



January, 2017

Comments on the Prevention and Combating of Hate Crimes and Hate Speech Bill, 2016

1. Background

The Department of Justice and Constitutional Development has released a Draft Prevention and Combating of Hate Crimes and Hate Speech Bill for public comment. The purpose of the bill is, in the main, to provide for the offence of hate crimes and the offence of hate speech, as well as the prosecution of persons who commit these crimes. The draft bill also provides for the prevention of these crimes and for appropriate sentences that may be imposed on persons who commit them.

The tourism industry is comprised of the hospitality sector, tour operators, travel agencies, vehicle rentals, bus operators, airlines, business tourism, the youth travel sector, and game lodges. These sectors interact with various stakeholders on a daily basis, and their interaction may include both verbal and written communication. These stakeholders include employees and visitors, and in other sectors, shareholders and suppliers. This is an industry that contributed 9.4% of GDP in 2015, and 9.9% of total employment (1,554,000 jobs) in the same year. Thus, confident communication with various stakeholders including visitors from different countries becomes crucial in keeping up with the momentum of contributing to economic growth.

2. Issues of concern

2.1. The definition of “offence of hate speech”

The definition of offence of hate speech includes communicating to one or more persons in a manner which:

- (i) advocates hatred towards any other person or group of persons
- (ii) is threatening or abusive or insulting towards any other person or group of persons,

and demonstrates a clear intention to stir up violence against, or bring into ridicule, any person or groups of persons based on their race, gender, sex, ethnic or social origin, sexual orientation, religion, culture, occupation, trade, among others.

The Bill also defines communication, which includes but is not limited to gesture, display, expression, written, visual or other descriptive matter, reference, oral statement and electronic communication.

We are firstly concerned with the broad definition of “hate speech”. This definition is broad and somebody may find that they have fallen foul without intending to do so. In instances between managers and subordinates, or even an argumentative client and an employee in one of our sectors, one of the parties may utter words which may be regarded as insulting or bringing someone into ridicule, or even stirring up violence with the other party.

Our other concern is that the definition of communication is broad, subjective and open to interpretation and abuse. This subjective definition, together with the broad definition of “hate speech”, may cause issues for the sectors that we represent as TBCSA. An oversensitive individual or persons may misinterpret the gestures, displays, expressions and oral statements of employees in our different sectors, based on this definition. There is also communication between subordinates and managers in the sector. If for any reason there is a gesture that a manager makes, which may not appear normal to the subordinate, or vice versa, that could easily be regarded as hate speech. This broad definition could therefore, through misinterpretation of actions, gestures and displays, bring some of our establishments into disrepute and disrupt the daily operations, possibly due to the above and similar kind of incidents.

With this broad definition, someone who is disgruntled or sensitive, whose complaint may not have the outcome they had desired, might lay a false claim against a company’s staff’s communication, which in their view could amount to hate speech or hate crime. From time to time, dissatisfaction may arise with regard to some incidents, service offered or not offered, as well as the quality of service rendered, and this could lead to some exchanges that may not be desirable, which could be regarded by the offended parties as hate speech. These occurrences may destroy the reputation of some of our business establishments.

3. Already existing legislation

An alternative to formulating new legislation altogether to deal with hate speech or hate crimes could be to extend the application of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 to cover the offence of hate speech and its prosecution. Among others, the purpose of this Act is to give effect to the spirit and letter of the constitution in particular -

- i. The prohibition of advocacy of hatred based on race, ethnicity, gender or religion, that constitute incitement to cause harm as contemplated in section 16(2) (c) of the constitution and section 12 of the Act,

- ii. To provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability, and
- iii. To provide for procedures for the determination of circumstances under which discrimination is unfair.

Currently, section 10 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act states that 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-

- (a) be hurtful
- (b) be harmful or incite harm
- (c) promote or propagate hatred

This is provided that bona fide engagement in artistic creativity, academic and scientific enquiry, fair 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. The prohibited grounds as stated in 10 (1) include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Also, the crime of *crimen injuria* (unlawful, intentionally and seriously impairing the dignity of another) may also be used to prosecute hate speech.

4. Practices in other countries

4.1. Legislation covering Hate offences and hate speech in New Zealand

New Zealand has a Human Rights Act (1993), which addresses discrimination or harassment on the grounds of race, sex and other prohibited grounds (same as those stipulated in section 10 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000). New Zealand is specific in the manner in which it refers to published material which may create racial disharmony. In the case of racial harassment, The Human Rights Act either talks about the use of language, physical behaviour or visual material to express hostility against, or brings into contempt or ridicule, any person on the grounds of race, colour or ethnic origin (section 63 [1]). Also, areas where this subsection is applied are specified, which are those of employment, application for employment, participating in a partnership and access to places, vehicles and facilities, to name a few. South Africa is not specific in terms of areas where the proposed bill will be applied.

It would be advisable for government to be as specific as possible when referring to communication, for example. The Human Rights Act of New Zealand could be utilised for purposes of adopting some useful practices in this regard.

4.2. Norwegian Penal Code, 1999

Norway prohibits hate speech, and defines it as publicly making statements that threaten or ridicule someone or that incite hatred, persecution or contempt for someone due to their skin colour, ethnic origin, homosexual orientation, religion or philosophy of life. Section 135a of the code refers to the prosecution of someone who wilfully or through gross negligence publicly utters a discriminatory or hateful expression. While the use of symbols is also deemed to be an expression, a discriminatory or hateful expression means threatening or insulting anyone, or inciting hatred or persecution of anyone because of their race or other orientation, as already outlined.

This code is clear in terms of the definition of hateful expressions. South Africa could consider some of these definitions in seeking to clarify what it means by communication.

5. Conclusion

Our concern as the Travel and Tourism industry is therefore around the broad definitions contained in the Draft Bill. These broad definitions may allow for abuse by disgruntled individuals. In addition, any allegations of hate crimes or hate speech against our business establishments would result in reputational damage, disruption of the productivity of the business, regardless of whether such allegations are later proved to be unfounded. Our industry's core function is to offer service to clients. On a daily basis, we provide unforgettable experiences to our clients and therefore, individuals providing these services may find themselves fallen foul without intending to do so, due to the proposed definitions in the Bill.

As an option, government could address gaps in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 as it currently stands, by elaborating on issues of hate speech and hate crimes, and being specific on definitions rather than drafting a new legislation altogether.