

15 February 2019

Portfolio Committee on the Department of Justice and Constitutional Development
Parliament

ATTENTION: Mr V Ramaano

BY EMAIL: vramaano@parliament.gov.za

Re: Submission on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B9 – 2018]

1. The Scalabrini Centre of Cape Town (SCCT) is a registered non-profit organisation that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. The Scalabrini Fathers have been providing welfare services in Cape Town to displaced communities since 1994. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic approach that considers all basic needs including advocacy, development, and welfare services.
2. The SCCT is a founding member and currently on the Steering Committee of the Hate Crimes Working Group (HCWG), 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. The HCWG seeks to contribute towards sound national policy and legislative interventions to combat hate crimes by seeking to contribute towards the 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.
3. We welcome this opportunity to provide comments on the Draft Prevention and Combating of Hate Crimes and Hate Speech Bill ('the Bill') and our comments are based on our extensive experience supporting and assisting foreign nationals who have been the victim of hate crimes and xenophobic violence. The SCCT has participated in the development of the HCWG's submission on the Bill and endorse the positions advanced in that submission, including *inter alia* suggestions on definitions, the undesirability of the inclusion of the offence of hate speech, and clarity regarding sentencing for hate crimes convictions.
4. In line with the HCWG's submission on the Bill, the SCCT recalls that the inclusion of the offence of hate speech in the Bill is inadequate as it would lead to serious unintended consequences for the people the provision is intended to protect. This is undesirable given the need for hate crimes protections and the negative social consequences that would accompany a Bill of this importance that is

unimplementable and ineffective. Considering the limited financial resources available for the implementation of the Bill, we fear that including hate speech provisions in a bill aimed at protecting hate crimes victims would, in creating a heavy caseload, trigger additional costs and hence significantly lessen the effective protection of hate crimes victims. Our concern is mainly that, while mechanisms aimed at tackling hate speech already exist in our society, victims of hate *crime* would be left without any other remedy should the provisions be inefficient.

5. Our comments in this submission focus exclusively on hate crimes committed against foreign nationals in an attempt to bring into focus the nature of serious hate crimes committed against foreign nationals, the obstacles victims face in pursuing justice, and the effects of these crimes on victims and the foreign national community at large. In doing so, we hope to contribute to more effective legislation that is holistic in its approach and is practical in terms of implementation.

Xenophobic violence and hate crimes

6. There has been significant debate in recent years about both the motivation for, as well as the prevalence of, violence directed against foreign nationals, or those who are perceived to be foreign nationals in South Africa. While acts of collective violence directed against foreign nationals, such as the events of May 2008, have drawn the most attention, it is worth noting that this type of violence has been an enduring characteristic of post-1994 Constitutional South Africa.¹ Since 2008, violence directed against outsiders has continued in both large acts of collective violence² as well as through attacks on individuals.³
7. This violence includes crimes such as murder, assault, robbery, looting, and arson as well as threats, intimidation, and harassment. These crimes are indeed severe, often resulting in serious injury and in the displacement of foreign nationals from local communities, both in cases of mass violence as well as in individual cases. While the motivations for these crimes vary and are complex, policy responses have often attributed violence primarily, if not exclusively, to 'criminal elements'. In the wake of the 2008 violence, President Thabo Mbeki stated that attacks against foreigners were simply an example of criminal behaviour,⁴ while more

¹ For a timeline of xenophobic incidents long pre-dating the May 2008 violence, see 'Appendix: Xenophobia Timeline' in J. Crush, 'The Perfect Storm: The Contemporary Realities of Xenophobia in Contemporary South Africa', Migration Policy Series No. 50 (Cape Town & Kingston, Southern African Migration Project, 2008) at pp. 44-54.

