the NAB) is the leading representative of South Africa's broadcasting industry, established in 1993. The NAB aims to further the interests of the broadcasting industry in South Africa, by contributing to its development. The current NAB members are:
 - 1.1.1. the three television services and 18 radio services of the SABC;
 - 1.1.2. licensed commercial radio broadcasters (including: Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, TMG, Classic FM, Kaya FM, YFM, Smile FM and Vuma FM);
 - 1.1.3. licensed commercial television broadcasters (e.tv, Multichoice, M-Net, StarSat);
 - 1.1.4. a host of community radio broadcasters and community television broadcaster, Faith Terrestrial;
 - 1.1.5. both the licensed broadcast signal distributor and the selective and preferential broadcast signal distributors, Sentech and Orbicom;
 - 1.1.6. associate members, including training institutions.
- 1.2. On 24 October 2016, the Department of Justice and Constitutional Development (the DoJ), published in government gazette number 40367, an invitation to interested parties to comment on the Prevention and Combating of Hate Crime and Hate Speech Bill (the Bill). The closing date for written comments was initially 1 December 2016, and was subsequently moved to 31 January 2017.
- 1.3. The NAB would like to thank the DoJ for the opportunity to submit its written submission, and we would like to be given an opportunity to participate in oral hearings, and any further consultations the DoJ may have.

2. Background

- 2.1. Given the historic context of South Africa's past apartheid regime and in the wake of the prevalence of social media and the abuse thereof, the NAB supports the spirit of the Bill in so far as it seeks to:
 - 2.1.1. give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination,

- xenophobia and related intolerance in accordance with international law obligations;
- 2.1.2. provide for the offence of hate crimes and the offence of hate speech and the prosecution of persons who commit those crimes;
 - 2.1.3. provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences;
 - 2.1.4. provide for the prevention of hate crimes and hate speech;
 - 2.1.5. provide for the reporting on the implementation, application and administration of this Act;
 - 2.1.6. amend certain Acts of Parliament.
- 2.2. However, the NAB is concerned that should the Bill be passed in its current form, it is likely to yield undesired results. The NAB would therefore like to make proposals to the DoJ in addressing the short-comings of the Bill.

3. Timing concerns

3.1. National Action Plan

In 2016, the DoJ published a National Action Plan (the NAP) for public comment. The purpose of the NAP is among others, “to build a non-racial, non-sexist society based on the values of human dignity, equality and the advancement of human rights and freedom. It intends to combat racism, racial discrimination, xenophobia and related intolerance”. According to the Minister, the NAP is meant to provide the basis for the development of a comprehensive policy framework against racism, racial discrimination, xenophobia and related intolerance. While the NAB appreciates that the NAP is meant to lay a policy framework to pave ways for the formulation of legislation, to our knowledge, the NAP has not yet been finalised. This therefore raises a concern around the timing of the Bill.

3.2. Minister’s media briefing on the launch of the Bill

3.2.1. The Minister in his media briefing held on 24 October 2016 on the launch of the Bill¹ indicated that steps are underway to amend the Promotion of Equality and Prevention of the Unfair Administration Action (PEPUDA), in order to build on the existing measures in PEPUDA. He further indicated that it was envisaged that the amendments would be tabled before Parliament in 2017.

¹ http://www.justice.gov.za/m_statements/2016/20161024-HateCrimes.html

3.2.2. The NAB is on the other hand concerned that the schedule of amendments to the Bill² does not reflect PEPUDA as one of the laws to be amended. While the NAB is aware that the scope and ambit of PEPUDA is on civil matters, to a certain extent, the NAB believes there is scope to deal with offences of hate crime and offences of hate speech via PEPUDA. Section 10(2) of PEPUDA recognises the role of the criminal justice system in addressing issues of hate speech. The Act empowers courts to refer any case dealing with publication, advocacy, propaganda or communication of hate speech to the Director of Public Prosecution having jurisdiction on criminal proceedings in terms of common law or relevant legislation. The NAB will make detailed inputs and suggestions once the public consultation process for the amendment of PEPUDA has been initiated.

3.2.3. It is therefore our view that the DoJ ought to attend to amending PEPUDA before considerations for a new Bill are made, as amending PEPUDA may fill the gaps the Bill is seeking to address.

4. Multi-stakeholder engagements

The NAB welcomes the level of engagement undertaken on the Bill. Among others, civil society organisations initiated multi-stakeholder engagements that were also attended by DoJ officials. The NAB is encouraged by the participation of government officials at such fora as it assists in better understanding the objectives of the proposed legislation. The NAB notes that in the multi-stakeholder engagements, the DoJ advised that a social impact assessment study (SIAS) was conducted prior to publishing the Bill, and furthermore, a victim impact assessment study (VIAS) will also be conducted once written inputs have been received. The NAB appeals to the DoJ to make the outcome of the SIAS publicly available, as well as that of the VIAS once conducted.

