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**SUBMISSION ON THE PREVENTION AND COMBATING OF HATE CRIMES AND
HATE SPEECH BILL**

Department of Justice and Correctional Services

SUBMISSIONS PREPARED BY:

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On behalf of
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I. THE LEGAL RESOURCES CENTRE

1. The Legal Resources Centre (**LRC**) is a public interest, non-profit law clinic in South Africa founded in 1979. The LRC has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument for justice to give agency to the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as to contribute to the development of human rights jurisprudence and the social and economic transformation of society.

II. INTRODUCTION

2. The LRC welcomes the opportunity to comment on the Prevention and Combating of Hate Crimes and Hate Speech Bill (“Hate Crimes and Hate Speech Bill”).
3. We welcome the invitation to engage with issues surrounding the creation of a legal framework that recognises the severity of crimes motivated by hatred and intolerance towards certain groups on the grounds of, but not limited to, race, gender, gender identity, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

III. LONG TITLE AND PREAMBLE

4. The long title of the Hate Crimes and Hate Speech Bill refers to the purpose of giving effect to South Africa’s constitutional and international obligation to combat “racism, racial discrimination, xenophobia and related intolerance”.
5. We acknowledge the need to address race based discrimination and violence but submit that racially motivated discrimination and violence is not the only kind of hate-based crimes of concern. Moreover, reference to “racism, racial discrimination, xenophobia *and related intolerance* [*own emphasis*]” implies that all forms of intolerance are related to racism or xenophobia.
6. In this regard, we draw attention to the norms and attitudes that prevail in South African societies that promote hate speech and hate crimes against children, women, persons with disabilities, persons who are HIV (Human Immunodeficiency Virus) positive, transgender persons, as well as persons with diverse sexual

orientations, to name but a few. It is, therefore, vital that any Hate Crimes and Hate Speech legislation adopt an intersectional understanding of discrimination and take a comprehensive approach to protect individuals from hate speech and hate crimes.

7. The first sentence of the long title currently states the purpose of the Hate Crimes and Hate Speech Bill as:

“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 intolerances”.

It is our recommendation that this is substituted for one of the following:

“To give effect to the Republic’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia, sexism, homophobia, transphobia, intersex-phobia, intolerance towards persons with disabilities, intolerance towards persons who are HIV positive, as well as all other forms of intolerances”.

OR

“To give effect to the Republic’s obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and all other forms of intolerances”.

8. We welcome the content of the Preamble. We appreciate the reference to the prohibition of direct and indirect discrimination, the right to human dignity, as well as the limitations of the right to freedom of expression.
9. The broad reference in the Preamble to the prohibition of unfair discrimination based on the open-ended list provided under Section 9 of the Constitution of the Republic of South Africa, 1996, further supports our submission in relation to the long title of the Bill.

IV. DEFINITIONS

Definition of harm

10. The Bill currently defines “harm” as including “any mental, psychological, physical or economic harm”.
11. We submit that this definition is too vague and ambiguous as it leaves too much room for subjective interpretation.
12. From the implementation of the Domestic Violence Act 116 of 1998, we have seen that the failure to define terms such mental or psychological harm requires police officers or magistrates to determine whether, within their own subjective interpretation, the experience of the victim amounts to abuse.
13. As such, we recommend that the Department define what constitutes mental, psychological, physical or economic harm with reference to existing legislation. For example, the Domestic Violence Act Amendment Bill B20B–2020 defines “economic, verbal and or psychological abuse” as well as “economic abuse”.
14. Defining these terms will go a long way towards effective implementation.

Definition of intersex

15. The intersex definition is insufficient. We recommend that the proposed definition be replaced with:

“A person born with a natural variation of sex characteristics that is more diverse than dominant social constructions of male and female bodies. Also called differences of sex development.”

Inclusion of the following definitions

16. Throughout the Bill, reference is made to gender identity. However, it is not defined in the definitions section. We, therefore, recommend the following definition of **“gender identity”** drawn from the Yogyakarta Principles:

“A person’s internal, deeply felt sense of being a woman, or a man, another gender, a combination of genders, or not having a gender”.

17. Similarly, the Bill refers to sexual orientation without defining it. We put forth the following definition of “**sexual orientation**”:

“A person’s emotional, affectional and sexual attraction to individuals of the same gender, a different gender or more than one gender”.

18. Although there is no direct mention made in the Bill of trans or transgender, these terms are relevant when speaking of gender identity. As a result, we recommend that “**trans/transgender**” is included in the definition section, with the definition being:

“A person whose gender identity differs from the gender assigned to them at birth”.