² See for example the events in Durban in April 2015 and Grahamstown in October 2015: J. Wicks, 'Several dead as xenophobic violence boils over in Durban', *Mail & Guardian* (14 April 2015) [Available at: <http://mg.co.za/article/2015-04-14-several-dead-as-xenophobic-violence-boils-over-in-durban>] and K.J. Van Resnburg, F. Mthonti, & M. Erskog, 'Xenophobia in Grahamstown: 'We are not leaving!' ', *The Daily Maverick* (29 October 2015) [Available at: <https://www.dailymaverick.co.za/article/2015-10-29-xenophobia-in-grahamstown-we-are-not-leaving/#.WJA62vn5hME>].

³ 'Cape Somalis 'still being threatened', *Mail & Guardian* (8 July 2011) [Available at: <http://mg.co.za/article/2011-07-08-cape-somalis-still-being-threatened>]

⁴ D. Everatt, 'Xenophobia, State and Society in South Africa, 2008-2010' (2011) *Politikon* 38(1) at p.7.

recently, in the wake of the 2015 violence, President Jacob Zuma has also denied that xenophobia is an issue in the country.⁵

8. While not every crime committed against a foreign national is motivated by hatred, the SCCT suggests that the motivations of attacks on foreign nationals are complicated and varied, and caution against presenting the message that such attacks are predominantly driven by criminal elements and posit that it may be simultaneously true that 'criminal elements' are motivated by both prospects of economic gain (through looting and theft) and by anti-foreigner attitudes or xenophobia. In providing our assistance to foreign nationals, the SCCT commonly encounters victims of hate crime where there is no doubt about the motivation of the perpetrators. While these attacks are primarily directed at foreign nationals, they have also targeted South African citizens who were perceived to be 'outsiders'.⁶
9. The SCCT therefore strongly supports the inclusion of culture, language, nationality, and ethnic or social origin as characteristics that may constitute a hate crime as found in section 3(1). The protection of these characteristics will establish a solid foundation for prosecution of crimes committed against perceived 'outsiders', both foreign nationals as well as South African citizens. The SCCT hopes that this inclusion will allow those serious crimes where hate is a prime motivating factor to receive the adequate attention they deserve in both the investigation and prosecution phases.
10. The SCCT further supports the amendment of the Bill to include migrant or refugee status as protected characteristics under section 3(1)(k). Whereas this characteristic was previously encompassed by the inclusion of nationality, the addition of an explicit reference recognises the particular vulnerability of refugees and asylum seekers⁷ and undocumented non-nationals (discussed below in paragraphs X and X) and should facilitate the work of police and prosecutors in identifying and prosecuting offending targeted against this group.

Obstacles foreign nationals face in realising justice after being victimised by xenophobic violence

11. Foreign nationals face a variety of obstacles in their pursuit of justice after being the victims of xenophobic crime. The SCCT often encounters individuals who do not receive proper attention at both the investigation phase as well as during prosecution. While many of these obstacles are faced broadly across many different population groups in relation to the pursuit of justice through the criminal justice system, particularly in areas with severe socioeconomic

⁵ C. du Plessis, 'Zuma denies xenophobia in AU discussion', *News24* (14 June 2015) [Available at: <http://www.sabc.co.za/news/a/4c055b0048bea0c784cebf1447fc6207/Zuma-denies-xenophobia-in-AU-discussion-20151406>].

⁶ 'Locals killed in South African attacks', *BBC News* (12 June 2008) [Available at: <http://news.bbc.co.uk/2/hi/africa/7450799.stm>].

⁷ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 at para 28.

challenges and lack of resources for policing,⁸ foreign nationals face specific vulnerabilities and obstacles. We outline some of these here for the DOJCD to consider in terms of implementation when the Bill becomes law and particularly in relation to sections 7 and 8, relating to Directives and Reporting on implementation. To realise the Bill's stated object of combatting hate crimes,⁹ regard must be given to addressing the practical obstacles faced by victims and much will depend on future Directives.

