

PEN South Africa deeply concerned over new Hate Crimes and Hate Speech Bill in Parliament

PEN South Africa is part of an international organisation that represents writers, editors and translators. Its members have pledged themselves to oppose any form of suppression of freedom of expression or censorship and to uphold freedom of the press.

PEN South Africa thanks the Department of Justice and Constitutional Development for the opportunity to make a submission of its views on the new draft Bill under the title Prevention and Combatting of Hate Crimes and Hate Speech. As PEN SA we are deeply alarmed at the dangers posed by this Bill.

PEN South Africa is fully cognisant of the fact that South Africa is a multi-cultural country and has recently emerged from a lengthy period where the majority was discriminated against on the grounds of colour and race.

Firm measures are required to guard against racist and hate speech. However, PEN SA strongly believes that we cannot, as a country and lawmakers, rely on the law to address these complex social problems and the hurt and outrage expressed by many South Africans. We acknowledge the genuine need signaled by this proposed legislation. However, the law – and this Bill in particular – cannot act as a shortcut to the broader social change that is clearly necessary.

In the points below, PEN SA outlines its concerns with the new bill.

PEN South Africa fears that the offences outlined in the Bill are far too broadly framed and could lead to inroads on freedom of expression, freedom of the media and censorship. It also fears that the Bill opens opportunities for the introduction of offences that equate “insult laws” where criminal defamation laws can be used – and, indeed, are used in many parts of Africa -- to censor the media and stifle the public’s right to know. In addition, it is alarmed at the penalties proposed for offences under the legislation. They include severe lengthy prison sentences.

PEN South Africa has noted that the comprehensive manner in which the Bill impinges on what would normally be regarded as humorous commentary on the mores of society has alarmed some comedians, who normally have few qualms about the law when performing. While one comedian supports the Bill because too many people have gotten away with a slap on the wrist for hate speech, three of his colleagues expressed grave concerns that the Bill is “too broad and very restrictive” and that it will prevent them from making critical comments in their jokes about the president and the state of the nation.

PEN SA Executive Committee:

Margie Orford (President), Mandla Langa (Executive Vice-President), Raymond Louw (Vice-President),
Gabeba Baderoon, Carole Bloch, Justin Fox, Mark Heywood, Adré Marshall, Mike van Graan
Nadia Davids (Co-opted)

Myolisi Sikupela (Centre Co-ordinator), Deborah Horn-Botha (Secretarial Services & Treasurer)

John Vlismas, who was voted the best stand-up comedian at South Africa's first Comedy Awards in 2007, said he took very seriously his role of making jokes about important things. Vlismas also warns that using the law against comedians would be a precursor to its use "against everybody".

Some also fear that jokes that make comparisons, mostly derogatory, between, say, the farmer, the Jew and the Englishman, may have to be avoided because they could be classified as hate speech under this legislation. Comedian Pieter Dirk Uys says that while hate speech is not acceptable it cannot be criminalised at the cost of free speech -- a sentiment that PEN South Africa totally agrees with.

A key component of hate speech as defined in the Bill is when any person intentionally "by means of any communication whatsoever, communicates in a manner that advocates hatred towards any other person or group of persons or is threatening, abusive or insulting towards any other person or group of persons and which demonstrates a clear intention to incite others to harm any person or group of persons whether or not such person or group of persons is harmed, or stir up violence against, or bring into contempt or ridicule, any person or group of persons."

The grounds on which advocacy is based relate to 17 human characteristics, including race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade. The concern here is that the characteristics are defined extremely broadly and encompass practically any distinguishing feature of a person. In addition to oral, written, illustrative, electronic and data communication, it extends "without any limitation" to "any gesture", "display", "expression", "visual or other descriptive matter" and "representation or reference".

The description of the categories and subjects of hate speech as defined in the Bill extend to virtually any characteristic and activity of a person and are far too wide. One of the dangers this situation gives rise to is the temptation it holds out for the authorities, including police officers and prosecutors, to base charges on almost any human emotion as expressed by facial or bodily expression or innuendo. Among the characteristics of the victims that the perpetrator of hate speech may latch on to is the new category called "intersex", defined as a congenital sexual differentiation which is atypical to whatever degree – whatever that may mean.

Another stretched feature of the requirements for hate speech classification is communication to one or more people that "is threatening, abusive or insulting towards any other person or group of persons" – providing another entry into the sphere of "insult" laws. Indeed, these requirements and the grounds for hatred based on a wide range of human characteristics listed in the Bill, most not cited in the Constitution, give rise to a further question whether because of that discrepancy the Bill might not be constitutional.