5. Specific comments on the Bill: scope of "hate speech"

5.1. During the multi-stakeholder engagement, various parties raised concern with the definition of hate speech is not aligned with the definitions as outlined in the Constitution and PEPUDA. The proposed offence of hate speech contemplated in section 4(1) of the Bill extends beyond the hate speech qualification in section 16(2) of the Constitution, and

² On page 13 of the Bill.

therefore falls within the terrain of expression which is protected by the right to freedom of expression in section 16(1) of the Constitution. We therefore request the DoJ to consider making the necessary alignments with the Constitution.

- 5.2. In 4(1)(ii) the words “threatening, abusive or insulting” are an over-reach as these are not included in the Constitution. In addition, the Bill widens the categories of hate crime to include for example, occupation or trade, HIV status, albinism, etc. Whilst these issues are important, it may be more appropriate to include such a list in amendments to the PEPUDA legislation.

6. International instruments on Human Rights

One of the objects of the Bill is to give effect to the Republic’s obligations in terms of the Constitution and International Human Rights instruments concerning racism, racial discrimination, xenophobia and related intolerance in accordance with international law obligations, however the Bill fails to list the said International laws. While there is a move internationally to advocate against hate speech, there is no specific international convention that directly addresses hate speech³. However, there is a variety of international instruments addressing the issue of freedom of expression. For purposes of this submission, we have identified a few key instruments (local and international) as set out below, as well as existing frameworks that address hate speech in the regulated broadcasting sector.

7. The Universal Declaration of Human Rights

As the cornerstone for Human Rights, the Universal Declaration of Human Rights (the UDHR) recognises the fundamental importance of freedom of expression as an individual human right, and a foundation for democracy, as a means of ensuring respect for all human rights and freedoms.

8. The Declaration of Principles on Freedom of Expression in Africa

The Declaration of Principles on Freedom of Expression in Africa recognises the right to freedom of expression as a fundamental right⁴. In terms of the Declaration, freedom of expression is not an absolute right, but is subject to limitations. The Declaration provides that freedom of expression:

³ UNESCO. (2015).

⁴ Passed at the African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia.

“should not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression”.

9. The International Covenant on Civil and Political Rights

According to UNESCO⁵, the International Covenant on Civil and Political Rights (the ICCPR) is the instrument mostly referred to in debates on hate speech. The ICCPR recognises the right to freedom of expression, and provides that such a right may be subject to certain restrictions, which may be stipulated by law.

10. The SA Constitution and the Bill of Rights

- 10.1. In terms of the Constitution of South Africa, the Constitution “is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled”. In other words, the Constitution enjoys supremacy, and any law that is not aligned to the constitution can be nullified.
- 10.2. Within the Constitution is the Bill of Rights, which seek to enshrine the rights of all people in the country and affirm the democracy values of human dignity, equality and freedom. The state is obliged by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights.
- 10.3. The rights in the Bill of Rights are not absolute, but are subject to limitations, and such rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom⁶.
- 10.4. Enshrined in the Bill of Rights is the right to freedom of expression. According to section 16(1) of the Constitution, everyone has the right to freedom of expression, which includes-
 - 10.4.1. Freedom to the press and the media;
 - 10.4.2. Freedom to receive or impart information or ideas;
 - 10.4.3. Freedom of artistic creativity; and,
 - 10.4.4. Academic freedom and freedom of scientific research.

⁵ UNESCO. (2015). Word Trends in Freedom of Expression and Media Development. Special Digital Focus 2015.

⁶ Section 9 of the Constitution.

- 10.5. Section 16(1) of the Constitution outlines protected speech, and protects the freedom of expression to the press and the media, and the right to receive and impart information which is of an artistic and creative nature, and of an academic and scientific research nature. It is regrettable that these protections, which are pivotal to the media in general, and to the broadcasting sector in particular, have not been carried into the Bill. The NAB therefore believes that the Bill should have consideration for the protection of broadcasts carried out for bona *fide* purposes, in the public interest.
- 10.6. Furthermore, the DoJ should be aware that broadcasting is a medium that educates and informs citizens, and by its very nature, is a useful tool to report on issues of hate speech and further facilitate dialogue on such issues in the public interest. In this context, the NAB is of the view that it is the responsibility and role of the media to identify and expose incidences of hate speech and that in doing so broadcasters should not be construed as “advocating” hate speech. Broadcasters play a critical role in ensuring that the problem is kept in the public domain and within the public discourse so as to support the objectives of combatting hate speech.

