



African Policing Civilian Oversight Forum

Submission

Prevention and Combatting of Hate Crimes and Hate Speech Bill

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African Policing Civilian Oversight Forum

Building 23B, Suite 16, Waverley Business Park, Wycroft Road, Mowbray, Cape Town, 7925

PostNet Suite 63 Private Bag x11, Mowbray, 7705

Tel: +27 21 447 2415

www.apcof.org.za

Trust no. IT1900/2012

Trustees: T Gandidze (Chair), G Cronje (Treasurer), P Tlakula, E van der Spuy, A Van Wyk

1 Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission to the Portfolio Committee on Justice and Correctional Services on the draft *Prevention and Combating of Hate Crimes and Hate Speech Bill* (B9-2018) (the Bill).

Our submission is based on [APCOF's research](#) into the capacity of the state institutions to prevent, detect and investigate xenophobic violence and hate crimes. Our research shows that incidents of xenophobic hate crimes have remained a regular feature in South Africa.¹ Various interventions that have been implemented to promote the principles of non-discrimination, equality and dignity of all persons have substantially failed to reduce incidents of xenophobic hate crime.

While we appreciate the effort required to draft, consult and enact new legislation, in our view the most important area of impact is the extent to which the key role players will be capacitated and supported to ensure its implementation. We are particularly concerned about the extent to which the South African Police Service (SAPS) will be supported to translate the legislation into operational policing that achieves the prevention, detection and investigation of the crimes contemplated. This will require a significant investment in the development of directives, training and oversight to ensure that police can:

- Identify crimes that will fall under sections 3 and 4 of the Bill, particularly for detective services.
- Categorise and enter data in relation to hate crimes and hate speech on the Crime Administration System (CAS).
- Adopt bias-indicator specific investigation procedures where a crime in terms of sections 3 or 4 is suspected.
- Ensure for the rights-based treatment of complainants and victims.
- Draw on the expertise of specialised units (based on good practice observed elsewhere) who are specifically trained in identifying, investigating and preventing hate crimes.

To that end, we encourage the Committee to maintain its oversight of the Bill's implementation, once enacted into law, particularly as it pertains to the effective prevention, detection and investigation of hate crimes and hate speech by the SAPS.

What follows is our analysis of the bill, in terms of both its utility as an instrument to address hate crimes and hate speech, and our recommendations to strengthen what we have identified as areas of weakness or gaps.

¹ Louise Edwards and Laura Freeman, *Policing and non-nationals: Analysis of police prevention, detection and investigation of xenophobic violence in South Africa*, African Policing Civilian Oversight Forum, Cape Town, 2021, available at <https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>. See also, Louise Edwards, Azwi Netshikulwe and Laura Freeman, *Policing and non-nationals: Community Police Forums and xenophobic violence in South Africa*, African Policing Civilian Oversight Forum, Cape Town, 2021, available at <https://apcof.org/wp-content/uploads/policing-and-non-nationals-community-police-forums-and-xenophobic-violence-in-south-africa.pdf>

2 Overarching comment on the utility of the Bill

We are encouraged by the government's commitment to adopting legislation to address hate crimes, and our research identifies three key gaps which justifies the need for this law:

- The lack of overarching legislation to deal with hate crimes.
- The lack data related to hate crimes.
- The lack of evidence-led interventions to address hate crimes.

The Bill addresses the inadequacies in the current legislative regime to respond adequately deal with hate crimes. For instance, xenophobic violence, crimes against key populations, and racial motivated crimes will be dealt with in terms of this Bill. APCOF research also identifies the lack of data on hate crime as a critical factor in addressing hate crimes. The Bill will therefore be critical as it will require the police to collect hate crimes data, enabling an understanding of the full extent of the problem. Hate crime data will also improve the design and implementation of evidence-led interventions. Finally, hate crime data will also enable the police to mobilise critical resources to build their capacity to prevent, detect, and investigate hate crimes.

3 General explanatory note

APCOF welcomes the reference to South Africa's obligations in terms of the Constitution and international human rights instruments to protect and promote human rights particularly in relation to equality and non-discrimination. We note, however, that South Africa has additional regional obligations through the [African Charter on Human and Peoples' Rights](#). The Charter provides a legal framework for the promotion and protection of human and peoples' rights on the continent, including measures to promote equality and non-discrimination under Article 2 on the basis of 'race, ethnic group, colour...national and social origin...or any other status'. Given that African migrants are disproportionately impacted by xenophobic violence, discrimination, racism and related intolerances, reference in the Bill's general explanatory note to the African Charter will go a long way in recognising the nuanced nature of the problem that this Bill seeks to address.

4 Preamble

We welcome the preamble to the Bill as it correctly describes the underlying reasons for the introduction of this law and its interpretation. With this in mind, we recommend the strengthening of the preamble of the Bill to quote the Constitutional provision that "that South Africa belongs to all who live in it, united in our diversity". The inclusion of this phrase will reinforce the commitment and constitutional aspiration of a South Africa where all are welcome and embraced in all their diversity.