PEN SA Executive Committee:

Margie Orford (President), Mandla Langa (Executive Vice-President), Raymond Louw (Vice-President),
Gabeba Baderoon, Carole Bloch, Justin Fox, Mark Heywood, Adré Marshall, Mike van Graan
Nadia Davids (Co-opted)

Myolisi Sikupela (Centre Co-ordinator), Deborah Horn-Botha (Secretarial Services & Treasurer)

These extracts from the Bill illustrate the major problem in trying to deal with hate speech. In defining it and taking action to prohibit it the immediate consequence is intrusion into freedom of expression and the application of censorship. This is strongly opposed by among others writers and journalists.

The writers and journalists believe that freedom of expression is a core value of a civilized and democratic society and that any curbs on hate speech will have the effect of preventing people from having access to the views and thoughts of others and thus limiting their freedom.

A hate crime is another offence under the Bill. It is the commission of any offence under any law by a person motivated by prejudice, bias or intolerance towards the victim because of the characteristics – or perceived characteristics -- which underlie the offence of communicating hate speech.

An important feature of hate speech is the necessity of proving that the culprit incited or brought about “harm” to the victim. This requirement is a cardinal principle laid down in the Constitution and the absence of this requirement in a charge may provide a certain amount of protection for an accused person. But the definition of harm – like so many other aspects of the Bill -- is very wide. It includes any mental, psychological, physical or economic harm.

It appears that in drafting this legislation the South African Department of Justice was influenced by the legislation in force in the United Kingdom, Australia and Canada though that influence appears not to extend to penalties. The South African penalties for hate speech appear to be much more severe. For a first offence a three-year jail term or a fine, not defined but according to commentators likely to be heavy, can be imposed and for a second offence the prison sentence can be 10 years or a commensurate fine. In Britain, the practice has been to impose a six-month jail term for a first offence.

Punishment for hate crime is more variable being subject to legal and court jurisdiction but the severity of the maximum is even more daunting, extending in some instances to a life sentence.

PEN South Africa believes the legislation must be withdrawn. South Africa already has a law which deals with hate speech, the Promotion of Equality and Prevention of Unfair Discrimination Act. According to a statement by John Jeffery, Deputy Minister of Justice and Constitutional Development, hate speech was excluded from the original version of the Bill because of the sensitivities and complexities involved particularly in a multi-cultural society. But because of a spate of inflammatory racist remarks on social media recently it was decided there was a need to include it in this Bill.

PEN SA Executive Committee:

Margie Orford (President), Mandla Langa (Executive Vice-President), Raymond Louw (Vice-President),
Gabeba Baderoon, Carole Bloch, Justin Fox, Mark Heywood, Adré Marshall, Mike van Graan
Nadia Davids (Co-opted)

Myolisi Sikupela (Centre Co-ordinator), Deborah Horn-Botha (Secretarial Services & Treasurer)

The Equality Act already holds out concerns about potential encroachment on freedom of expression. Section 10 of the Act states: “No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds against any person, that could reasonably be construed to demonstrate a clear intention to be hurtful, be harmful or to incite harm (and/or) promote or propagate hatred.”

PEN South Africa sides with activists, journalists and writers who believe the new legislation will have a chilling effect on freedom of speech and freedom of expression. But PEN South Africa believes the legislation will do much more damage. The implementation of the legislation is likely to result in actual censorship and the harsh prison sentences could inflame emotions among communities that could lead to violence.

Should oral hearings of submissions be held by Parliament, PEN South Africa will be most appreciative of the opportunity to make a presentation at a hearing.

Margie Orford (President, PEN South Africa)
Mandla Langa (Executive Vice President, PEN South Africa)
Raymond Louw (Vice President, PEN South Africa)
Carole Bloch (Board Member, PEN South Africa)
Adré Marshall (Board Member, PEN South Africa)
Nadia Davids (Board Member, PEN South Africa)
Gabeba Baderoon (Board Member, PEN South Africa)

PEN SA Executive Committee:

Margie Orford (President), Mandla Langa (Executive Vice-President), Raymond Louw (Vice-President),
Gabeba Baderoon, Carole Bloch, Justin Fox, Mark Heywood, Adré Marshall, Mike van Graan
Nadia Davids (Co-opted)

Myolisi Sikupela (Centre Co-ordinator), Deborah Horn-Botha (Secretarial Services & Treasurer)