

Advocating for the inclusion of restorative justice in the proposed Hate Crimes and Hate Speech Bill - submission to the Justice Portfolio Committee of the National Assembly

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[Redacted]

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1. EXECUTIVE SUMMARY

While there are good reasons for hate crimes legislation, there are two fundamental criticisms of this approach that should be noted:

1. The enhancement of punishment and additional criminalization of hate-motivated perpetrators does little to repair the harms caused by incidents of hate
2. Enhancing the penalties of offenders is unlikely to effectively challenge the underlying causes of prejudice, at least at an individual level.

The Bill does not appear to have taken these criticisms into account at all. Prevailing official thinking appears to argue that if the purpose of hate crime legislation is to provide for harsher sentencing, it does NOT make sense to utilise restorative justice as this provides for mitigation. There is also a concern that restorative provisions could be abused and lead to these offences not being taken seriously¹. Furthermore, the Bill does also not appear to have taken into account the deep and complex social context in which hate incidents occur. The RJC is convinced that it is essential to do so. This submission substantiates the value that a restorative justice (RJ) approach would add to this bill.

It must be recognised that hate incidents occur in a complex social context. Many hate crimes arise out of a sustained period of harassment and bullying that includes hate speech. Victims often experience severe emotional and mental health consequences. Perpetrators can also not be seen in isolation, but as having been shaped by their primary groups and communities. This submission details why a retributive, punitive approach does little to address these attitudes, behaviours and consequences.

A restorative justice approach is concerned with addressing harm in tangible ways. For this reason the submission recommends that a restorative justice approach be integrated into the bill, making mediation, counselling and educative programmes available at

- A prevention and early intervention stage.
- a pre-trial stage (as part of diversion)
- a sentencing stage (as part of non-custodial sentences)

using the framework of the Child Justice Act (CJA), 2008) and that civil society organisations, supported by the State be used to make these options available. Accredited training in restorative justice mediation and hate incidents should be mandatory for all practitioners.

The RJC would appreciate an opportunity to make an oral presentation about the Bill to the Portfolio Committee.

¹ This argument was articulated very clearly by the Deputy minister for Justice at the AGM of the Hate Crimes Working Group on 30 June 2016 as well as at a seminar hosted by The Southern African Liaison Office 28 June 2018 and again at a webinar hosted by The Southern African Liaison Office 28 September 2021

2. INTRODUCTION

The Restorative Justice Centre (RJC) is a registered NPO based in the heart of Pretoria. Since 2001 we have assisted over 4000 victims of crime and abuse and 12 000 child and adult offenders. We currently function with contract staff and volunteers. The RJC's main focus is promoting restorative justice practices as a means to peacebuilding and the constructive resolution of conflict. RJC is a pioneer in the restorative justice sector and an important provider of restorative justice services in South Africa. In addition to advocating for the increased use of restorative justice we also train practitioners.

3. PURPOSE AND RATIONALE

In tabling the Prevention and Combating of Hate Crimes and Hate Speech Bill South Africa is joining an international trend in which multiple jurisdictions are criminalizing both hate crime and hate speech to protect a range of different victim groups. Central to the vast majority of these laws is the provision for increased punishment 'for any offender who "demonstrates" or who is (partly) motivated by, hostility towards a victim based on the victim's actual or presumed identity traits'². The rationale for this increased punishment arises from the retributive principle of proportionality on the view that a hate offender's intention/purpose carries a higher degree of moral blameworthiness, while simultaneously recognizing the enhanced level of harm that such crimes cause to victims, communities and society more broadly.

The Bill provides limited guidelines for sentencing, referring to relevant aspects of the Criminal Procedure Act and where those provisions are not relevant, hate crimes should be regarded as aggravating circumstances. The Bill recommends that hate speech, in the case of a first offence, lead to a fine or imprisonment for a period not exceeding three years, or to both a fine and prison. Apart from this, the Bill thus does not provide any new mechanisms for responding to hate crime or speech.