Documentation difficulties

12. Documentation, which provides proof of legal stay in the Republic, is an important issue, and a complex one, and we urge the DOJCD to consider methods to raise awareness amongst staff and other government departments on the vulnerabilities and needs of foreign nationals in this area and the need to pursue justice regardless of a victim's legal status. In this regard we welcome the inclusion of a specific duty on designated cabinet members to develop programmes to provide assistance to 'any person who wants to lodge a complaint of a hate crime' in terms of section 9(2)(c).
13. All persons in South Africa, regardless of their immigration status are protected by the Bill of Rights as found in Chapter 2 of the Constitution. These rights are the foundation of a free and just democratic society and, with exception to the right to vote, apply to all persons in the Republic irrespective of their legal status. The Supreme Court of Appeal has stated unequivocally that–

Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reasons – it must be respected, and is protected, by section 10 of the Bill of Rights.¹⁰

These rights, including the right to dignity, may be limited as under section 36 of the Constitution, but only when such limitation is done of a general application and is reasonable and justifiable in an open and democratic society. The SCCT believes that it is critical that victims of hate crimes are able to pursue justice given the severe nature of the crime, the violation of their rights under the Bill of Rights, and due to the negative effects non-prosecution has on the rule of law and society more generally.

⁸ See generally: 'Towards a safer Khayelitsha, Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha' (18 August 2014) [Available at: http://www.khayelitshacommission.org.za/images/towards_khaye_docs/Khayelitsha_Commission_Report_WEB_FULL_TEXT_C.pdf] ; For an example of recent case about resource allocation see: J. Etheridge, 'SJC on victory in police resources allocation case – it's been a long time coming,' *News24* (14 December 2018) [Available at: <https://www.news24.com/SouthAfrica/News/sjc-on-victory-in-police-resources-allocation-case-its-been-a-long-time-coming-20181214>]

⁹ In terms of section 2(c).

¹⁰ *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (4) SA 326 (SCA) at para 25.

14. Asylum seekers and refugees have been recognised by the Constitutional Court as a 'vulnerable group'¹¹ and despite having access to legal status under the Refugees Act (No 130, 1998) many still face numerous obstacles to remain documented. Due to severe access issues at Refugee Reception Offices (RRO), as operated by the Department of Home Affairs (DHA), individuals seeking international protection are often unable to apply for asylum in a timely manner or, after having done so, are unable to keep their documentation valid due to the administrative blocks within the system. This is especially relevant for those who do not reside near an RRO and have to travel significant distances for administrative action every one to six months.¹²
15. While the Cape Town RRO remains closed to new applicants, placing severe strain on this population, on 19 October 2018, the Port Elizabeth RRO finally re-opened to new applicants.¹³ However, faced with high demand from those wishing to lodge new applications, the centre quickly struggled to cope with the numbers and regularly turns away asylum seekers due to lack of capacity.¹⁴ Asylum seekers and refugees who cannot be helped on the day of visit are therefore allocated appointment times, currently going as far as November 2019 based on our interactions with asylum seekers. This situation illustrates the obstacles in accessing documentation, those with expired permits unable to remain documented, and those without any documentation at risk of being arrested and detained.
16. A major difficulty for those foreign nationals lacking proper documentation is the ability to open cases with SAPS and to follow these cases through prosecution to a conviction. Our offices often encounter undocumented individuals who have been the victims of hate crimes but have been refused assistance at SAPS stations due to their lack of documentation. In some instances, individuals are told to return to the station with their documentation for assistance (even if they suffered physical injuries during the attack) or are told that they cannot be helped as they lack documentation. Often, individuals who are the victims of hate crimes do not even attempt to report these crimes to SAPS as they are afraid of approaching the authorities as they believe they may face detention and deportation if they attempt to open a case as an undocumented foreigner. This is underlined by the findings of the Hate and Bias Crimes Monitoring Project, which showed that 66% of hate crimes were not reported to police. Among the reasons cited for victim's decision

¹¹ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 at para 28.

¹² On the systemic difficulties of accessing the asylum system, see: R. Amit, 'No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices' (Johannesburg, The African Centre for Migration & Society at the University of Witwatersrand, 2012) [Available at: http://fhr.org.za/files/5413/8503/7665/no_way_in_barriers_to_access_service_and_administrative_justice_final_report.pdf]; R. Pather, 'Cape Town refugees in limbo: "You can't stay here without your paper"', *The Daily Vox* (30 June 2016) [Available at: <http://www.thedailyvox.co.za/cape-town-refugees-in-limbo-you-cant-stay-here-without-your-paper/>].

