



MEDIA STATEMENT

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FOR IMMEDIATE RELEASE:

HCWG dismayed at Qwelane hate speech judgment by Supreme Court of Appeal

The Hate Crimes Working Group (HCWG) has been eagerly awaiting judgment in the Jon Qwelane hate speech case that was recently heard before the Supreme Court of Appeal. However, we are dismayed that the [judgment](#) failed to uphold human rights and access to justice for lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI+) communities in South Africa. We deplore the overturning of Qwelane's guilty verdict and the Court's verdict that existing legislative provisions on hate speech are unconstitutional, as this has far-reaching implications for protection against hate speech.

This case began a decade ago after Qwelane wrote a highly controversial article for the *Sunday Sun* newspaper titled "[Call me names, but gay is NOT okay](#)".¹ In it, he makes numerous homophobic statements, which he explicitly states that he will not apologise for, and he admits his unwavering support for Mugabe's "unflinching and unapologetic stance over homosexuals". He claims that homosexuality is "wrong", "against the natural order of things" and that the Constitution should be amended by excising the provisions that "give license" to same-sex or same-gender marriage.

The Supreme Court of Appeal (SCA) handed down judgment² in this case on Friday 29 November 2019, overturning the High Court's guilty verdict and finding Qwelane not guilty of hate speech. The Court ruled that certain provisions in Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), which regulate hate speech, are unconstitutional because they are vague and overly broad.

The Court's recommended amendment of PEPUDA significantly limits the ambit of what constitutes hate speech, as well as the prohibited grounds for hate speech. By limiting the prohibited grounds of hate speech exclusively to "race, ethnicity, gender, religion or sexual orientation", many vulnerable groups are excluded from protection, including intersex persons/persons with differences of sex development, persons with disabilities, sex workers, homeless persons and HIV-positive persons, to name a few.

The HCWG is surprised and dismayed at this outcome, not least of which means that Qwelane faces no legal consequences for his deeply homophobic statements that attack and dehumanise members of communities who are already vulnerable and marginalised on the basis of their sexual orientation. The Court's judgment leaves these communities with no recourse or justice in respect of harmful homophobic statements that fuel prejudice and hatred towards them.

Hate speech has a severe impact on members of LGBTQI+ communities in South Africa. Moreover, the connection between hate speech and hate crime is undeniable. A recent [study](#) on the mental health and well-being of LGBTI people in South Africa found that almost three quarters (73%) of participants had

¹ Qwelane, Jon. (2008). "Call me names, but gay is NOT okay" *Sunday Sun*, 20 July 2008. Available at: http://www.mambaonline.com/images/sundaysun_small.pdf

² *Qwelane v South African Human Rights Commission and Another* (686/2018) ZASCA 167 (29 November 2019). Available at: <http://www1.saflii.org/za/cases/ZASCA/2019/167.pdf>

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. Members of the network work in diverse sectors, namely in LGBTI rights; migrants, refugees and asylum seekers rights; gender-based entities and broader human rights organisations. They 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.

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experienced verbal harassment on the basis of their sexual orientation and/or gender identity or expression at some point in their life, and 41% of participants during the previous year.³ Additionally, almost half of participants were survivors of sexual violence and more than half of participants had experienced some form of physical violence at some point in their lives.⁴ These rates are higher than the general population. The study further found that social exclusion, marginalisation and stigma have a negative impact on the mental health and wellbeing of LGBTI people, and that they have higher levels of depression, anxiety and suicidality than the general population.⁵

Statements such as those made by Qwelane reinforce and contribute to an environment of intolerance and hatred in which members of LGBTQI+ communities are subjected to widespread verbal abuse, discrimination and violence, and cannot feel safe emotionally or physically. It is therefore vital that the law provides recourse for victims of hate speech on the basis of sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC).

The HCWG believes that the right to freedom of expression must be carefully balanced with the right to be protected from hate speech. In this, the right to human dignity is paramount. We are of the view that South Africa needs comprehensive legal protection both in respect of hate speech and hate crimes. For many years we have been advocating for comprehensive laws in respect of hate crimes, but this type of legal protection has not yet been enacted or provided. Without this, groups vulnerable to hate are rendered more vulnerable. We therefore valued the fact that Section 10 of PEPUDA at least offered some protection for victims of hate speech. However, with the restrictive and diluting effect of the SCA judgment, we are concerned that victims of hate speech now too will be more vulnerable.

The constitutional commitment to equality is a cornerstone of our democracy and PEPUDA is Parliament's recognition that discrimination is perpetrated in many forms, and that hate speech harms minorities vulnerable to such discrimination. Vulnerable and marginalised groups should have a remedy so that we can build understanding and forge a more tolerant and compassionate society. The hate speech clause in PEPUDA allows for a balancing of interests, including the right to freedom of expression; whereas the changes proposed by the SCA would severely limit the protection offered by this provision. **We therefore urge the SAHRC to appeal this judgment.**

At the same time, [we call for the urgent passing and implementation of the Hate Crimes Bill](#),⁶ to help ensure that persons who commit hate crimes are also no longer able to act with impunity. We urge government to prioritise this piece of legislation in the interest of effectively monitoring, prosecuting and combating homophobic, transphobic, intersexphobic and other forms of hate crimes facing LGBTQI+ and other vulnerable communities in our country.

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³ Müller, A., Daskilewicz, K. & the Southern and East African Research Collective on Health (2019). *Are we doing alright? Realities of violence, mental health, and access to healthcare related to sexual orientation and gender identity and expression in South Africa: Research report based on a community-led study in nine countries*. Amsterdam: COC Netherlands, p.41. Available at: <https://tinyurl.com/tcu7toj>

⁴ Ibid. pp. 41, 46.

⁵ Ibid. p.93.

⁶ Hate Crimes Working Group. (2019). *Submission of the Hate Crimes Working Group: Prevention and Combating of Hate Crimes and Hate Speech Bill*. Submission to Portfolio Committee on Justice and Correctional Services, 15 February 2019. Available at: <https://tinyurl.com/yx6294s4>