While there are good reasons for hate crimes legislation, there are two fundamental criticisms of this approach that should be noted:

1. The enhancement of punishment and additional criminalization of hate-motivated perpetrators does little to repair the harms caused by incidents of hate
2. Enhancing the penalties of offenders is unlikely to effectively challenge the underlying causes of prejudice, at least at an individual level³.

The Bill does not appear to have taken these criticisms into account at all. The RJC is convinced that it is essential to do so. It has made submissions in this regard to the Department of Justice during the call for comments to address this, arguing the value that a restorative justice (RJ) approach would add to this bill. This submission explores and recommends some specific ways in which this can be done, based on consultations held within the members of the HCWG and related groups.

4. RESTORATIVE JUSTICE CONCEPTS AND IT'S CURRENT STATUS

Since at least the early 1970s there has been growing dissatisfaction in many countries with the criminal justice system, both in the way it is conceptualised and in the way it functions. The various streams within this comprehensive movement have included the restitution movement, the victims' rights and support movement, the prison abolition

² Walters, M.A. 2014. Hate Crime and Restorative Justice: exploring causes, repairing harms. Oxford University Press, p ix

³ Walters, M.A. 2014. Hate Crime and Restorative Justice: exploring causes, repairing harms. Oxford University Press, p xxii

movement,⁴ and more recently the therapeutic jurisprudence movement.⁵ Specific concerns that have been expressed include:

- the fact that criminal proceedings tend to exclude victims, despite the fact that they are the very people most affected by the crime incident;
- the inadequacies in the conceptual foundations or practices of criminal justice;
- the recognition that imprisonment causes suffering and debilitation;
- the inadequacies of retribution alone as a governing theory; and
- the appropriateness of making offenders accountable to their victims.

Restorative justice is a very specific stream within this comprehensive movement, and has developed in such a way that it is not limited to criminal justice matters.⁶

RJ has been described as an ‘appraisive’ concept (the term implies a number of values and standards); it is also an internally complex and open concept that continues to develop with experience.⁷ A useful articulation is the following three conceptions of RJ:⁸

The encounter conception

This is probably the most common way of using the term, as it captures one of the central ideas of the movement: ‘that victims, offenders, and other “stakeholders” in a criminal case should be allowed to encounter one another outside highly formal, professional-dominated settings such as the courtroom’. These encounters are variously referred to as victim offender mediation, conferencing or meetings and are often highly effective in providing victims with a platform to articulate the harm they have experienced.⁹

The reparative conception

Proponents of this conception agree with the typical retributive view that when a crime has been committed, an injustice exists that needs to be put right. However, they reject that simply imposing pain upon offenders is either necessary or sufficient to achieve this. They hold that while the imposition of pain and suffering on offenders may provide some short-lived sense of justice for victims, it typically does not have much tangible meaning for victims, nor is it very effective in changing either the behaviour of the offender in question or of deterring similar behaviour by other would-be future offenders. Instead, the essence of justice is found in ‘repairing the harm’ or ‘putting right the wrongs’. ‘Putting right’ can be understood to mean the need to:

- address harms (primarily those of victims, but also those of communities); and
- address causes at all levels (personal, interpersonal, environmental and societal).¹⁰

Where the reparative conception differs from the encounter conception, is that even where an encounter cannot take place, other steps can be taken to address the harm resulting from a crime. This opens up the possibility of partially

⁴ Daniel Van Ness, ‘An Overview of Restorative Justice Around the World’, Paper presented at Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18–25 April 2005.

⁵ Annette Van der Merwe, ‘Therapeutic jurisprudence: judicial officers and the victim’s welfare’ – *S v M* 2007 (2) SACR 60 (W) p98 - 106. At http://137.215.9.22/bitstream/handle/2263/15710/VanDerMerwe_Therapeutic%282010%29.pdf?sequence=1

⁶ Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice*, US and Canada: Willan Publishing, 2007, p 15.

⁷ Johnstone and Van Ness, *Handbook ...*, p 8.

⁸ *Ibid*, 9–20.

⁹ *Ibid*, 9.