19. The Definitions section of the Bill further requires a definition of “**gender expression**” because as with trans/transgender, when speaking of gender identity, gender expression inevitably becomes significant. We, therefore, suggest the following definition that is informed by the Yogyakarta Principles and recent examples of international best practices, such as Malta’s gender recognition law:

“‘Gender expression’ means the way in which a person expresses their gender identity, or how it is perceived by others. It may involve using dress, speech, mannerisms or other means, and, if freely chosen modification of bodily appearance or function by medical, surgical or other means”.

20. It is crucial for the definitions to include a definition of “**sex**” that is broad enough to include intersex persons, transgender persons and other persons who may have a nonbinary physical appearance, or who may have altered or be altering their sex characteristics. In light hereof, we suggest the following definition:

“‘Sex’ means female, male, intersex and all other forms of sex characteristics, as well as the alteration of sex characteristics, whether this results from gender affirming surgery or other surgeries, medical treatment (e.g., hormonal), or through injury or disease”.

21. Finally, it is our submission that the Bill should define “**sex characteristics**”. In this regard, we refer to Malta’s ground-breaking Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015.¹ Importantly, this piece of legislation is the first law in the world to protect the right to bodily integrity and physical autonomy of intersex minors by prohibiting surgical interventions or sex assignment treatment on the sex characteristics of minors who are too young to be able to provide informed consent. Sex characteristics should be defined as:

“‘Sex characteristics’ mean the chromosomal, gonadal and anatomical features of a person, which include primary characteristics such as reproductive organs and genitalia, and/or in chromosomal structures and hormones; and secondary characteristics such as muscle mass, hair distribution, breasts and/or structure”.

V. OBJECTS OF THE ACT

22. The objectives of the Bill do not adequately connect to the Preamble of the Bill. For example, the objectives reference international obligations. However, it does not reference the Constitutional obligations to respect, protect and promote the rights to equality, dignity, safety and security as well as bodily integrity.
23. The objectives of the Bill make provision in section 2(f) and 2(g) for the combatting of the commission of hate speech and the collection of data on hate crimes and hate speech. This is a positive approach, but we propose adding two more sections that will link with section 2(f) and 2(g).
24. We propose adding section 2(h) “provide information and address the root causes of the hate crime or hate speech” and 2(i) “provide rehabilitation programs to individuals and communities affected by such acts of hate.”

VI. OFFENCE OF A HATE CRIME

25. We note the list of characteristics and commend the Department on its inclusivity.
26. We nonetheless recommend it not be regarded as an exhaustive list, we therefore recommend the removal of “one or more” from section 3(1).

¹ Malta: Gender Identity, Gender Expression and Sex Characteristics Act XI of 2015 <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12312&l=1>

27. Section 3(k) makes provision for the following characteristics “nationality, migrant or refugee status”. We propose adding the characteristic “asylum seeker” to ensure that the Bill recognises and protects this group of people residing in South Africa.
28. Section 3(3) states any prosecution in terms of this section must be authorised by the Director of Public Prosecutors (DPP). We submit that this is an unreasonable expectation and that it will overburden the DPP if it is required to decide whether to prosecute hate crimes. We further submit that the prosecutor is equipped to determine whether a prima facie case exists to proceed with a charge of hate crime. Requiring the involvement of the DPP could result in an undue delay, leaving victims to wait a long time for justice.

VII. OFFENCE OF HATE SPEECH

29. Section 4(1)(a) sets out the offence of hate speech, referring to harm caused “based on one or more of the following grounds”. It is our recommendation that “one or more of the following grounds” be substituted with “real or perceived characteristics”. This ensures that it is not an exhaustive list and includes hate speech based off perpetrators perception of victims.
30. Section 4(1)(a)(ii) (kk) seeks to protect persons from hate speech based on their “nationality, migrant or refugee status”. We propose adding the ground “asylum seeker” to ensure that the Bill recognises and protects this group of people residing in South Africa.
31. Section 4(2)(b) provides that the provisions of subsection (1) do not apply in respect of anything done as contemplated in subsection (1) *if it is done in good faith during engagement in any academic or scientific inquiry* (emphasis added). We submit that the inclusion of a less restrictive freedom of scientific research provided in section 4(2)(b) does not conform with the constitutional provision on freedom of scientific research, contained in section 16(1)(d) of the Constitution. Furthermore, section 16(2) of the Constitution restricts the application of 16(1)(d) by providing that the right does not extend to “(a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.
32. We submit that the inclusion of only a “good faith” restriction requirement for the freedom of scientific research, which does not include the restrictions as contained

in section 16(2) of the Constitution, to be an unreasonable lowering of the standards contained in the freedom of expression provision of the Constitution.

