



HATE | CRIMES | WORKING | GROUP

Presentation to the Portfolio Committee on Justice and Correctional Services:
The Prevention and Combating of Hate Crimes and Hate Speech Bill [B9-2018]

Chair: Sibusiso Khasa, Amnesty International

Deputy Chair: Thozama Njobe, Triangle Project



Who we are



Durban Lesbian & Gay Community & Health Centre



HEINRICH BÖLL STIFTUNG
CAPE TOWN
South Africa | Namibia | Zimbabwe





The focus of our presentation

- Section 1: Suggested additions to definitions
- Section 3: The offence of hate crime
- Section 5: Victim Impact Statements
- Section 6: Penalties and orders
- Section 7: Directives
- Section 8: Reporting on implementation
- Section 9: Prevention
- Costing of the Bill



Section 1: Definitions

- **“Associates”**
 - We suggest the inclusion of the term “associates” in the definitions section, to be defined as family members, colleagues, friends and other possible connections to a victim. It is important to define the term, because it is used in the section on Victim Impact Statements.
- **“Harm”**
 - We are very concerned about the lack of clarity provided by the current definition of the term “harm” in the Bill, and about the uncertainty it may cause in the interpretation of the law.
- **“Intersex”**
 - We submit that the definition of “intersex” should be removed from the definitions section of the Bill.



Section 3: Hate Crime

- We are broadly supportive of the framing of this offence, however...
 - Gender-neutral wording should be used throughout the Bill, by replacing “him or her” with “them”.
 - It is necessary to include “**gender expression**” as a listed characteristic in section 3(1)(h) for the sake of completeness.
 - It is necessary to include “**asylum seeker**” as a listed characteristic in section 3(1)(k) for the sake of completeness.
 - Given the necessary distinction in the list of characteristics between sex and gender, the listing of “sex” in section 3(1)(p) should include “**sex characteristics**”.
- We recommend an express legal obligation on the Director of Public Prosecutions, or their delegate, to automatically provide written reasons when a decision has been taken to decline to prosecute a charge of hate crime.



Section 5: Victim Impact Statements

- We submit that section 5(1) and (2) should be reworded as provided below:

5. (1) For purposes of this section, a victim impact statement means a sworn statement or affirmation by one or more of the following persons:

(i) the victim;

(ii) someone authorised by the victim to make a such statement on behalf of the victim

(ii) in the event of the victim's death, the victim's associate(s);

(iii) an organisation or institution with expert knowledge or experience of the group to which the victim belongs, or is perceived to belong;

which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and their associate(s).

(2) The prosecutor must, when adducing evidence or addressing the court on sentence in respect of an offence under this Act, consider the interests of a victim of the offence and the impact of the offence on the victim, and furnish the court with a victim impact statement provided for in subsection (1).

(2A) Where is not possible to obtain a victim impact statement provided for in subsection (1), the prosecutor must provide the court with written reasons for the absence of such a statement by either the victim, their associate(s), or an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.



Section 6: penalties and orders

- We submit that this section of the Bill requires a good deal of clarification.
- The difficulty in understanding what is contemplated extends beyond the wording of the section, to the schedule of legislation (and specifically sentencing legislation) that this Bill will amend.
- We appeal to the Portfolio Committee to depart from the legalistic way in which the Bill is written in this regard.
- It is critically important for ordinary people to be able to understand this law and have legal certainty about the consequences of hate crime.



Section 7: Directives

- We support the inclusion of directives for the National Prosecuting Authority, however, we recommend that section 7 be subdivided into further additional parts to require **training** in relation to the Directives.
- Directives should go hand in hand with training.
- It is especially important to expressly extend the requirement for Directives to the SAPS, in the form of National Instruction(s) and Standing Orders – again, with commensurate **training**.
- The inclusion of the SAPS under the general implementation provisions in section 8 is not sufficient to underscore the critical role played by SAPS in the detection of hate crime and hate speech.



Section 9: Prevention

- The HCWG is disappointed with this section of the Bill and cannot support it in its current iteration.
 - Section 9(1) places only a generic legal duty of the “the State” and only two Chapter 9 institutions.
 - Section 9(1), on a plain reading, only creates a duty to promote awareness of the criminalisation of hate crimes and hate speech.
 - Section 9(2) places a duty on the President to designate certain executive departments, for the development of certain programmes. However, we submit that such departments can, and should, be specifically identified and listed in the principal legislation, thereby creating justiciable legal obligations and legal certainty.
 - Section 9(2)(c) is unrealistic and impractical, and we submit that the principal legislation should create utmost certainty about the exact state departments that have the legal obligation to assist victims with lodging complaints.
 - Section 9(2)(d) should create certainty about the exact state department(s) responsible for the training of public officials.
 - Section 9(3) should not be limited to presiding officers alone and should contemplate similar training for public prosecutors.
- Cabinet has adopted the **National Action Plan to Combat Racism and Racial discrimination, Xenophobia, and Related Intolerance (NAP)**. The document sets out the key actors in South Africa’s commitment to the eradication of discrimination and intolerance. The Bill should follow suit.



Learnings from CERD (Section 9 cont)

- Article 7 the **Convention on the Elimination of Racial Discrimination** (CERD) highlights the role of “teaching, education, culture and information” in the promotion of understanding and tolerance. **Deterrence of hate crime, through criminalisation alone, does not constitute prevention.**
- It must be complemented by a broadly educational approach, precisely because racism, homophobia, xenophobia and other forms of hatred and prejudice can be the product of, among other things, indoctrination or inadequate education.
- Article 7 is framed in mandatory language, requiring State parties to “adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to... discrimination and to promoting understanding, tolerance and friendship..., as well as to propagating universal human rights principles, including those of the Convention.”
- This means that state departments and institutions responsible for education, culture, and information, **at the very minimum**, are all critical role-players in preventing prejudice and discrimination.



Costing of the Bill = accountability

- We note that while various versions of the Bill have been available since 2016 the Bill remains **uncosted**.
- We cannot agree with the assertion in the explanatory memorandum to the Bill, that the complicated work of prevention and combating of hate crimes and hate speech can be done within existing departmental budgets.
 - Without a costing accompanying the explanatory memorandum, such an assertion cannot be verified.
 - The HCWG believes the Bill will require changes to current ways of preventing, detecting, and prosecuting crimes.
- **Poor implementation plagues many SA laws.** Failure to properly cost legislation contributes to this. The HCWG is deeply concerned that the lack of a costing means the Bill will suffer the same fate.

We welcome your questions.



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