



# **Prevention and Combating of Hate Crimes and Hate Speech Bill**

**Public Submission of the Democratic Alliance**

May 2023

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## 1. Introduction

The Prevention and Combating of Hate Crimes and Hate Speech Bill has a long history, with its initial formulation stretching back to 2009. The Bill was originally intended to solely address the offence of hate crimes, but following the public outrage directed at the Penny Sparrow incident of 2015, the offence of hate speech was subsequently included alongside hate crimes in the Bill.

The previous Portfolio Committee on Justice and Correctional Services had called for comments in 2019, however due to time constraints, this Bill lapsed at the end of the 5<sup>th</sup> Parliament. It was subsequently decided that the Committee would await the outcome of the Qwelane judgement, which provided greater clarity on the hate speech provisions in the Promotion of Equality and Prevention of Unfair Discrimination Act.

The Hate Crimes and Hate Speech Bill seeks to address the phenomenon of incidents motivated by prejudices within our society. It attempts to achieve this through the creation of two new criminal acts, namely 'hate crimes' and 'hate speech'. The Bill also puts in place measures to prevent and combat these offences. Both importantly and controversially, the Bill will make it a criminal offence to intentionally distribute material which constitutes hate speech, including through electronic means.

The publication of the 'Hate Crimes and Hate Speech Bill' has caused concern across South African society. The Democratic Alliance (DA) is of the opinion that should this draft Bill be passed into law; it may have chilling effects on free speech. We are also concerned that it may be used by powerful and politically connected individuals to silence criticism against them.

There is a need to address the root cause of prejudice within our society as opposed to its mere criminalisation as done within this Bill. Finally, there are a variety of other ancillary concerns that we outline in our submission.

Given South Africa's past, and the continuing prevalence of racial hateful prejudices, the DA supports the need to take strong action against hate crimes and hate speech in our society. However, we cannot support this Bill in its current format as it has an inadequate definition of 'harm', fails to address the root causes of prejudice in our society and opens up the potential for abuse of its provisions to silence views which the government may find objectionable. As the Official Opposition, we will oppose this Bill in Parliament should our concerns not be addressed.

The DA has taken the decision to submit our comments and objections during the public comment process. In these comments we seek to address the concerns of our supporters and the South African public generally. Resultantly, as the Official Opposition, we make this submission on behalf of the people of South Africa.

**Democratic Alliance**  
May 2023

## 2. Comments on the Bill

The Prevention and Combating of Hate Crimes and Hate Speech Bill has the following stated objectives:

- Give effect to the Republic's obligations regarding prejudice and intolerance as contemplated in international instruments;
- Provide for the prosecution of persons who commit offences referred to in this Act and provide for appropriate sentences;
- Provide for the prevention of hate crimes and hate speech;
- Provide for effective enforcement measures;
- Provide for the co-ordinated implementation, application and administration of this Act;
- Combat the commission of hate crimes and hate speech in a co-ordinated manner; and
- Gather and record data on hate crimes and hate speech.

After conducting a careful analysis of this Bill, together with inputs from the South African public, the DA submits the following comments:

### 1. Clause 1 – Definitions of Harm, Victim and Hate

The current definition of 'harm' is, "substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups".

The definition of harm as contained in the Bill is both vague and broad. In order to make a clear law this definition will have to be improved to provide greater certainty as to what will constitute a harm.

We are further of the view that the terms "victim" also needs to be properly defined in order to address the broad and vague nature of the Bill. It will have to be carefully considered whether natural and juristic persons should be included in the definition of "victim". We are strongly of the view that "victim" should be defined in such a way as to include only natural persons in order to prevent the abuse of the legislation to clamp down on criticism aimed at companies, political parties, governments and groups of elected politicians (caucuses). The definition of victim as it currently stands includes juristic persons, which may prove contentious.

"Hate" should also be clearly defined in the Bill. It is not good law to leave such a fundamental element to the crime open to interpretation by courts or through legal precedent if it can be clearly defined within the Bill itself.