¹⁰ Adapted from Howard Zehr, *The Little Book of Restorative Justice*, Intercourse, Illinois: Good Books, 2002, p 2002.

restorative solutions to crime being generated outside encounter processes, and reparative sanctions being ordered and administered by professionals within the criminal justice system.

It is clear from this explanation that the concept of 'harm' features prominently in RJ thinking. An important text in the field has defined harm as follows:

The negative impact of an offence upon a person, group or community. Examples of direct harm include property loss, damage or destruction; physical and psychological injury; and death. Examples of indirect harm include rising fear in a neighbourhood or a growing sense of lawlessness¹¹.

An RJ approach seeks to address actual harm as articulated by stakeholders in very tangible ways. The usual retributive approach, on the other hand, simply imposes a proportionate amount of punishment typically leaving the needs of victims unaddressed.

The transformative conception

This conception differs significantly from the first two. Essentially it views the issues that arise from dealing with individual matters as pointers in contributing to the goal of a just society. It is grounded in a holistic perspective of people in relation to each other and the physical environment, and has implications for the way we use language, the way we treat other people and the environment, the way we allocate resources, and the way we respond to all harmful conduct.

This perspective understands that while certain conflicts can be resolved and managed, they are often based on underlying issues, often situations of serious injustice. Simply managing and resolving conflict can suggest that we ignore these issues and the need for change. The concept of 'conflict transformation' has been suggested as recognising the immediate situation as well as the underlying patterns and context. It has been defined as:

... to envision and respond to the ebb and flow of social conflict as life-giving opportunities for creating constructive change processes that reduce violence, increase justice in direct interaction and social structures and respond to real-life problems in human relationships.¹²

This conception is thus concerned with linking micro and macro perspectives, seeing individual incidents as symptoms of a broader context of structural injustice. A restorative justice process is an opportunity for healing, creative problem-solving and fundamental transformation. Such an approach goes beyond restitution.

These three conceptions need to be regarded as different perspectives of RJ, not mutually exclusive of each other, but as part of a greater whole.

It is also helpful to understand that the term 'restorative justice' is used in at least three ways:

- referring to an approach to, a way of thinking about justice generally
- a restorative justice process, referring to an encounter, as explained above
- programmes that draw on a restorative approach, such as therapeutic, life-skills, didactic and vocational skills programmes.

Diversion practice

South Africa has embraced RJ in a number of significant ways. The Truth and Reconciliation Commission is regarded as a pioneering example of applying the concept at a macro political level. The concept has been defined in at least two pieces of legislation¹³; a National Policy Framework has been drafted and several superior court judgements have

¹¹ Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice*, US and Canada: Willan Publishing, 2007, p 633

¹² John Paul Lederach, *The Little Book of Conflict Transformation*, Intercourse, PA: Good Books, 2003, p 14.

¹³ The Probation Services Act, 1991 and the Child Justice Act, 2008

established a significant jurisprudence¹⁴. Furthermore, the Child Justice Act, 2008, in addition to defining the concept, lists as one of its aims, 'to expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law'. It has then gone on to develop a well-articulated system for diverting a range of cases, from minor to serious, making this a central feature. Detailed provision is made for therapeutic and didactic programmes as well as victim offender mediation at both a pre-trial and sentencing level.

In the period leading up to the operationalization of the Child Justice Act in 2009, the period from the early 1990s saw significant development and institutionalization of the practice. In a comprehensive review of policy and practice, there is a reflection on three studies undertaken to assess the effectiveness of certain programmes¹⁵. The first, conducted by a major service provider about one of its own programmes, used recidivism (commission of another offence after completing the diversion programme, irrespective of whether the child had actually been arrested, charged, and/or convicted for the alleged offence) as the main criterion. The same group of children were interviewed in 1998 and in 2000.

The study found that only 7% of the participants had re-offended in first 12 months after participating in the diversion programme. On average, the identified recidivists reoffended seven months after completing the programme. In 2000, the same group of 468 participants were approached and 356 of these returned questionnaires. Fifty five percent of the follow-up interviews were conducted with the participant, and 45% with a significant other. The second study found that a further 10% of participants had re-offended. (P16)

In a third study, a different service provider offering a programme for young sex offenders attempted to determine the programme's success through gauging recidivism rates, assessing the impact of the programme content, and exploring the children's experience of attending the diversion programme.

