

Submission of the Hate Crimes Working Group:

Prevention and Combating of Hate Crimes and Hate Speech Bill [B9B-2018]

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). The HCWG is a multi-sectoral network of civil society organisations and private individuals 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 LGBTQI+ and sexual orientation, gender identity and expression and sex characteristics (SOGIESC) rights; sex worker rights; migrant, refugee and asylum seeker rights; religious organisations; academic and research entities; gender-based entities; and broader human rights organisations.

The HCWG seeks to contribute towards sound national policy and legislative interventions to combat hate crimes by seeking to contribute towards the speedy enactment of comprehensive hate crimes laws; improve the policing of, and judicial responses to hate crimes; and assist in the development of effective mechanisms to monitor hate crimes incidents.

All our members combined have extensive track records in advocacy work in these and other focus areas. They all share a common concern regarding the impact of hate crimes in South Africa from the perspective of 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.

The Preamble

The preamble to any legislation exists not only to describe the reason for that law but may also be of assistance to legal practitioners, litigants and courts in interpreting the law. For this reason, its importance should not be overlooked. We note that the Bill, in its preamble, refers to just two international commitments, namely Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban (the Durban Declaration), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). There are many other international instruments that are applicable.

The HCWG feels strongly that this appears to create a hierarchy of prejudice and discrimination, prioritising racial discrimination at the top. While we appreciate that South Africa is now attempting to meet its obligations under the CERD, we submit that this Bill should not create a hierarchy of prejudice and discrimination and therefore should not refer only to those instruments dealing with racism and racial discrimination.

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 only the CERD and the Durban Declaration, to the exclusion of other relevant

international law instruments to which South Africa is a signatory, and which commit South Africa to non-discrimination.

We submit that if international instruments are to be referenced, and we strongly believe that they should, then all the applicable international instruments must be included. This will ensure that the content of the Bill captures the importance of the intersectionality that exists in preventing and combating hate crimes, and guide interpretation. We propose including the following international and regional human rights instruments in the Preamble:

- African Charter on Human and People’s Rights
- African Charter on the Rights and Welfare of the Child
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and its Optional Protocol
- Convention on the Rights of the Child
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Resolution 275 of the African Commission on Human and People’s Rights, on Protection against Violence and other Human Rights Violations against Persons based on their real or imputed Sexual Orientation or Gender Identity.
- Universal Declaration of Human Rights
- Yogyakarta Principles Plus 10: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. These principles have regularly been applied and cited in judgments handed down by South African courts, in deciding matters relating to SOGIESC.

Definitions (Section 1)

“Associates”

We suggest the inclusion of the term “associates” in the definitions section, defined as family members, colleagues, friends and other possible connections to a victim. It is important to define the term, given it is used in the section on Victim Impact Statements. We also suggest using the term “associates” in the sections setting out the elements of hate crime and hate speech. It is simpler and easier to read, as a catch-all phrase, in place of listing all possible personal connections to victims in the relevant sections.

“Bona fide”

While this term is easily understood by legal practitioners, it is not a common term in everyday parlance. We submit that its use in Section 4(2) of the Bill requires that it either be added to the definitions section of the Bill or replaced with the more commonly understood term “good faith”.

Objects of the Bill

The HCWG supports the stated objects of the Bill and has no further submission in this regard.

Section 3

Section 3(1)

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

Section 3(3)

We support the contemplated role of the Director of Public Prosecutions in this section. Additionally, we strongly submit that there should be an express legal obligation on the Director of Public Prosecutions, or their delegate, to provide written reasons to a complainant or their associates within THREE WORKING days when a decision has been taken to decline to prosecute a charge of hate crime. This can be achieved with the addition of a new section 3(4).

The proposed section 3(4) can be inserted as follows:

(4) Where the Director of Public Prosecutions, or a person delegated by them, declines to prosecute a charge of hate crime, written reasons for this decision must be provided to the complainant or their associate(s) within three working days

We further note that the definition of WORKING DAYS would need to be included in Section 1 (Definitions). In this regard we note that working days refers to “*any other day than a Saturday, Sunday and/or public holiday*”.