¹³ 'Home Affairs re-opens refugee office it closed in 2011' *Groundup* (22 October 2018) [Available at: <https://www.groundup.org.za/article/home-affairs-reopens-refugee-reception-office-it-closed-2011/>]

¹⁴ J. Chirume, 'New PE refugee centre struggling to cope with large number of applicants'; *Groundup* (26 November 2018) [Available at: <https://www.groundup.org.za/article/new-pe-refugee-centre-struggling-cope-large-number-applicants/>]

not to report were fear of being arrested (e.g. with regard to undocumented non-nationals) and fear of retribution or further victimisation.¹⁵

17. Beyond the opening of a case and investigation, documentation, or lack thereof, can also complicate prosecutions. The lack of documentation for both victims and witnesses results in an inherently unstable situation where employment and day-to-day subsistence can be difficult. Given the protracted nature of many investigations and prosecutions, foreign nationals may struggle to maintain their legal status throughout the case; for those without documentation, participating in a meaningful way in the prosecution can be extremely difficult.

Lack of support during investigations and court proceedings

The lack of ability to communicate clearly in South African languages by many victims accounts for difficulties during the investigation process. This issue is particularly prevalent when crimes are committed against Somali nationals. The inability to communicate hampers the speed of investigations at the scene of the crime as often SAPS are required to wait for a translator which delays the gathering of vital information. The inability to communicate clearly also results in inaccurate statements or statements that are vague and insufficient for prosecution.¹⁶

18. The findings of the Hate and Bias Crimes Monitoring Project further underlined that an investigating officer was only appointed in 32% of cases reported, that only 15% of complainants were provided with updates regarding the investigation and only 8% were informed of their rights when the case was reported. These figures illustrate the lack of support the victims have to face when bringing a case before the competent authorities. The project highlighted that while 36% of hate crimes victims gave positive feedback about police's support, 18% of victims however perceived the SAPS as being dismissive or disinterested in their case, 8% thought the police was hostile. Very few victims (10%) were of the opinion that their case was properly investigated.
19. In prosecutions brought forward for violence and crime inflicted on foreign nationals during the outbreaks of violence in 2008, the poor success rate of prosecutions was largely attributed to lack of witnesses and lack of interpreters.¹⁷ While prosecutions in cases of mass violence offer unique challenges due to the high caseload, the SCCT has also had cases brought forward under normal circumstances withdrawn due to the lack of interpreters, suggesting that this problem is structural.

¹⁵ Mitchell, Y., & Nel, J. A. (2017). The Hate and Bias Crimes Monitoring Form Project: January 2013 to September 2017. Johannesburg: The Hate Crimes Working Group at page 16.

2017. Johannesburg: The Hate Crimes Working Group.

¹⁶ V. Gastrow and R. Amit, 'Elusive Justice: Somali Traders' Access to Formal and Informal Justice Mechanisms in the Western Cape' (Johannesburg, The African Centre for Migration & Society at the University of Witwatersrand, 2012) [Available at: www.migration.org.za/uploads/docs/report-38.pdf].

¹⁷ J.P. Misago, 'Disorder in a Changing Society: Authority and the Micro-Politics of Violence'. In L.B. Landau (ed) *Exorcising the Demons Within – Xenophobia Violence and Statecraft in Contemporary South Africa* (Johannesburg, Wits University Press, 2011).

