



Submission of the Hate Crimes Working Group:

**Prevention and Combating of Hate Crimes
and Hate Speech Bill**

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1. Introduction

The Hate Crimes Working Group (HCWG) welcomes the opportunity to make submissions on the draft Prevention and Combating of Hate Crimes and Hate Speech Bill (the Bill). We are very pleased to have the opportunity to engage with this long-awaited and crucial piece of legislation and look forward to engaging further with the Portfolio Committee on Justice and Correctional Services (the Portfolio Committee).

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.¹

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.

This submission will deal with specific provisions of the Bill that we believe are important for its functioning and operation. For the sake of brevity, additional information, such as suggested changes and information for context, will be included in an annexure to this submission (see Annexure A).

We would also like to extend our gratitude to the African Policing Civilian Oversight Forum (APCOF) for their contributions to this submission, pertaining to sections 7 and 8 of the Bill.

2. 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.

We strongly believe that this Bill should not create a real and/ or perceived hierarchy of prejudice and discrimination and therefore should not make reference only to those instruments dealing with

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

racism and racial discrimination. Doing so may result in unnecessary resistance and/ or pushback from certain quarters and thus delay implementation.

With this in mind, 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.

See Annexure A for suggested rewording of the Preamble.

Also note, we particularly support the mention in the Preamble of the “severity of the emotional and psychological impact of hate crimes and hate speech [that] extends beyond the victim, to the group to which the victim belongs or is perceived to belong”.

3. Definitions (S1)

3.1. 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. Defining this term will be important, given its inclusion in the explanation of the offence of hate crime (see para 3. (1) on page 4), as well as in the section on victim impact statements (see para 5. (1) on page 5).

3.2. 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. Note, our suggestion is that *economic* harm may be more apt, as it is a more inclusive term.

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

We finally note our concern about the lack of clarity around the use of the term ‘harm’, in general, and about the uncertainty such a term will cause in the interpretation of the law until tested in court.

3.3. 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 Justice and Correctional Services, unless expressly stated otherwise. This makes it clear that the Department of Justice (DOJ) is the lead department on this Bill.

3.4. 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 the Bill should follow that of the CERD²:

“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.

4. Offence of Hate Crime (S3)

4.1. Subsection 1

We are broadly supportive of this definition, including the listed grounds and/or characteristics.

² Committee on the Elimination of Racial Discrimination (CERD). Definition is available here: <https://www.ohchr.org/Documents/ProfessionalInterest/cerd.pdf>.

We would suggest that under S3(1)(k) the characteristic “asylum seeker” should be added for the sake of completeness.

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).

We believe the inclusion of the phrase “in part or in whole” is vital to the implementation of the Bill and more accurately captures the intention as set out in the Preamble and in meeting the obligations made by various international instruments.

4.2. Subsection 2

There is some lack of clarity as 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.

4.3. Subsection 3

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

5. Penalties or orders (S6)

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 Portfolio Committee 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 following³:

- 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.

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.” See section 3.1 under Annexure A for an example of the complexities that will arise when charging a hate crime.

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.

6. Directives (S7)

We support the inclusion of this provision in the Bill, which will provide direction to members of the prosecuting authority on their role in achieving the objects of the Act. However, we recommend that section 7 be subdivided into further additional parts to require training in relation to the directives, and to extend the requirement for ‘directives’ to the South African Police Service (SAPS) in the form of a National Instruction (and commensurate training).

The new sections 7(1) will contain the current text of Section 7(1), amended to include a **90-day deadline** within which the Director of Public Prosecutions must issue directives as contemplated in the Act, with the new 7(2) including the requirement of training based on the directives. The new sections 7(3) and (4) will provide for the issuance of National Orders and Instructions by the National Commissioner of the SAPS in order to support the achievement of the objectives of the Act by SAPS members, including through the provision of adequate training. The National Instructions should relate specifically to the manner in which cases relating to hate crimes are investigated (including

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

identification of matters as hate crimes; special investigative procedures that apply to matters identified as hate crimes; the treatment of complainants and victims, including precise detail on the content of victim impact statements, risk assessments and referrals for victims and complainants) and the collection and analysis of information contemplated in section 8 of the Act.