Offence of Hate Speech (Section 4)

Section 4(3)

We reiterate our submission regarding section 3(3) and submit that a decision to decline to prosecute a hate speech charge should be subject to an express legal obligation on the Director of Public Prosecutions or their delegate to provide a complainant or their associates with written reasons within THREE WORKING days. This can be achieved by an addition of a new section 3(4). We propose the provision to read as follows:

(4) Where the Director of Public Prosecutions, or a person delegated by them, declines to prosecute a charge of hate speech, written reasons for this decision should be provided to the complainant or their associate(s) within three working days.

We further reiterate that the definition of WORKING DAYS would need to be included in Section 1 (Definitions). In this regard we note that working days refers to “*any other day than a Saturday, Sunday and/or public holiday*”.

Section 5

Section 5(1)

While we are encouraged by the provision that requires a victim’s authorisation when a person other than the victim is making a Victim Impact Statement (VIS), we wish to point out that hate crimes in South Africa at times regularly lead to the death of the victim. In other words, a victim may not be able to either make a VIS themselves, or indeed authorise anyone else to do so on their behalf. A hate crime is a *message crime*, and while there may be an individual victim of the crime, the impact is also felt by the community or group(s) to which they belong.

For this reason, we submit that a prosecutor should be empowered by the Bill to obtain expert input on a VIS from interest groups and organisations who work directly with the community or group(s) to which victims belong. This will greatly assist the court to understand the impact of the hate crime not only on individual victims and their associates, but the broader group(s) to which the victim belongs, especially if a hate crime caused a victim’s death. Also, where a victim died because of a hate crime, there must nonetheless be a mechanism for their voice, or the voice of others like them, to be heard. This is both appropriate and necessary, given that hate crimes as “message crimes” spread fear and affect the equality and dignity of entire communities or groups of people. To this end, we submit that section 5(1) should be reworded as provided below:

5. (1) For purposes of this section, a victim impact statement means a sworn statement or affirmation by one or more of the following persons:

(i) the victim;

(ii) someone authorised by the victim to make a such statement on behalf of the victim

(ii) in the event of the victim’s death, the victim’s associate(s);

(iii) an organisation or institution with expert knowledge or experience of the group to which the victim belongs, or is perceived to belong;

which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and their associate(s).

Section 5 (2)

We are encouraged that the Bill creates an obligation on prosecutors to provide written reasons to the court in the absence of a VIS from the victim. However, we are concerned as noted above that the VIS is only limited to that of the victim. In this regard, we submit that the VIS must extend to:

- someone authorised by the victim to make such a statement on behalf of the victim.
- in the event of the victim's death, the victim's associate(s).
- an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.

Further, we propose the following section 5 (3) be added:

(3) Where is not possible to obtain a victim impact statement provided for in subsection (1), the prosecutor must provide the court with written reasons for the absence of such a statement by either the victim, their associate(s), or an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.

Reporting on the implementation of the Act: Section 8

The HCWG supports the provisions of section 8. However, we submit due to the public interest nature of hate crimes and hate speech in South Africa, section 8 (2) must be equally extended to the public. Therefore, the information contemplated by section 8 (1) must be available to the South African public. In this regard, we submit the following inclusion be made with regards to that provision:

(2) The information contemplated in subsection (1) must be made available in the prescribed manner and at the prescribed times to

— *(a) Parliament;*

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

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

(d) the Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

e.) Public

Prevention of Hate Crimes and Hate Speech: Section 9

The HCWG supports the provisions of section 9 and suggests that adequate funding is allocated to strengthen the work of the awareness campaigns and trainings of officials. Experts in sexual orientation, gender identity and sex characteristics should be consulted along with civil society organisations with experience in these areas.

Oral Presentation:

The HCWG would welcome the opportunity to give an oral presentation to the National Council of Provinces, as this bill will affect all people in every province. The Hate Crimes Working Group represents a variety of different groups that are all vulnerable to hate crime, and their voices should be heard when deliberating this bill.

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