

To: National Council of Provinces

By email

[HateCrimesBill9B-2018@parliament.gov.za](mailto:HateCrimesBill9B-2018@parliament.gov.za)

22 May 2023

Dear National Council of Provinces, ,

## **COMMENTS ON THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL [B9 -2018]**

### **1. INTRODUCTION**

1. The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to fostering integration between migrants, asylum seekers, refugees, and South Africans. Our mission is to welcome, to protect, to promote and integrate mobile populations in local society. In providing assistance to mobile populations, we advocate respect for human rights and use a holistic approach that considers all basic needs. The SCCT works with asylum seekers, refugees and other migrants on a daily basis, addressing obstacles many face to meaningfully contribute to society. We draw on this experience, along with relevant and contemporary research on migration, to offer our input on the Prevention and Combating of Hate Crimes and Hate Speech Bill [B2-2022] (hereafter 'the Bill').
2. While we agree with much of the Bill's aims and proposals and support the passing of the Bill, our comments in this submission are focused on the impact some of the proposals will have on refugees, asylum seekers and other migrants whose documentation status may or may not be precarious. Our submission focuses on the need for legislation to protect non-citizens and the realities of documentation for asylum seekers, refugees and migrants in South Africa and how this may impact the Bill's effectiveness.

The centre is registered with the South African Department of Social Development as a non-profit organisation (021-079 NPO), as a Child and Youth Care Centre (C7569) and as a Public Benefit Organisation with the South African Revenue Services (930075335) and governed by a Trust (IT2746/2006). Auditors: PKF Constantia Valley Cape Town Inc. VAT number: 4780251437.

3. SCCT is a member of and sits on the Groups Steering Committee of the Hate Crimes Working Group (HRWG) and supports and endorsed the submission of the HCWG to the National Council of Provinces.

## **2. SUPPORT FOR THE BILL**

4. We support the adoption of the Bill for several reasons. Research outlines the severe emotional and psychological impact of repeated xenophobia motivated crimes, attacks and hate speech on vulnerable migrants and the associated individual and group psychosocial trauma.<sup>1</sup> We have witnessed the same in our experience working with asylum seekers, refugees and other vulnerable migrant groups – which demonstrates the importance and urgency of legislation that deals with such hate crimes and hate speech. To date, there has been a lack of justice for the victims of xenophobia motivated hate crimes and speech, and a lack of recognition of these crimes. Too often these crimes are merely labelled as ‘criminal’ acts while disregarding the hate element.
5. A culture or practice of impunity for perpetrators of xenophobic hate crimes still persists coupled with institutional discrimination against these same groups, rendering it difficult for victims to seek and effectively obtain recourse. The passing of the Bill will also hopefully assist ensure increased sensitivity to and ensuring awareness of the duty of the South African Police Service to protect individuals and their property in instances of xenophobia related crime and not to neglect to do so.<sup>2</sup>
6. The adoption of the Bill is necessary for the above hate-motivated crimes and speech to be recognised and appropriately addressed in our law. Broadly, we believe the Bill will:
  - assist in the prosecution of xenophobic hate crimes and hate speech, and hate crime and hate speech related crimes;
  - serve to amplify argument in aggravation of sentence and appropriate recourse;
  - assist in the rehabilitation of sentenced individuals; and

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<sup>1</sup> 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>]; and 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.

<sup>2</sup> *Osman v Minister of Safety and Security and Others* (EC09/2008) [2010] ZAEQC 1 (15 December 2010)

- allow for the reporting and quantifying of such crimes to allow for adequate prevention programs.

In this sense, it may provide a sense of justice and healing through recourse to the law and recognition from it. It would furthermore assist in addressing the above-mentioned institutional discrimination and culture of impunity for perpetrators.

7. Finally, the adoption of the Bill is in line with international instruments and national policy including:

- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- the Third United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance and the Declaration adopted at the World Conference, held in Durban (the Durban Declaration);
- the National Conference to commemorate the 20th anniversary of the Third World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCARX20); and  
the SA National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.

8. Furthermore, the adoption of the Bill enhances and gives life to the protection afforded to refugees and asylum seekers by the 1951 UN Convention relating to the Status of Refugees; the 1967 UN Protocol Relating to the Status of Refugees; the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; and, as codified within our domestic legislation, the Refugees Act 130 of 1998.

### **3. AREAS OF IMPROVEMENT**

#### Section 5

9. Since the 2008 xenophobic attacks, there have been few effective prosecutions for xenophobic motivated crimes holding an individual/s to account. This is exacerbated by the fact that it is not possible to take statements from deceased migrants.
10. In terms of section 5 of the Bill, we are encouraged by the provision for Victim Impact Statements (VIS) and the requirement for the victim's authorisation when a person

other than the victim is making a VIS. However, hate crimes in general and in the context of vulnerable migrants often lead to the death of the victim. As the section currently provides, the deceased migrant would neither be able to give a VIS nor authorise another person to do so on their behalf.

11. The VIS is important as it allows 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 VIS is not only important for the successful prosecution of xenophobic hate crimes but also for use in evidence in aggravation and the appropriate sentencing or sanction. It could further tailor the appropriate rehabilitation, such as community service with a migrant organization or a sensitization course, where appropriate.
12. It is welcomed that the VIS will include evidence by statement of the negative consequences on the victim and their associated migrant group with shared characteristics, reflecting effect of hate crimes on a particular group. However, where a victim dies because of a hate crime, there must 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 groups of people. This is equally necessary for the successful recognition that the motive for the crime is hate.
13. Given the nature of xenophobic hate crimes and their effects on people with share characteristics within the community, the SCCT submits that the prosecutor should be required by section 5 of the Bill to obtain expert input either from the group to which the victim belonged or from organizations which work directly with the group to which the victim belonged. Furthermore, that the prosecutor should be required to explain the absence of such a statement in the case of the death of the victim.
14. In Section 1 under definitions of the grounds point (e) and characteristics point (i) we appreciate the inclusion of asylum seekers. However, it may serve to expand the ground and characteristic to include undocumented people.

15. We have seen that migrants and South African's alike if they are not in possession of documentation have an additional level of vulnerability to hate crimes and hate speech. The fact that 1/3 of the victims of xenophobic violence in 2008 violence were south African speaks to the impact of documentation has on the perpetuation of hate crimes and hate speech. Similarly, violence has escalated in xenophobic attacks where victims were not able to produce 'documentation'.<sup>3</sup>

16. We submit that in points definitions grounds point e) and characteristics point i), mentioned above, or in a separate section that undocumented people are provided for as a separate characteristic and ground.

### **CONCLUDING REMARKS**

17. In summary, it is our submission that the Bill is positive in most respects and believe that it should be passed. We have highlighted areas for revision and improvement in relation to Grounds, Characteristic and Victim Impact Statements sections. We remain concerned about the consequences in the absence of the bill. If the proposed bill is signed into law and implemented this will be a crucial step forward. SCCT would also welcome an opportunity to make oral submissions to the National Council of Provinces. We thank the National Council for the opportunity to provide our insight on these important issues.

### **Submissions of the Scalabrini Centre of Cape Town.**

James Chapman

Shaun Kraak

Corey Johnson

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<sup>3</sup> See for example the case of Elvis Nyati who was murdered in part because he could not produce a passport. T. Head, "Diepsloot: One killed in mob justice attack, after demand 'to see passports'", *The South African* (7 April 2022). [Available at: <https://www.thesouthafrican.com/news/breaking-diepsloot-latest-news-update-mob-justice-murder-passport-7-april/>]