See Annexure A for suggested wording.

7. Reporting on the Implementation of the Act (S8)

We welcome provision for the collection and collation of hate crime statistics by the SAPS.

In its current form, section 8 of the Bill provides ultimate responsibility for the collection of data and reporting on implementation of the Act to the Minister of Justice and Correctional Services. While the Minister has an important role to play in the collection and dissemination of data for its specific areas of competency, section 8 should also provide equivalent responsibility to the Minister for Police regarding the collection and dissemination of crime data by the SAPS. In addition, the specific role of the SAPS and the National Prosecuting Authority (NPA) in the collection and dissemination of relevant data should be addressed in section 8, specifically the obligation to publish such data in their respective annual reports, and, with regards to the Police, as part of the quarterly release of Crime Statistics.⁴

Further, section 8 does not prescribe the levels of disaggregation that data related to the objects of this Act require in order to provide an accurate picture of the prevalence, and effectiveness of measures to combat hate crimes. This can be addressed through provision in section 8 of minimum levels of disaggregation, and by directing the NPA and the SAPS to establish the specific offence in their data collection and management systems.

We recommend a reframing of section 8 to provide for, (a) the interrelated, but necessarily separate, roles of the Minister of Justice, NPA, Minister of Police and National Commissioner of the SAPS in the collection and dissemination of information; and (b) the levels of data disaggregation required to achieve the objects of the Act. See Annexure A for suggested wording.

⁴ See what was suggested under “5. Penalties or orders” of our submission. If a new category of crime is, however, intended by this proposed legislation, such a new category of crime must, of course, be established following the passage of this Act.

8. Prevention of Hate Crimes (S9)

The HCWG is disappointed with this section of the Bill, and cannot support it in its current iteration.

Specific objections are as follows:

- Section 9(1) contains a generalised duty of “the State” and only two Chapter 9 institutions. It is nonsensical and impractical to expect every single state institution to play some undefined, generalised role in preventing hate crimes. How will institutions will be held accountable for such an undefined obligation? Furthermore, it is unclear why the SAHRC and the CGE would have a role to play in prevention, while the CRL does not.
- Section 9(1), on a plain reading, only creates a duty to promote awareness of the criminalisation of hate crimes (and hate speech). This is obviously and wholly insufficient for the prevention of hate crime in South African society. Merely making our society aware that certain actions now constitute a crime, does not even begin to address the root causes of societal hate and prejudice, which gives rise to hate crime. This section will simply not achieve prevention.
- Section 9(2) places a duty on the President to designate certain executive departments, for the development of certain programmes. However, we submit that such departments can, and should, be specifically identified and listed in the principal legislation, thereby creating justiciable legal obligations and legal certainty.
- Section 9(2)(b) properly belongs under Section 7, and should be removed from Prevention.
- Section 9(2)(c) is unrealistic and impractical, and we submit that the principal legislation should create utmost certainty about the exact state departments that have the legal obligation to assist victims with lodging complaints.
- Similarly, Section 9(2)(d) should create certainty about the exact state department(s) responsible for the training of public officials. This particular section also fails to recognise and draw on the wealth of knowledge and skills available in the civil society sector, which could be tapped into for training purposes.

- Section 9(3) should not be limited to presiding officers alone, and should contemplate similar training for public prosecutors.

The HCWG submits that **General Comment No 35⁵, from the Committee on the Elimination of Racial Discrimination (CERD)⁶** contains critically important observations, and best practices, for the prevention of racial discrimination. Its observations and recommendations can easily be extrapolated to include other forms of prejudice, and we submit that the Committee and the DOJ must be guided by these evidence-based observations and findings.

