



NAB
National Association of Broadcasters

**THE NAB WRITTEN SUBMISSION ON THE PREVENTION
AND COMBATING OF HATE CRIMES AND HATE SPEECH
BILL**

PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

INTRODUCTION

- 1 On 7 December 2018, the Portfolio Committee on Justice and Correctional Services published a notice inviting the public to comment on the Prevention and Combating of Hate Crimes and Hate Speech Bill (Bill). Interested persons were given until 15 February 2019 to submit their written input.

- 2 The National Association of Broadcasters (NAB) is a leading representative of South Africa's broadcasting industry representing the interests of all three tiers of broadcasters. Our members include the public broadcaster, commercial radio media groups; Primedia, Kagiso Media, Tsiya Group, AME, MSG Afrika, as well as independents, Classic FM, Kaya FM, YFM, Smile FM, and LM Radio; all the licensed commercial television broadcasters e.tv, Multichoice, M-Net, and StarSat-ODM; a host of community radio broadcasters and community television broadcaster, Faith Terrestrial. The NAB membership also extends to training institute, NEMISA and the broadcast signal distributors, Sentech and Orbicom

BACKGROUND CONTEXT

- 3 This public participation process follows a legislative review process which was initiated by the Department of Justice and Constitutional Development in October 2016. It is the NAB's understanding that the Bill seeks to *inter alia* give effect to South Africa's obligations in terms of the Constitution as well as international human rights instruments concerning racial discrimination, xenophobia and related intolerance. The Bill also seeks to provide for the statutory offence of hate speech as defined in the Bill, and for the prosecution of persons who commit the offence of hate speech.

SCOPE OF HATE SPEECH

- 4 The NAB is concerned with the broad definition of hate speech, which goes beyond the definition provided in section 16(2) of the Constitution. The NAB respectfully cautions the Committee against adopting such an approach as it may jeopardise the constitutionality and therefore the validity of the Bill.
- 5 The NAB further notes that hate speech is also defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, as amended (Equality Act) which is administered through the South African Human Rights Commission and the Equality courts. The Equality courts are empowered to grant appropriate relief including ordering payment of damages, or refer a matter to the Director of Public Prosecutions having jurisdiction for the possible institution of criminal proceedings in terms of common law or other relevant legislation. The NAB submits that the promulgation of additional legislation which provides another definition of hate speech may cause great legal uncertainty and have a detrimental effect on media freedom.
- 6 The NAB recommends that there should rather be a greater effort to capacitate existing institutions such as the Equality courts to deal with matters pertaining to alleged hate speech as and when they are reported.
- 7 The NAB is however encouraged by the notable improvements in this draft of the Bill, particularly the exceptions which have now been introduced in section 4(2) of the Bill following the previous public participatory process. The NAB notes that section 4(2) provides that the provisions pertaining to the offence of hate speech do not apply to any bona fide artistic creativity, performance or other form of expression, *to the extent that such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm* (our own emphasis) based on one or more of the grounds referred to in the Bill.

- 8 The NAB submits that whilst the exceptions are progressive and provide for a balancing of interests and rights, the current wording may lead to confusion and have the unintended consequence of nullifying the exception. Broadcast content is regulated through the Codes of Conduct administered by the Independent Communications Authority of South Africa (ICASA) and the Broadcasting Complaints Commission of South Africa (BCCSA) respectively. The codes prohibit the broadcasting of content which constitutes hate speech in line with section 16(2)(c) of the Constitution. This prohibition is applied within the context of section 36 of the Constitution in terms of which the rights in the Bill of rights may be limited by law of general application to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Consequently, the codes provide for exemptions to a broadcast which, judged within context, amounts to a bona fide scientific, documentary, dramatic, artistic, or religious broadcast.
- 9 The NAB submits that media content, including creative and artistic expression must be assessed within context taking into consideration the manner in which an issue is presented as well as the literary, artistic, dramatic or educational merit. Broadcasting is a vital medium which provides a platform for expression, education and entertainment. The NAB therefore recommends that the wording in section 4(2)(a) be revised to read:
- “(a) any *bona fide* artistic creativity, performance or other form of expression, to the extent that when judged within context, 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)”
- 10 Following from the preceding paragraph, the NAB recommends that the Committee engage with religious organisations and other stakeholders in respect of the exception outlined in section 4(2)(d) of the Bill.

CONCLUSION

- 11 In conclusion, the NAB thanks the Portfolio Committee for the opportunity to make this written submission. We trust our brief submission will be considered and we do not require an additional verbal presentation.