Institutionalised discrimination

20. Incidences of institutionalized discrimination, which can be defined as the policies of the dominant institutions and the behaviour of the individuals who control these institutions and implement policies that are intended to have a differential and/or harmful effect on minority groups, occur frequently within the context of public service delivery which not only fuels anti-foreigner sentiments amongst members of the public but is also perceived to represent the State's position towards foreign nationals. The inequality of service delivery marginalises foreign nationals and creates opportunities for corruption. Within DHA and especially at RROs, beyond the resource constraints and associated access issues, it has been observed that the obstacles complicating access to the asylum system are–

commonly produced by the individual effort of officials of the DHA, who act outside their legislative mandate to prevent asylum seekers gaining access to the reception system [...] Put simply, the DHA officials are embedded in an institution which sanctions its officials engaging in extra-legal practices that prevent foreigners from entering and residing legally in South Africa.¹⁸

Outside of the asylum system, at various times police stations in the Western Cape have refused to certify copies of asylum documentation and have also refused asylum seekers and refugees from deposing to affidavits, including those who have lost their permits and who require an affidavit to receive a new permit. Corruption within the asylum system, involving officials from the DHA as well as third parties, is endemic and has a high public profile thereby associating foreign nationals with crime and corruption.¹⁹ It is perceived that the police do not react appropriately in cases brought by foreigners and perpetrators of hate crime are likely to be encouraged by this perception.

21. There have been troubling incidents in the past where individuals arrested for alleged hate crimes motivated by nationality have been released without charge due to pressures from local communities. For example, in 2006, business owners who had been arrested after xenophobic violence in Masiphumelele in the Western Cape were released after politically connected individuals intervened and lobbied for their release.²⁰ During the xenophobic violence of 2008, there were incidents where suspects were released without charge after community members led a protest march to the court on the day of the hearing and stated that the violence was done as a group and not by individuals.²¹

¹⁸ D. Vigneswaran, 'A foot in the door: Access to asylum in South Africa', *Refuge* 25(2) (2008) at p. 43.

¹⁹ See for example R. Amit, 'Queue here for corruption – Measuring irregularities in South Africa's asylum system' (Johannesburg, The African Centre for Migration & Society at the University of Witwatersrand and Lawyers for Human Rights, 2015) [Available at: <http://www.migration.org.za/uploads/docs/lhr-acms-report---queue-here-for-corruption---july-2015.pdf>]; 'Home affairs a corrupt hell for refugees', *The Citizen* (26 November 2016) [Available at: <http://citizen.co.za/news/news-national/1357923/home-affairs-a-corrupt-hell-for-refugees/>].

²⁰ J.P. Misago, T. Monson, T. Polzer, and L. Landau, 'May 2008 Violence Against Foreign Nationals in South Africa – Understanding Causes and Evaluating Responses' (Forced Migration Studies Programme and CoRMSA, 2010) at pp. 142-143.

²¹ T. Monson and J.P. Misago, 'Why history has repeated itself: The security risks of structural

22. The paragraphs above have outlined the significant obstacles face in achieving justice as well as institutional, and often extra-legal, barriers to justice. These forms of bias and administrative discrimination that operate outside of the law, resulting in extra-legal harassment of foreign nationals, may entrench economies of corruption and violence which have severe implications for the rule of law and constitutional democracy.²²
23. Considering the above issues, the SCCT supports section 7 which requires directives to ensure the objects of the Act are met including the circumstances in which cases may be withdrawn or prosecution stopped; such a directive would provide greater clarity for prosecutions for all involved parties. The SCCT supports the requirement for a directive from the National Commissioner of the South African Police Service. In light of evidence of the under-reporting of hate crimes the national instructions to be issued by the National Commissioner will be crucial in addressing historical obstacles to the prevention and prosecution of hate crimes and shaping SAPS future response. Similarly, the requirements for Reporting on the implementation of the Act in terms of section 8 will provide an opportunity to track progress in regards to hate crimes. The SCCT welcomes the addition, at section 2(g), of gathering and recording of data on hate crime as one of the Bill's objects.
24. We urge the DOJCD to carefully consider how to ensure that foreign nationals are able to access justice after being victimised by hate crimes and for DOJCD to consider its future obligations in terms of section 9. Civil society can play a significant role in this regard and the most recent draft version of the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, released for public comment in 2018, provides a useful starting point to achieve these objectives. We encourage the DOJCD in partnership with other government departments to continue to refine this strategy to complement the current Bill's priorities.

