



# Submission of the Hate Crimes Working Group: Prevention and Combatting of Hate Crimes and Hate Speech Bill

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## Introduction

The Hate Crimes Working Group (HCWG) welcomes the opportunity to make submissions on the draft Prevention and Combatting of Hate Crimes and Hate Speech Bill (the Bill). We also wish to heartily congratulate the Department of Justice and Constitutional Development (DOJ) on this draft Bill, which has been long-awaited by civil society.

The HCWG is a multi-sectoral network of civil society organisations set up to spearhead advocacy and reform initiatives pertaining to hate crimes in South Africa and the region.<sup>1</sup>

Members of the network range from grass-roots to academic institutions, and work in diverse sectors including religion, sexual orientation, gender identity and gender expression, migrants / displaced groups, disability, health status, nationality and ethnicity. All share a common concern on the impact of hate crimes in South Africa from the perspective of the victims or from a legal, service provision, research-based or advocacy perspective.

The HCWG is led by a steering committee, consisting of: Amnesty International (South Africa), Durban LGBTI Community and Health Centre, Gender Dynamix, Lawyers for Human Rights, Psychological Society of South Africa, Scalabrini Centre, Sex Worker Education and Advocacy Task Force, Sonke Gender justice, South African Jewish Board of Deputies, Triangle Project.

This submission will deal with each of the provisions of the Bill in turn, with the aim of offering constructive criticism, and alternative wording where applicable.

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<sup>1</sup> A full list of members can be accessed at <http://hwcg.org.za/members/>



## 1. The Preamble

The preamble to any legislation exists not only to describe the reason for that particular law, but may also be of assistance in interpreting the law. For this reason, its importance should not be overlooked.

With this in mind, we particularly support the mention of the “severity of the emotional and psychological impact of hate crimes and hate speech extends beyond the victim, to the group to which the victim belongs or is perceived to belong”.

However, we caution against the express mention of the *Declaration* (adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance), and the *International Convention on the Elimination of All Forms of Racial Discrimination*, to the exclusion of other relevant international law instruments that commit South Africa to non-discrimination. To expressly list the former, to the exclusion of the latter, creates the impression that racial discrimination is accorded priority over other forms of discrimination. It also then fails to capture the importance of the intersectionality that exists in preventing and combatting hate crimes.

We further suggest the following wording for the long-title of the Bill:

*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; to protect all in South Africa against victimisation in the form of hate crime on the basis of their fundamental or immutable characteristics; to provide for the offence of hate crimes and the offence of hate speech and the prosecution of persons who commit those crimes; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech; to provide for the*



*reporting on the implementation, application and administration of this Act; to amend certain Acts of Parliament consequentially; and to provide for matters connected therewith.*

## 2. Definitions

### 2.1 Associates

We suggest the inclusion of the term “associates” in the definitions section, to include family members, colleagues, friends and other possible connections to a victim. We will expand on the necessity of this definition in our submission below, regarding the offence of hate crime.

### 2.2 Communication

We note that this definition is couched in very wide terms. We will return to this issue in our discussion of the hate speech provision.

### 2.3 Harm

We submit that in this definition, the words “mental” and “psychological” appear to be interchangeable. We note that the preamble makes mention of the term “emotional harm”, and with this in mind we suggest that the term “mental” be replaced with “emotional” harm.

We further note that “financial” harm is used elsewhere in the Bill, but this definition speaks of “economic” harm. Consequently, we suggest that a choice is made, and consistent use is made of either “financial” or “economic” harm throughout the Bill.



Lastly, we note that “social” harm is also used elsewhere in the Bill. We suggest that “social” be included in this definition.

Our suggested wording for this definition is as follows:

**“harm”** includes any emotional, psychological, physical, social, or economic harm;

## 2.4 Intersex

We submit that this definition should be replaced with the following definition:

**“Intersex”**: A term referring to a variety of conditions (genetic, physiological or anatomical) in which a person’s sexual and/or reproductive features and organs do not conform to dominant, binary, and typical definitions of “female” or “male”.