33. In this regard, we point to the highly criticised study titled *Age- and education-related effects on cognitive functioning in coloured South African women* which purported that “coloured women in South Africa have an increased risk for low cognitive functioning, as they present with low education levels and unhealthy lifestyle behaviours”.² This extremely discriminatory and prejudicial study – which caused a great uproar in the scientific and South African community at large³ – would arguably pass the “good faith” standard contained in this current Bill whilst simultaneously by-passing the express restriction by the Constitution of scientific research that advocates hate.
34. We are concerned that the inclusion of a “good faith” requirement would create a broad standard of restriction – especially in the highly specialised realm of scientific research – and is therefore not only up for scrutiny over its constitutionality, but also vague and uncertain. Section 4(2)(b) of this Bill should, therefore, correctly reflect the restrictions contained in Section 16(2) of the Constitution to ensure compliance with the constitutional standard.
35. As in relation to Section 3(3) discussed above, Section 4(3) requires that any prosecution in terms of this section must be authorised by the Director of Public Prosecutors (DPP). We submit that this is an unreasonable expectation that has the potential to overburden the DPP. Again, we submit that the prosecutor is equipped to determine whether a *prima facie* case exists to proceed with an offence of hate speech and that requiring the involvement of the DPP may unduly delay a complaint.

VIII. VICTIM IMPACT STATEMENT

36. Section 5(1) provides only for the use of sworn statements and affirmations. This section does not recognise the importance of testimonies made by individuals or

² S Nieuwoudt, K E Dickie, C Coysee, L Engelbrecht, E Terblance “Age- and education-related effects on cognitive functioning in Colored South African women” (2020) 27 *Aging, Neuropsychology, and Cognition* (retracted).

³ R Grobler “Authors retract Stellenbosch University study on coloured women's 'low thinking function” (03-05-2019) <https://www.news24.com/news24/southafrica/news/authors-retract-stellenbosch-university-study-on-coloured-womens-low-thinking-ability-20190503> (accessed 27-09-2021).

communities directly affected by hate crime or hate speech. We therefore propose that Section 5(1) is amended to read as follows:

“For purposes of this section, a victim impact statement means a sworn statement or affirmation or *testimony* by the victim or someone authorised by the victim to make a such statement on behalf of the victim, which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and his or her family member or associate”.

37. Section 5(2) states that a prosecutor should, where practical, furnish the court with a victim impact statement. This section allows the prosecutors discretion on whether it is possible to provide a statement, we submit that it should be mandatory to provide a victim impact statement to the court. The Bill is victim centred and, therefore, should not allow the cases to be decided without the victims input.
38. Section 5(3) should also make provision for testimonies and should be amended accordingly.

IX. PENALTIES OR ORDERS

39. In its current form, the Bill focuses on imprisonment, periodical imprisonment, declaration as a habitual criminal, committal to any institution established by law, a fine or correctional supervision.
40. We submit that although imprisonment or a fine may be appropriate in some serious instances or for repeat-offenders of hate crimes, it will not contribute towards the reform of individuals who commit these crimes or make hateful utterances. This is because hate crimes and hate speech stem from intolerance towards a particular group or groups based on inherent characteristics.
41. Imprisonment and fines alone will not cultivate the necessary awareness of the inherent dignity of all persons regardless of their inherent characteristics that is needed to prevent hate crimes and hate speech.
42. Despite the reference to correctional supervision, it is our submission that the focus of penalties or orders in the Bill should be on reformatory and rehabilitative techniques.
43. We, therefore, recommend that (i) community service at an organisation or government department that works with the affected group and the (ii) completion

of a sensitisation course on the affected group should be included in the list of sanctions. It is, furthermore, important that these two sanctions be the starting point in punishing hate crimes and hate speech. However, when imposing community service as sanction, it should nonetheless be ensured that the perpetrator does not (i) have direct access to the affected group or (ii) only has supervised access to the affected group to prevent further damage to be caused.

X. PREVENTION OF HATE CRIMES AND HATE SPEECH

- 44. We welcome the obligation imposed by the Bill on the state to promote awareness against hate crimes and hate speech through the development of programmes to educate the public, and to ensure that individuals who suffer the effects of hate crimes and hate speech are supported in lodging a complaint.
- 45. However, we are concerned that public education and information campaigns may be insufficient in addressing the biases that underlie hate crimes and hate speech.
- 46. As such, it is our recommendation that the campaigns not only be directed at the general public, but that there also be sector-specific campaigns, for example, education and work.

XI. CONCLUSION

- 47. We trust that you will find this submission useful. Should you have any comments or questions, please do not hesitate to contact Amy-Leigh Payne at amyleigh@lrc.org.za.

ENDS