5 Objects of the Act

We agree with the objects of the Act but recommend that section 2(a) be amended to include reference to South Africa's regional human rights obligations:

"Give effect to the Republic's obligations regarding prejudice and intolerance as contemplated in regional and international law instruments."

South Africa acceded to the African Charter in 1996 and as such recognises the provisions of the Charter part of the South Africa's law in terms of section 231(4) of the Constitution. Whilst the African Charter has not been enacted into the South African law by national legislation, Section 233 nonetheless provides for its application.

6 Victim impact Statement

APCOF supports the express provision in the Bill for a Victim Impact Statement. We echo the words of the [Law Society of South Africa](#), which points to Victim Impact Statements as being useful in furnishing new information to the court to address the actual physical, psychological, social and financial consequences of the offence on the victim and not just the question of an appropriate sentence.² In this way, the Victim Impact Statement is a means of ensuring that victims voices are heard and that they are enabled to fully participate in the criminal justice system.

This position is also reflected in the Victim Charter, which explicitly encourages the participation of victims of crime in the criminal justice system. This includes by giving evidence during court proceedings to highlight to the court the impact of the crime on the victim. This practice is now well established in our criminal justice system, particularly in interpersonal violent crimes such as murder and rape. This has found expression in the *Child Justice Act 75 of 2008* and the *Criminal Law (Sexual offences and related matters) Amendment Act 32 of 2007*. Given the interpersonal nature of hate crimes and hate speech, APCOF welcomes it as consistent with the precedent set in other legislation, and by the Victim Charter.

We submit, however, that additional safeguards related to the taking of a Victim Impact Statement should be provided to reduce any potential harm, secondary victimisation and right to privacy of victims. The Law Society of South Africa recognises this and has stated that '[v]ictims should have an option to tender a statement and the right to request the prosecutor to refrain from presenting the court with details of injury.'³ Given the adversarial nature of court proceedings, safeguards must be put in place to protect the victim from any further harm that may arise as a result of submitting their Victim Impact Statement.

We agree that the Victim Impact Statement should be admissible as evidence in court and should be dealt with in terms of the law of evidence. This provision is consistent with the precedent set in which the Victim Impact Statement are admitted during or after the trial to demonstrate to the Court the impact of the crime and in mitigation of sentence. The provision is also consistent with the recommendations from the Law Society of South Africa which recommended that the Victim Impact Statement should contain only information that is not before the court and that the court should have the discretion to admit or reject in the evidence the Victim Impact Statement.

² South African Law Commission. 1997. Sentencing Restorative Justice- Compensation for victims of crime and victim empowerment. Issue Paper 7. Project 82. https://www.justice.gov.za/salrc/ipapers/ip07_prj82_1997.pdf (Accessed 23 September 2021).

³ South African Law Commission. 1997. Sentencing Restorative Justice- Compensation for victims of crime and victim empowerment. Issue Paper 7. Project 82. https://www.justice.gov.za/salrc/ipapers/ip07_prj82_1997.pdf (Accessed 23 September 2021).

7 Penalties

Section 6(3)(a) and (b) of the draft Bill prescribes the sentence for any person convicted in terms of section 4. The prescribed sentence for ‘a first conviction, to a fine or to imprisonment for a period not exceeding three years, or both a fine and such imprisonment; and any subsequent conviction, to a fine or imprisonment for a period not exceeding five years or both a fine and such imprisonment.’

APCOF recommends that the Bill be amended to include the prescribed sentencing option of ‘community service’ and ‘restorative justice processes’. In terms of the former, the option of community service is an important inclusion to promote the rehabilitation of an offender through an appropriate community service order, with a view to influencing a change in their behaviour and attitudes towards a certain group of people. This approach is consistent with the precedent developed in South Africa which recognises the importance of the sentence through community service as an option instead of custodial sentence. Custodial sentences do not always provide effective means of achieving justice and the rehabilitation of offenders.

We further submit that if done within a framework of promoting the dignity of victims and offenders, in an environment that promotes freedom from discrimination and the equal participation of all parties, restorative justice processes are an appropriate way of dealing with hate crimes. The purpose of [restorative justice](#) is to repair the harm caused by the crime, to provide a space for the parties to determine how to do this together, and to assist in fundamentally changing attitudes, relationships and communities. The restorative justice approach has already been adopted by the [Justice Crime Prevention and Security Cluster \(JCPS\)](#) in relation to a range of criminal offences, and we recommend that the Bill be amended to explicitly include it as part of the range of measures available for a conviction of hate crime or hate speech.

8 Directives

We welcome the provision for Directives by the National Director of Public Prosecutions in consultation with the Director General of Justice and Constitutional Development and the National Commissioner of the South African Police Service, provided for in section 7(1). However, we recommend that the Bill provide for the consultation and the issuance of these directives to be time bound. In our view, a period not exceeding 90 days of the promulgation of the ensuing Act would be reasonable.