We submit that the most relevant observation from General Comment No 35, for the purpose of prevention, is the manner in which Article 7 (of the Convention) highlights the role of “**teaching, education, culture and information**” in the promotion of understanding and tolerance. Deterrence of hate crime, through criminalisation alone, does not constitute prevention. It must be completed by a broadly educational approach, precisely because racism, homophobia, xenophobia and other forms of hatred and prejudice can be the product of, among other things, indoctrination or inadequate education.

Article 7 of the Convention, framed in mandatory language, requires State parties to “adopt immediate and effective measures, particularly in the fields of **teaching, education, culture and information**, with a view to combating prejudices which lead to... discrimination and to promoting understanding, tolerance and friendship..., as well as to propagating universal human rights principles, including those of the Convention.” This means that state departments and institutions responsible for education, culture and information, at the very minimum, are all critical role-players in preventing prejudice and discrimination. For this reason, we submit that these departments at national and provincial level **cannot be omitted from the Bill if prevention efforts are to be meaningful and effective**. Their involvement is a bare essential for addressing the root cause of hate and prejudice in South African society, thereby preventing crimes driven by hate and prejudice.

We particularly draw your attention to clause 33 of General Comment No 35, which not only provides insight into the nature of the education needed, but the importance of adequate resources for prevention efforts to be effective:

⁵ General Comment No 35 from the Committee on the Elimination of Racial Discrimination. Available here: <https://www.refworld.org/docid/53f457db4.html>.

⁶ On 10 December 1988, South Africa ratified the International Convention on the Elimination of All Forms of Racial Discrimination.

*“Appropriate educational strategies in line with the requirements of article 7 include intercultural education, including intercultural bilingual education, based on equality of respect and esteem and genuine mutuality, **supported by adequate human and financial resources**. Programmes of intercultural education should represent a genuine balance of interests and should not function in intention or effect as vehicles of cultural assimilation.” (own emphasis)*

The CERD also recommends that:

“Information campaigns and educational policies calling attention to the harms produced by racist hate speech should engage the general public; civil society, including religious and community associations; parliamentarians and other politicians; educational professionals; public administration personnel; police and other bodies dealing with public order; and legal personnel, including the judiciary.”⁷

Therefore, at a bare minimum, relevant departments and institutions which should be listed in the principal legislation would include:

- The Department of Basic Education
- The Department of Higher Education and Training
- The Department of Arts, Culture, Science and Technology
- The Department of Communication
- The South African Human Rights Commission
- The Commission for Gender Equality
- The Commission for Religious and Cultural Rights
- The National House of Traditional Leaders

9. Regulations (S10)

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

⁷ Clause 36 of General Comment No. 35

10. Costing

We note that while various versions of the Bill have been available since 2016 the Bill remains uncostered. We contest the idea that the complicated work involved with the prevention and combating of hate crimes (and hate speech) - work which will involve considerable interdepartmental cooperation, can be done within existing budgets.

We remain deeply concerned that this Bill will be impossible to implement without a substantial commitment of resources and are disappointed that this commitment is still lacking.

11. Conclusion

The HCWG has been advocating for the passage of hate crimes legislation since at least 2009, while the South African government has been committed to passing hate crimes legislation for nearly 19 years – following its commitment at the World Conference Against Racism in 2001.

As the HCWG, we are encouraged that the Bill has reached this important stage and are now anxious that it is passed and implemented as speedily as possible. We also strongly urge the Portfolio Committee to not allow this opportunity to pass it by and to ensure that this legislation includes meaningful timeframes and reporting structures and delivers on its long-awaited promise.

12. Oral submission

The Hate Crimes Working Group requests to make an oral submission to the Portfolio Committee on Justice and Correctional Services, when hearings are held.