This definition is in accordance with the Psychological Society of South Africa’s statement on gender and sexual diversity.

## 2.5 Minister

We note that the Bill currently contains no definition of “Minister”, and suggest that a definition be added to clarify that it is the Minister of DOJ, unless expressly stated otherwise. This makes it clear that the DOJ is the lead department on this Bill.

## 2.6 Racism

We note that the Bill contains no definition of racism, and we submit that this is a serious omission. The definitions section of the Bill presents an opportunity to create a shared, consistent, and clear definition for the whole of South Africa. Our society, in which racism is



so often understood in vastly different ways depending on individual social background socialisation and personal ideologies, is in dire need of a shared understanding of the term.

We suggest that the definition of racism in Bill should follow that of the CERD:

**“Racism”:** Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

## 2.7 Transgender

We note that there is currently no definition of “transgender” contained in the Bill. We submit that the following definition be added to the Bill:

**“Transgender”:** A term for people who have a gender identity, and often a gender expression, that is different to the gender they were assigned at birth by default of their primary sexual characteristics. Some transgender people may identify as men or women while others may identify as being outside the men-women binary (as being non-binary, gender-queer, agender and demigender). Transgender people challenge society’s view of gender as fixed, unmoving, dichotomous, and inextricably linked to one’s biological sex. Transgender is not a sexual orientation – transgender people can be heterosexual, bisexual, pansexual, homosexual or asexual. Some transgender people who opt for treatment (hormonal or surgical) are often called transsexual. Not all transgender people opt for treatment and some only opt for partial treatment.



## 2.8 Other definitions not currently contained in the Bill

We suggest that the following important terms be defined in the Bill, with a view to bringing about a shared understanding of the terms on South African society:

**“Prejudice”**: A forejudgment; bias; preconceived opinion.

**“Bias”**: An inclination or prejudice for or against one person or group, especially in a way considered to be unfair.

**“Intolerance”**: Unwillingness to accept views, beliefs, or behaviour that differ from one's own.

## 3. Objects of the Act

We submit that in addition to the objects currently listed, the gathering and recording of data on hate crimes is also an important objective of the Bill, due to the role this plays as in prevention.

Consequently, we suggest that this be captured as subsection (g).

## 4. Offence of Hate Crime

### 4.1 Subsection 1

We are broadly supportive of this definition, including the listed grounds and /or characteristics. We do, however, suggest that the characteristics should be listed alphabetically, to avoid the impression that priority is given to one characteristic over another.



We further submit that reference to a “family member” should be removed from this section of the Bill. It is not only family members that are made vulnerable by association – friends, colleagues, mere bystanders, and a range of other associates may also become targeted.

Consequently, we suggest that the term “family members” be replaced with blanket the term “associates”. The term “associates” may then be defined in the definitions section of the Bill, to include family members.

We also suggest the following wording for the subsection:

3(1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated **in part or whole** on the basis of that person’s prejudice, bias or intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim or **her or his associate(s)**.

#### 4.2 Subsection 2

There is some lack of clarity with regards to how a prosecutor would approach a particular hate crime, with regards to charges, and we will raise this in our discussion on sentencing below.

We further submit that subsection (b) and (c) are repetitive, and that one of these subsections should be shortened for clarity and the sake of plain language.

We suggest that the subsection be shortened to read as follows:

(2)(a) Any person who commits a hate crime is guilty of an offence and liable on conviction to a sentence as contemplated in section 6(1).

(b) Any person who attempts to commit a hate crime is guilty of an offence and is liable, on conviction, to a sentence as contemplated in section 6(1).

#### 4.3 Subsection 3

We support the contemplated role of the Director of Public Prosecutions in this section.

### 5. Offence of Hate Speech

After much contemplation, debate, and discussion, the HCWG has come to the conclusion that it cannot in any way support the criminalisation of hate speech as contemplated in this section.