We recommend that section 7 be amended to include provision for the issuance of Directives, in the form of standing orders or national instructions, by the National Commissioner of the SAPS. The SAPS will be integral to the successful implementation of the legislation, as it will be through their mandate to prevent, detect and investigate crime that the identification of crimes contemplated in sections 3 and 4 of this Bill, and the evidence required to ensure successful prosecution, will be achieved. We also recommend that section 7 include a provision that the NPA and the SAPS develop and provide training of all its members within a period not exceeding 12 months of the ensuing Act.

To implement our recommendations, we recommend the inclusion of the following text in section 7 of the draft Bill:

7(2). The National Director of Public Prosecutions must develop relevant training courses with reference to the directives referred to in subsection (1) and ensure that adequate training takes place within the National Prosecuting Authority.

7(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).

7(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 within a period of 12 months from the promulgation of this Bill.

9 Reporting on the implementation of the Act

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. This is common practices across the world to place the responsibility of monitoring the implementation of, and report on the Act in the Executive Authority and/or department that developed the Act. As part of the monitoring the implementation of the Act, the Minister of Justice and Constitutional Development, South African Police Service, and the National Prosecuting Authority should be required to collect the hate crime and hate speech data, analyse it and report on it.

Accordingly, we recommend that section 8 be amended to specifically require the Minister of Justice, the South African Police Service and the National Prosecuting Authority to publish such data in their respective annual reports.

10 Prevention of hate crimes and hate speech

APCOF welcomes the coordinated and inter-departmental approach to the prevention of offences of hate crimes and hate speech in the draft Bill. However, we are concerned that programmes specifically contemplated in section 9 are limited in scope, and do not address all elements of a prevention methodology.

The focus on training and public information, while important, does not reflect an emerging trend in crime and violence prevention discourse towards broadening the concept of prevention to ensure that we are designing and implementing program and activities that strengthen the capacity of state institutions to effectively and sustainably address the drivers of crime and violence. This includes programs and activities that address broader societal and environmental factors that can lead to hate crimes and hate speech.

Inspiration for expanding the scope of prevention programs within the legislation can be taken from the work of the [UN Special Rapporteur](#) on the promotion of truth, justice, reparation and guarantees of non-recurrence. He has stressed the need to establish a comprehensive prevention framework that promotes interventions in civilian institutions, reform of security and justice sector role players, strengthening the role of civil society in the prevention of crime and violence, and interventions to address risks and challenges leading to violence in the cultural and individual spheres. Similar to this idea is the World Health Organisation's [ecological model](#) for understanding violence, which uses a four-level socio-ecological model to understand and prevent violence within the context of a complex interplay between individual, relationship, community and societal factors. This model has been used extensively in South Africa the training of local Community Safety Forums and municipalities in crime and violence prevention.

We submit that a similar nuanced approach to preventing hate crimes and hate speech is required, and that the development of an overarching prevention framework should be provided in section 9 to allow for a multi-sectoral plan to be developed to ensure that the scope of prevention programs and activities are broad enough to ensure their effectiveness.

We further submit that the South African Human Rights Commission (SAHRC) has a duty to promote awareness of the prohibition against hate crimes and hate speech more broadly in communities and the public. In this regard, we recommend that the Bill should compel the SAHRC to develop awareness programmes that other government institutions and Chapter 9 institution should roll out as part of their efforts address root causes designed to prevent the offences of hate crimes and hate speech.

Finally, we submit that state departments should be required to develop internal programmes and policies regarding offences related to hate crimes and hate speech. State departments should also be directed to develop and provide training on diversity, prejudice, conscious and unconscious bias and the offences related to hate crimes and hate speech to staff members as part of the drive to raise awareness. State departments and chapter 9 institutions should be required to report on their efforts in terms of preventing hate crimes and hate speech.

11 Regulations

We recommend that 10(1) should be made mandatory by removing the word 'may'. In this regard, the section should read 'the Cabinet member responsible for the administration of justice must, where applicable, make regulations regarding any matter which is required or permitted by this Act...' We contend that the discretion 'may' provides does not compel the Cabinet member to comply with this provision. We contend that without the regulations in place, the full extent of this ensuing Act cannot be operationalised.

12 Conclusion

We thank the Department of Justice and Constitutional Development for the current iteration of the Bill. We think it is a solid starting point towards addressing hate crimes and hate speech in South Africa, which has resulted in untold pain and suffering by many victims of these crimes as yet undefined under South African law. We believe that the Bill will further strengthen government strategies such as the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances and move South Africa towards its vision of creating a diverse and united country which belongs to everyone living in it.

For more information, please contact:

Sean Tait

Director

African Policing Civilian Oversight Forum

E: sean@apcof.org.za

Ph: 021 447 2415

W: www.apcof.org.za