### 2. The Threat of Self-Regulation of Speech and a Subsequent Chilling Effect on Freedom of Expression.

The creation of a new crime of Hate Speech, and the harsh prison penalties attached to it, may result in increased self-regulation of the journalistic profession and the public at large, even when the speech may not fall foul of the provisions of the Bill.

Journalists and citizens, weary of the threat which the Bill poses may choose to refrain from making speech they fear will fall foul of the provisions of the Bill, even if this would not in actuality be the case.

The mere threat of imprisonment may result in self-censorship, thereby reducing freedom of expression across the country. This will result in a poorer marketplace of ideas, resulting in reduced debate and quality of idea exchanges between persons.

### **3. A Lack of Justification for the Included Characteristics and Grounds**

The DA believes that a clear justification for the inclusion of all characteristics must be provided by the Department. While the DA does not necessarily deny that the characteristics contained within the Bill are not subject to hate crimes, the inclusion of these characteristics must be supported by clear evidence justifying their need for protection. A clear and comprehensive justification for the inclusion of these characteristics has not yet been presented.

Any limitation on freedom of expression, on grounds not already included within the Constitution, must during a section 36 rights limitation analysis give consideration to less restrictive means to achieve the purpose of curbing hate speech and hate crimes. As the grounds extend beyond that of what is included currently in the Constitution, as exceptions to the section 16 right to freedom of expression, clear justification should be provided as to their inclusion within the Bill at present.

### **4. A Lack of Justification for the Bill in the First Instance**

The DA does not believe that adequate justification has been provided by the Department on the need for the Bill, and the inadequacy of existing remedies and legislation.

The government has failed to provide statistics on incidents of hate speech since the implementation of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). It therefore cannot be concluded that other existing measures to deal with incidents of hate crime and hate speech are failing to have a positive effect on the problem. Given the seriousness of creating these new criminal offences, clear justification should be provided to support the need for this Bill.

Furthermore, the DA holds the view that this Bill is seeking to double legislate for hate crimes, by taking circumstances which would ordinarily be taken into account at the sentencing stage where an underlying crime exists. The addition of the 'hate' element should instead be used as an aggravating factor during the sentencing stage as opposed to creating an entirely new crime within this Bill. As the Bill poses a risk of the government using the provisions of the Bill to curtail speech or actions it finds politically undesirable, the usage of existing legislation and mechanisms would prove to be a safer solution for the nation as a whole.

### **5. Penalties or Orders**

We believe that the criminalisation of hate crimes and hate speech will serve only as a deterrent rather than addressing the core root of the problem. The sentencing provisions under this act require a greater focus on rehabilitative mechanisms as opposed to only imprisonment and the payment of fines. We

submit that rehabilitative measures should be included in all penalties or orders to address the core prejudices and motivations which underly all hate crimes and instances of hate speech. A requirement that rehabilitative measures be issued either as stand-alone sentences or alongside fines and imprisonment would reduce the occurrence of re-offences in the future. It should further be considered to clearly distinguish between matters that should be dealt with by way of PEPUDA and matters that should be dealt with by way of the criminalisation of some hateful acts and speech.

## **6. Eight-year jail term as sanction**

The DA is of the view that the eight-year jail term, even as a maximum sanction, is unreasonable and disproportionate and should be reconsidered.

## **3. Conclusion**

The DA recognises that the stated objectives behind this Bill are laudable, given the history of South Africa, and the lingering effects this history continues to have on our society in the present day. However, we believe the Bill contains a multitude of flaws which require correction. Preferably, we believe this Bill should be abandoned and 'hatred' instead be used as an aggravating factor in sentencing under existing crimes.

We further believe that the Bill its current form may have a chilling effect on free speech, by resulting in persons self-regulating their speech to avoid falling foul of the provisions of the Bill. This may have chilling effects on the ability of the public to draw attention to content which constitutes hate speech, and to condemn it on public platforms.

Finally, while the Bill aims to make a marked difference in the prevention and combatting of hate crimes and hate speech, the government should instead make greater attempts at addressing the root causes of these social ills. Societal policies which aim to rehabilitate and educate are preferable to the crude criminalisation of hate crimes and hate speech, which address only the symptoms rather than the cause of crimes motivated by hatred.