Practical, ideological, legal, and constitutional considerations prevent us from providing our support. We believe that the provision will lead to serious unintended consequences for the very people the provision is intended to protect. We intend to provide extensive explanation of our position on this point at the Parliamentary public participation phase of the Bill, should the provision be retained.

We believe there are both existing and imminent measures that adequately address the hate speech issue in our society. We do not support the creation of a new mechanism to deal with hate speech, where existing mechanisms have not been adequately strengthened, used, and publicised. Existing mechanisms include:

- The criminal charge of *crimen injuria*, which forms part of the common law;
- The definition of hate speech, and the civil remedy provided by the Promotion of Equality and Prevention of Unfair Discrimination Act of 4 of 2000, which allows for varied, creative, and transformative order by Equality Courts;



- The prohibition of incitement in Section 16(2) of the Constitution;
- The prohibition of incitement with regards to the names of companies, as outlined in section 11 of the Companies Act 71 of 2008;
- The existing legal framework as it relates to criminalised incitement, outlined in the Intimidation Act 72 of 1982, and section 16 of the Films and Publications Act 65 of 1996;
- The laws governing the workplace and employer/employee relationships and disciplinable and dismissible conduct, as recently developed by the Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (CCT19/16);
- The contemplated prohibition of incitement of violence and damage to property, in the draft Cyber Crimes and Cyber Security Bill.

## 6. Impact of Offence on Victim

We fully support the express provision for victim impact statements, and would submit that this section be drafted in even more mandatory terms with regards to prosecutors obtaining such statements. We suggest the following wording in this regard:

(2) The prosecutor **must**, when adducing evidence or addressing the court on sentence in respect of an offence under this Act, consider the interests of a victim of the offence and the impact of the offence on the victim, and, where practicable, furnish the court with a victim impact statement provided for in subsection (1).

We further submit that the term “family member” should be replaced with “associate”, in line with our submissions made on the offence of hate crime.



## 7. Sentences and Acts Amended

We submit that there is a good deal of clarification that is required with regards to this section of the Bill. The difficulty in understanding what is contemplated extends beyond the wording of the section, to the schedule of legislation (and specifically sentencing legislation) that this Bill will amend.

We appeal to the Department to depart from the legalistic way in which the Bill is written in this regard, due to the importance of ordinary people being able to understand and have legal certainty about the consequences of hate crime.

It is our understanding, from communication with the Department, that the section contemplates the following:

- 6(1) Hate crimes may be sentenced in accordance with all the various sentencing options ordinarily available to a court;
- 6(2) That if a minimum sentence already applies to the base crime, that sentence is to be handed down by the presiding officer; and that in certain cases, the hate element of the crime is also to be regarded as aggravating.

(We will not deal with subsection 6(3) due to our lack of support for the criminalisation of hate speech in its entirety).

If we are correct in our understanding of the intention of the drafters, the language in the Bill does not express that intention. In fact, the Bill creates a new, self-standing crime of “hate crime.”



It is entirely unclear how a prosecutor would charge a person who has committed a hate crime, when taken together with other crimes. This may be demonstrated by way of example:

*Thandi, who is a black lesbian living in Khayelitsha, is assaulted and then raped multiple times by Olwethu, at gunpoint. During the attack and the rapes, Olwethu says to Thandi that she is stealing the women from the men, that he hates lesbians, and that he will show her how to be a real woman. Thandi reports the incident to the police, who compile the docket. As a result of the attack and the multiple rapes, Thandi's injuries prevent her from going to work for several months, and her 7 year old brother, of whom Thandi is the primary care giver, will go hungry.*

*Sipelo, the prosecutor, receives the docket. Due to the creation of the new offence of hate crime (any act already criminalised but motivated by hate), Sipelo charges Olwethu with the section 3 offence in the Bill.*

*The following questions arise for Sipelo:*

- *Should Olwethu only be charged with the section 3 offence of hate crime, or also separate charges of assault and rape?*
- *Does this amount to charging Olwethu twice for the same offences?*
- *Are rape and assault competent verdicts for a section 3 offence of hate crime?*