Semi-structured interviews were conducted with 25 children who had completed the programme at least 12 months prior to the interview date. The results suggested that the intervention was useful for holding children accountable and teaching them to take responsibility for their abusive behaviour. It was also fairly successful in accomplishing the set aims and objectives of each session held with children. The programme was less effective in assisting children to develop respect and empathy for their victim. Overall, the information on programme content was regarded as positive and apart from the more entrenched beliefs about gender stereotypes and notions of power, the participants retained many of the concepts taught. Group work was seen to be a necessary and beneficial aspect of the intervention. None of the children interviewed reported any sexual re-offending after attending the programme and only one child had recommitted a non-sexual criminal offence. (p17).

¹⁴ The matters in which superior courts have ruled on restorative justice are:

North Gauteng:

- *S v Shilubane* 2008 (1) SACR 295 (T), [2005 JOL 15671(T)]
- *S v Maluleke* 2008 (1) SACR 49 (T)
- **S v Thabethe** 2009 (2) SACR 62 (T)

Eastern Cape:

- *S v Saayman* 2008 (1) SACR 393 (E)

Supreme Court of Appeal

- **S v Thabethe** 619/10

Constitutional Court:

- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
- *S v M (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC);[2009(2) SACR 477 (CC)]
- *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)
- *Le Roux vs Dey* CCT 45/10 [2011] ZACC 4

¹⁵ Wood, C. 2003. Diversion in South Africa: a review of policy and practice 1990 – 2003. Pretoria, Institute for Security Studies Paper 79

Similarly, a 2013 article¹⁶ on a study that assessed fifty four children who were referred to a different service provider and programme found that the majority of the children were able to sustain the positive outcomes of the programme during the six months since participation in the programme. Deterioration in behaviour was noted in the cases of only two children (p30). More recent published research on this topic could not be found.

In the years following the development of diversion practice for children, diversion for adults has also developed. Although the National Prosecuting Authority does not desegregate the number of children from adults in its annual reports, significant numbers of cases are finalized using the method of Alternative Dispute Resolution Mechanism, which includes referral to programmes as well as informal mediation by the prosecutor. There is no legislation or dedicated policy governing this practice regarding adults, although the Department of Social Development has currently engaged a service provider to develop norms and standards for adult diversion. Anecdotal evidence suggests that a number of cases involving hate crimes are currently being finalised by prosecutors in this way¹⁷.

In recent years considerable attention has been given to the evaluation of restorative justice processes. An international comprehensive, longitudinal study¹⁸ claims that *procedurally*, restorative justice is perceived by victims and offenders as a more humane and respectful way to process crimes than conventional justice and that it is better than criminal justice in producing important results that we want from justice: less repeat offending, more repair of harm to victims, fewer crimes of vengeance by victims, more reconciliation and social bonding among families and friends affected by crime, and more offences brought to justice. The same study concluded that restorative justice may work better with more serious crimes than with less serious crimes¹⁹.

South African research on restorative justice processes, while limited, has confirmed the findings referred to above. Another local study found that RJ significantly improved access to justice for both victims and offenders in the community with an overwhelming majority indicating satisfaction with the processes they had participated in. The programme succeeded in supplementing the existing conventional justice system by helping to lower the court roll backlog. Furthermore, it created opportunities for peace-making in the community, assisted in improving neighbourhood relationships and contributed, through various events and publications, to a greater awareness of local crime and crime-prevention strategies. Most significantly, it is clear that the values and practices of restorative justice do hold much promise for serving the needs of crime victims, and when practiced with appropriate skill, can impact positively on victims' long term healing.²⁰

5. THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT OF 4 OF 2000

In addition to this very supportive policy environment for RJ and diversion, one of the key existing pieces of legislation for dealing with hate speech, the Promotion of Equality and Prevention of Unfair Discrimination Act of 4 of 2000, contains a number of measures in similar vein:

- in the guiding principles of the Act, section 4 :
 - a) the expeditious and informal processing of cases, which facilitate participation by the parties to the proceedings
 - d) the use of corrective or restorative measures in conjunction with measures of a deterrent nature

¹⁶ Hargovan, H. 2013. Child Justice in Practice: the diversion of young offenders. In SA Crime Quarterly number 44, Pretoria, Institute for Security Studies.