11. The Promotion of Equality and Prevention of Unfair Discrimination Act

- 11.1. In order to give effect to the provisions of section 9 and 36 of the Constitution, Parliament, in 2000 promulgated PEPUDA. Section 12 of PEPUDA gives life to the protections introduced by section 16(1) of the Constitution in relation to broadcasting services and provides:

“No person may-

- (a) disseminate or broadcast any information;
- (b) publish or display any advertisement or notice

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided bona fide engagement in artistic creativity, academic and scientific inquiry, far and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section”. [our emphasis]

12. Advertising Standards Authority of South Africa

In terms of section 55(1) of the Electronic Communications Act 26 of 2010, (the ECA) all broadcasting service licensees must adhere to the Code of Advertising Practice determined and administered by the Advertising Standards Authority of South Africa ("the ASA Code"). The ASA Code prohibits advertisements which contain discriminatory content unless such discrimination is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁷ The scope of the ASA Code generally excludes political advertisements and advertisements which express an opinion on a controversial matter involving issues within the areas of public policy and practice.⁸

13. The Film and Publication Act as amended

The Film and Publication Board is required to classify a film, game or publication as "refused" under section 16 of the Film and Publications Act, 1996 if it contains propaganda for war or incites imminent violence, or advocates 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 interest⁹

14. The ICASA Broadcasting Code of Conduct

ICASA administers a Code of Conduct for broadcasters (the ICASA Code of Conduct)¹⁰. In line with section 16 of the Constitution the ICASA Code of Conduct prohibits the broadcasting of violence and hate speech. However, the Code allows for exclusions in instances where "a broadcast which, judged within context, amounts to a *bona fide* scientific, documentary, dramatic, artistic, or religious broadcast; (2) a broadcast which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or (3) a broadcast which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest.

15. Broadcasting Complaints Commission of South Africa Codes

15.1. In terms of section 54 of the ECA, the ICASA Code of Conduct does not apply to a broadcaster who is a signatory and member of a body which to the satisfaction of ICASA

⁷ Clause 3.4 of the ASA Code. "Discrimination" is defined in clause 4.17 of the ASA Code

⁸ Clause 2 of the ASA Code.

⁹ Section 16(4) and 18(3) of the Films and Publications Act.

¹⁰ Published on 6 July 2009 in government gazette number 32381.

administers a code of conduct enforced by such a body. In 1993, the NAB established the Broadcasting Complaints Commission of South Africa (the BCCSA), a body as recognised by ICASA, that is responsible for administering two codes of conduct for broadcasting services licensees, namely the Free-to-Air Broadcasting Code, and the Subscription Broadcasting Code (the BCCSA Codes)¹¹. Likewise, the two BCCSA Codes prohibit the broadcasting of violence and hate speech, but also allow for exclusions in instances where “a broadcast which, judged within context, amounts to a *bona fide* scientific, documentary, dramatic, artistic, or religious broadcast; (2) a broadcast which amounts to a discussion, argument or opinion on a matter pertaining to religion, belief or conscience; or (3) a broadcast which amounts to a *bona fide* discussion, argument or opinion on a matter of public interest”.

- 15.2. Based on the provisions of the stipulated international instruments, the Constitution of South Africa, as well as the provisions of the regulatory/self-regulatory codes of conduct governing the broadcasting sector, it is clear that the right to freedom of expression is not absolute, but is subject to limitations and are permissible only where carried out in a *bona fide* manner in the public interest.

16. Inter-governmental engagements

The NAB supports the proposal to have inter-governmental awareness campaigns, as provided for by section 9(2) of the Bill. In furthering the efforts of this initiative, the NAB advocates for a coordinated transparent and collaborative effort by the various identified departments in order to avoid duplication whilst ensuring alignment across the various departments.

17. Conclusion

- 17.1 The NAB welcomes the opportunity to make its written comments to the DoJ.
- 17.2 The NAB is concerned about the timing of the Bill, as the NAP has not yet been finalised, which is set to lay a policy framework for the Bill. The NAB further proposes that, before proceeding with the Bill, the DoJ should attend to the amendment of PEPUDA to fill any gaps the Bill is seeking to address.

¹¹ <http://bccsa.co.za/codes-of-conduct/>

17.3 Furthermore, the NAB proposes that in line with protections in the Constitution, existing legislation, together with self-regulatory and co-regulatory instruments in place, the protection in section 16(1) of the Constitution be extended to the Bill to ensure that broadcasters' *bona fide* broadcasts carried for the purpose of artistic creativity, and academic and scientific research is protected.