*When it comes to sentencing, it is clear that Olwethu must be subject to a life sentence for rape, due to the fact that the rape was motivated by hate, and a dangerous weapon was used, and he raped Thandi multiple times.*

- *How does this square with the obligation of the presiding officer to regard the injury and loss of support to the little brother as aggravating circumstances, as per section 3(b)(iii) of the Bill?*



- *Will Olwethu be sentenced for the section 3 offence of hate crime, and also separately for the assault, and the rape?*
- *There is no mention of the hate aspect of the crime being treated as aggravating sentence.*

These questions relate similarly to bail, and issues pertaining to the amendment of the Child Justice Act.

We suggest that by way of illustration, when the Bill is published for public comment by Parliament, the Department include various examples of charging and sentencing as an explanatory annexure to the draft Bill. This will assist those interested in the Bill, but who do not have legal knowledge, to understand what exactly is contemplated by the legislature.

Lastly, we understood from the Department that all hate crimes will be heard in the Regional Courts. However, there is no provision to this effect in the Bill.

## 8. Directives

We strongly support this provision, and suggest that a time line be put in place for the issuing of these directives.

We submit that it is reasonable to expect directives to be issued by the National Director of Public Prosecution within 90 days of the promulgation of this Bill.

## 9. Reporting on the Implementation of the Act

We welcome provision for the collection and collation of hate crime statistics by the South African Police Service.



We do, however, suggest that the responsibility for regulations in this regard should fall on the shoulders of the Minister of Police, in consultation with the Minister of Justice and Constitutional Development. It is the Minister of Police that is responsible for crime statistics and their release.

In the event that the Department elects to retain this responsibility as that of its own Minister, the Bill should mandate the national Police Minister and/or Commissioner to issue national instructions to police officers, to ensure the operationalisation and implementation of the regulations.

As with the directives contemplated in this Bill, we strongly suggest that the issuing of regulations and national instructions be time-bound, to ensure operationalisation of the Bill as soon as possible after it is promulgated.

## 10. Prevention of Hate Crimes

We are strongly supportive of a coordinated and inter-departmental approach to the prevention of hate crimes. We submit that in the list of role-playing departments in this section of the Bill, the Department of Social Development and the Department of Health should also be included, as departments whose staff are often “first-responders” to victims.

However, we submit that the wording used in subsection 2, “must cause programmes to be developed”, is unnecessarily ambiguous and appears to remove direct responsibility from the state to a certain degree. It is less ambiguous to state that departments “must develop programmes.”

With regards to the content of such programmes, as listed in subsection (2)(a)-(d), we submit that the Bill should be more detailed. It is important to acknowledge that the implementation of this Bill will be new to many officials, across departments, and it will be



crucial to ensure that the necessary sensitivity training and education takes place within government, and outside of it. It is not advisable to assume that government officials in the relevant departments, especially those who are often “first responders”, will understand all the listed characteristics in section 3 of the Bill, or the intersectionality of these listed characteristics. Similarly, the need for general public education and awareness cannot be under-estimated. In addition to introducing new offences, the Bill speaks to grounds of prejudice and/hatred that are unfamiliar to many in South Africa, and large-scale campaigns against hate and intolerance will be required for a variety of audiences.

In this regard, we submit that it would be helpful for the Department to refer to Article 7 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), which goes beyond the practical arrangements needed to include the promotion of understanding, tolerance and friendship among all peoples.

## 11. Regulations

We submit that “may” in this section should be replaced by “must.” Without regulations, the Bill cannot be operationalised, and regulations are therefore not optional.

## 12. Costing

We note that this Bill has not yet been costed. We submit that a costing must be done as soon as possible, and should be available once the Bill is published for public comment by Parliament.

Political commitment to the implementation of the Bill includes financial commitment by all relevant departments.



## Conclusion

We believe that the current iteration of the Bill is an excellent starting point for hate crimes legislation. We cannot, however, support the criminalisation of hate speech, and submit that this provision should be removed from the Bill in its entirety.