¹⁷ Discussion with researcher from Khulisa Social Solutions, 16 March 2018.

¹⁸ Sherman and Strang (2007 and 2015) in Hargovan, H.2011. Evaluating restorative justice: working out 'what works'. In *Acta Criminologica* 24(1)

¹⁹ Sherman and Strang (2007 and 2015) in Hargovan, H.2011. Evaluating restorative justice: working out 'what works'. In *Acta Criminologica* 24(1) p 76 – 77)

²⁰ Hargovan, H.2011. Evaluating restorative justice: working out 'what works'. In *Acta Criminologica* 24(1) p 72)

- Sections 20(3) and 21 (4) empower a presiding officer to refer a matter before, during or after an inquiry to another institution, body, court, tribunal or other forum which in his/her opinion can deal with the matter more effectively in terms of that alternative forum's powers and functions
- Sections 21 (2)(c) and (d) make provision for an order making a settlement between the parties an order of court, including payment of damages in respect of financial loss or impairment of dignity, pain and suffering.

South Africa thus has a number of legislative and policy provisions for dealing with criminal and civil matters in alternative ways to formal proceedings that have also been endorsed by the highest court. The system of probation officers and social crime prevention, supported by a number of civil society organisations, manages criminal matters of this nature. Furthermore, there is significant empirical evidence that demonstrates the effectiveness of these programmes in changing behaviour.

6. INSIGHTS FROM INTERNATIONAL RESEARCH

Research and policy development literature on hate crime available on the internet points to a rich resource in this field that has evolved since the 1990s²¹. Key elements from this literature include:

- an understanding of the drivers of hate crime and hate speech: a context of poverty and unmet needs, the power of stereotypes that are driven by public discourse, and that these crimes are committed by individuals rather than groups²²
- responses need to go beyond law enforcement to community efforts to promote racial and cultural tolerance and cohesion (including skilled community structures to address intergroup community disputes) and to model this behaviour.

These elements are also reflected in South Africa's Draft National Action Plan to combat racism, racial discrimination, xenophobia and related intolerance 2016-2021.²³ Specifically, the NAP view is that 'social cohesion must be at the centre of social transformation'.²⁴ A restorative approach to hate incidents and all levels would assist in using them as opportunities for social transformation because of its inter-personal and dialogical emphasis, whereas a retributive response, while theoretically sending a strong denunciatory message is likely to reinforce existing attitudes and behaviour.

Walters highlights some of the arguments in support of the usefulness of the law to address hate crime:

- The state's expression of denunciation of an offender's actions provides a public declaration of the moral wrongfulness of particular conduct and identity-based prejudices as well as the promise of future eradication of hate-motivated offences. Even though the laws that make trials leading to such outcomes possible are likely to have little individual deterrent effect they will ultimately play an important role in shaping society's attitudes towards these issues²⁵

²¹ see for example Strategy – Counselling of offenders involved in hate groups (US National Crime Prevention Council) [www.ncpc.org, http://www.ncpc.org/topics/hate-crime/strategies/strategy-counseling-for-offenders-involved-in-hate-groups](http://www.ncpc.org/topics/hate-crime/strategies/strategy-counseling-for-offenders-involved-in-hate-groups); Promising Practices against Hate Crimes (US Department of Justice, May 2000) <https://www.ncjrs.gov/pdffiles1/bja/181425.pdf>; A Policy Makers Guide to Hate Crimes (US Department of Justice, March 1997) <https://www.ncjrs.gov/pdffiles1/bja/162304.pdf>; Preventing and responding to hate crimes. A resource guide for NGOs in the OSCE Region (Organisations for Security and Co-operation in Europe - OSCE's Office for Democratic Institutions & Human Rights (ODIHR) Poland, www.osce.org)