Effects of xenophobic violence on victims and the foreign national community

25. The effects of xenophobic violence are severe and cause major trauma to not only victims but also to other members of the community. Often these crimes accompany the destruction of livelihoods and property, causing further trauma in which victims must attempt to recover physically and mentally as well as rebuild their livelihoods. The 2015 violence in Durban officially resulted in seven deaths and numerous injuries, yet the official death toll 'does not reflect the greater impact of xenophobia in KwaZulu-Natal and elsewhere in South Africa. Hundreds of shops and businesses were looted and destroyed, there were countless non-fatal injuries, migrants embarked on a mass exodus from Durban'.²³

Xenophobia', (2009) *SA Crime Quarterly* 29, at p. 29.

²² L.B. Landau, 'Urbanisation, Nativism, and the Rule of Law in South Africa's 'Forbidden' Cities', *Third World Quarterly* (2005) 26 (7) pp. 1115-1134.

²³ E. MacLean & S. Ekambaram, 'Why migrants don't want to leave the camps', *Mail & Guardian* (12 May 2015) [Available at: <http://mg.co.za/article/2015-05-12-why-migrants-dont-want-to-leave-the-camps>].

26. Those displaced from their homes and forced into displacement camp remained reluctant to return home after the severity of the attacks and the perceived lack of assistance from the authorities. Psychologists from the humanitarian group Médecins Sans Frontières assessed people in the Chatsworth camp after the 2015 Durban violence and found that–

many have symptoms of post-traumatic stress consistent with those of people living in camps in South Sudan and Central African Republic, where people are fleeing active conflicts. Some of those displaced in Durban face multiple and compounded trauma, with this most recent displacement added to others experienced before. The trauma related to repeated insults in their everyday life in South Africa was also striking.²⁴

27. This assessment reflects the severity of these hate crimes. Researchers have described victims' experiences of attacks as 'reflections of a long-standing, ongoing pattern of assaults'; one victim of the May 2008 attacks described a period of at least seven years as one of continual verbal and physical abuse and another individual, discussing violence endured in Durban in 1999, said he did not envision an end to the xenophobia: 'I knew ... inside my heart [that] this was not normal violence or normal crime; it is xenophobia. It is not something that will go away in a few moments and finish. The chaos will just continue and get worse and worse.'²⁵
28. As demonstrated above, the effects of these crimes are severe and we welcome the Preamble's mention of this severity which states that 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'.
29. The SCCT strongly supports the inclusion of section 5 into the Bill, regarding the impact of the offence on the victim, which now compels the prosecutor to consider the interests of the victim of an offence in regards to evidence or in terms of sentencing. This provision will better allow for the severity and impact of the crime to be communicated to the court which may counter arguments that the offence was purely criminal and was not carried out by prejudice. The SCCT welcomes the expansion of section 5(1) to include evidence by statement of the negative consequences on the victims or their associate. Given the nature of xenophobic hate crimes and their effects on fellow community members, the SCCT recommends that section 5(1) be expanded so that, where appropriate, individuals who are close to the victim or a member of the victim's 'group' but are not a family member may be able to make statements on behalf of the victim. This would allow for a more thorough understanding of the impact of the crime and would also reflect the Preamble's reference to the broad impact of hate crimes.
30. Given the often severe economic damage that xenophobic violence causes, the SCCT also strongly supports the requirement as found in section 6(2)(b)(i)-(iii) that the court must consider the damage to property and financial losses, physical

²⁴ Ibid.

²⁵ L. Vromans, R.D. Schweitzer, K. Knoetze & A. Kagee, 'The experience of xenophobia in South Africa' (2011) *American Journal of Orthopsychiatry* 81(1) at pp. 91-92.

or other injuries, and the loss of income or support when considering sentencing for those convicted of hate crimes.

Conclusion

31. The SCCT believes that the current version of the Bill provides an excellent foundation for a more effective and just response to hate crimes committed in the Republic. We look forward to continued engagement on this issue with the DOJCD through the Bill and other mechanisms such as the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.