Annexure A: Supplementary information for submission

1. Preamble

Suggested wording for preamble:

*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. Section 1: Definitions

The following definitions need to be included with the adoption of the suggested wording for sections 7 and 8 of the Bill, as per points 4 and 5 below:

“National Commissioner” means the National Commissioner of the South African Police Service, appointed in accordance with section 207(1) of the Constitution of the Republic of South Africa, 1996;

“National Orders and Instructions” means National Orders and Instructions of the South African Police Service issued under section 25(1) of the Police Act, 1995 (Act No. 68 of 1995);

“Police Act” means the Police Act, 1995 (Act No. 68 of 1995);

3. Section 3: Offence of hate crime

Suggested wording:

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).

3.1. Hate crimes: example of charging a 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.

4. Section 7

We submit that Section 7 be amended to read as follows:

<p>7.</p> <p>(1) The National Director of Public Prosecutions must, within 90 days of the promulgation of the Act, and after consultation with the Director-General; Justice and Constitutional Development and the National Commissioner of the South African Police Service, issue directives regarding all matters which are reasonably necessary or expedient to be provided for, and which must be complied with by all members of the prosecuting authority who are tasked with the institution and conduct of prosecutions in cases relating to hate crimes and hate speech, in order to achieve the objects of this Act, including the following:</p> <p style="margin-left: 40px;">(a) the manner in which cases relating to hate crimes and hate speech are to be dealt with, including –</p> <p style="margin-left: 80px;">(i) the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped; and</p> <p style="margin-left: 80px;">(ii) the leading of relevant evidence indicating the presence of prejudice or intolerance towards the victim, in order to secure a conviction contemplated in section 3(2); and</p> <p style="margin-left: 40px;">(b) the collection and analysis of information contemplated in section 8(1)(a).</p>

(2) The National Director of Public Prosecutions must develop training courses with reference to the directives referred to in subsection (1) and ensure that adequate training takes place within the National Prosecuting Authority.

(3) The National Commissioner of the South African Police Service must, within 90 days of the promulgation of the Act, and in consultation with the Minister of Police, and the National Director of Public Prosecutions, issue National Instructions regarding all matters which are reasonably necessary or expedient to be provided for in relation to this Act and which must be followed by all police members, including the following:

- (a) the manner in which cases relating to hate crimes and hate speech are to be dealt with, including –
 - (i) procedures for the identification of matters as hate crimes or hate speech, including training on diversity and bias;
 - (ii) special investigative procedures that apply to matters identified as hate crimes or hate speech;
 - (iii) the treatment of complainants and victims, including detail on the process for obtaining victim impact statements, risk assessments and referrals; and
- (b) the collection, analysis and publication of information contemplated in section 8(1)(b).

(4) The National Commissioner must develop training courses with reference to the National Instructions referred to in subsection (3) and ensure that adequate training takes place within the South African Police Service, with specialist training provided to all members of Detective Services.

5. Section 8

We submit that Section 8 be amended to read as follows:

(1) In order to enable effective monitoring, analysis of trends and interventions and to provide quantitative and qualitative data, in respect of the prevention and combating of hate crimes and hate speech -

(a) The Cabinet member responsible for the administration of justice must after consultation with the National Director of Public Prosecutions, prescribe the information that must be collected and collated by the National Prosecuting Authority; and

(b) The Cabinet member responsible for policing must, after consultation with the National Commissioner of the South African Police Service, prescribe the information that must be collected and collated by the South African Police Service.

(2) The information prescribed in subsection (1) must include the collection and dissemination of information that provides data on –

(a) hate crimes as a specific category of crime recorded by the South African Police Service and the National Prosecuting Authority;

(b) the characteristic or perceived characteristic of the victim by reference to the characteristics set out in section 3(1) of this Act in the case of hate crimes; and

(c) the grounds set out in section 4(1)(a) of this Act in the case of hate speech.

(3) The information contemplated in subsection (1) must be made available in the prescribed manner and the prescribed time to -

(a) Parliament;

(b) the Chairperson of the South African Human Rights Commission;

(c) the Chairperson of the Commission for Gender Equality;

- (d) the Chairperson Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities;
- (e) the public, through the publication by the South African Police Service of annual Crime Statistics, and the publication by the South African Police Service and the National Prosecuting Authority of their respective annual reports.