²² While individuals may be influenced by their primary and other groups, The US Bureau of Justice Assistance, in its Policy Makers Guide to Hate Crime states 'The majority of offenders—and passive observers—are merely individuals who believe racial and ethnic stereotypes and act on spur-of-the-moment impulses. Frequently alcohol or drug use is a factor in the commission of hate crimes' (pxi)

²³ See particularly p58 - 66

²⁴ National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, section 70, p27

²⁵ It is worth noting that in the South African jurisprudence context of dignity, 'the means used to effect the denunciation must be compatible with the values society seeks to affirm'. Skelton argues that through its emphasis on participation by victims, offenders and communities, restorative justice 'creates the most appropriate framework for denouncing crime in South Africa'

- Linked to this ‘denunciatory process of censuring hate offenders’ is a further message of support to groups that have suffered victimization, an implicit promise of active protection from targeted victimization.²⁶

The research by Walters offers particularly helpful insights²⁷. It sought specifically to examine whether RJ helps to repair the harms caused by hate crime victimisation in the United Kingdom. It focused on a community mediation project as well as a police project and drew on observations at eighteen mediations and sixty interviews. The findings are startling:

- At the community mediation project, the majority of complainant victims interviewed (17/23) reported that the mediation process *directly improved their emotional well-being* - levels of anger, anxiety and fear were reduced directly after the mediation process. The four most common reasons were:
 - Participants felt they could **play an active part** in their own conflict resolution
 - Participants were able to **explain to the perpetrator and others** the harms they had experienced
 - Participants felt supported by mediators who **listened** to their version of events
 - The **perpetrator signed an agreement promising to desist** from further hate incidents.
- Regarding prevention of re-offending
 - **11 out of 19** separate cases of **ongoing** hate crime incidents researched in the community mediation project area ceased directly after the mediation process had taken place.
 - A further **6 cases** stopped after the community mediator included other agencies in the mediation process. These included schools, social services, community police officers and housing officers.

The findings of the police mediation project were less positive:

- Fewer than half the victims were satisfied with the outcomes, felt they’d had an opportunity to explain how the incident had affected them or that the outcome had helped repair the harm. Reasons that were given included:
 - Feeling pressured by the police to agree to the intervention.
 - Most felt that the apology was disingenuous;
 - Only one victim was given an opportunity to talk directly with the offender about the offence and how the offender could repair the harms he had caused
 - Officers had received a three hour training session on the virtues of RJ.

Walters proposes that his research provides empirical evidence to strengthen the view from a number of case studies that suggest that inclusive dialogue may be better suited to reducing the harms caused by hate than the mere imposition of punishment, while simultaneously challenging the underlying causes which give rise to hate-motivated behaviour²⁸

(Response from a restorative justice perspective. Paper delivered at the Open Society Foundation for SA conference Sentencing in South Africa, 25-26 October 2006: 22-23).

²⁶ Walters *ibid*, p xxii

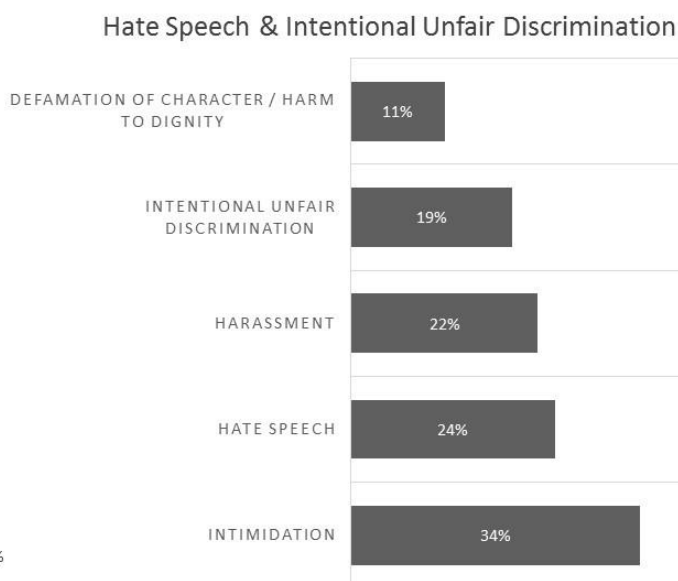
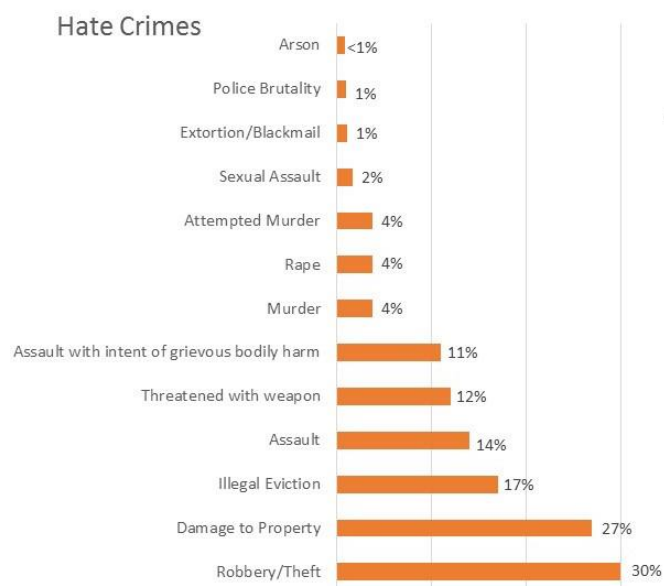
²⁷ Walters, M.A. 2014. Hate Crime and Restorative Justice: exploring causes, repairing harms. Oxford University Press Executive Summary of Findings, accessed from <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms/> on 30 October 2015

²⁸ Walters *ibid*, p xxv

7. INSIGHTS FROM SOUTH AFRICAN RESEARCH ON HATE INCIDENTS

Research conducted for the Hate Crimes Working Group reflects the following breakdown of incidents²⁹:

DESCRIPTION OF THE HATE INCIDENTS (2)



While the legal categorisation of incidents does not necessarily reflect the impact it has on a victim, the Report emphasises that ‘hate crimes are often devastating to surviving victims’ (p5). This would typically be due to the harassment, hate speech and intimidation that often accompanies the incidents. At the same time, the cases involving assault, illegal eviction, damage to property and robbery/theft indicate that by far the majority of cases in the study are not categorised as serious and may well lend themselves to being resolved using a restorative approach, either at a diversion or sentencing level.

8. CURRENT PERSPECTIVES FROM ADVOCATES AND SERVICE PROVIDERS WORKING WITH HATE CRIMES AND HATE SPEECH

In addition to the above policy and practice perspective, in the latter half of 2017 workshops were held with members of the Hate Crimes Working Group and other interested groups about the validity of advancing a restorative approach in responding to hate crimes in the proposed legislation. Participants at these workshops were overwhelmingly supportive of this idea. Two significant perspectives emerged from these discussions:

- An awareness of the context from which hate offenders come. The discussion explored the sources of prejudice towards people perceived as ‘other’ and the role that families and other primary groups play in forming and nurturing these. In view of this, it was agreed that imposing severe punishment on perpetrators of hate crime could be a form of scapegoating, a response that looks for individuals to blame without recognising that such individuals are representative of very similar views in their families and communities. Focusing on individuals could thus actually harden the attitudes of families and communities. The limited role that punishment can play more generally in changing attitudes and behaviour was also acknowledged. There was thus clear support for attitude and behavioural change programmes, as well as mediation and dialogue,

²⁹ Mitchell, Y. and Nel, J. A. (2017). The Hate Crimes and Bias Monitoring Form Project: January 2013 to September 2017. Johannesburg: The hate Crimes Working Group, p14.

whether at a pre-trial stage or as part of a non-custodial sentence, and a recognition that these could play an important role in developing a range of constructive responses to hate crime.

- An awareness of the context of sustained harassment within which incidents of hate crime occur, including daily, ongoing acts of taunting, constant bullying or conflicts between people known to each other within specific settings, such as a school or a community. This is borne out by the research³⁰ conducted on behalf of the HCWG that found that 34% of offenders are known to the victim, and a further 34% come from the same community. In many cases, incidents of hate crime were preceded by verbal and physical harassment, bullying, discrimination and intimidation. This was linked to recognition of the progression that often occurs from conflict to violence, crime and harm. Participants felt that this was of particular relevance to early intervention and prevention of the escalation of violence. The role of conflict transformation, mediation and dialogue stood out as potentially playing a very significant role in this context.

9. DISCUSSION

This brief review suggests that the concept of hate crime and speech legislation is appropriate for South Africa: given the country's history of centuries of discrimination and the ideals framed in the Constitution, the functions of denouncing the wrongfulness of behaviour, affirming societal values and providing support and protection to victims take on particular meaning.

However, as in the response of using minimum sentences, the Bill is based on the belief that punishment as a primary response to crime is effective. This is despite the prevailing criminological view that 'while punishment does have a deterrent effect, it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact. There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked.'³¹ As the Bill provides no alternatives in this regard – it simply proposes more of the same, despite ample evidence of its failure - this must be regarded as a fundamental flaw.

A restorative approach to hate crime and hate speech, based on the three conceptions outlined above, provides a sounder and more appropriate basis for the proposed legislation.

Two specific concerns are often raised about RJ in response to this, both of which are directly addressed by Walters³². The first is that it is a 'soft option', and that perpetrators will simply say sorry to avoid punitive sanctions. This concern can be partly dismissed by the evidence that punitive measures are generally ineffective, so in one sense there is nothing to be lost in trying alternatives. The more persuasive argument, though, lies in the evidence of Walters' research, of the extraordinarily high satisfaction levels experienced by victims as well as the high rates reported of hate crime behaviour ceasing. In this author's view, this evidence overrides the related concern that a restorative approach may be appropriate for children, but is not for adults. This is particularly so in the case of the proposed legislation attempting to ensure that a hate offender's intentions should be regarded as aggravating factors. The second concern is that victims will experience a meeting with offender(s) as being re-victimised. Walters accepts that

³⁰ Mitchell, Y. and Nel, J. A. (2017). The Hate Crimes and Bias Monitoring Form Project: January 2013 to September 2017. Johannesburg: The hate Crimes Working Group.

³¹ Van Zyl Smit, D. 2004. Swimming against the tide: controlling the size of the prison population in SA in Dixon, B. & van der Spuy, E (eds) *Justice gained? Crime and Crime Control in South Africa's transition*. Cape Town: UCT Press, p 248. See also Tonry, M. 2006. Keynote address delivered at the Open Society Foundation for SA conference *Sentencing in South Africa*, 25-26 October 2006, p 7 and Terblanche, S. 2008. *Research on the sentencing framework bill*. Cape Town, Open Society Foundation of South Africa p 16;

³² Walters, M.A. 2014. Hate Crime and Restorative Justice: exploring causes, repairing harms. Oxford University Press Executive Summary of Findings, accessed from <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms/> on 30 October 2015

this is a valid concern, but points out that in his entire study this was raised only in one case and then the objection was that the police facilitator (not the young offender) had treated the victim unfairly. His argument is that

If RJ is to be used more widely for hate crime, police services and other justice agencies must use experienced and fully trained restorative practitioners who understand, not only the key values underpinning RJ, but also the sensitive dynamics of hate crime victimisation. In order to further support the reparative qualities of restorative practice, organisations should work together using a multi-agency approach to addressing hate crime.³³

This perspective is echoed by the US National Crime Prevention Center's recommendations for counselling to be available in addition to face to face encounters.³⁴

A crime prevention perspective provides further validation for this approach³⁵. Crime prevention may be defined as 'disrupting the mechanisms that cause crime events'³⁶. The most obvious entry points for intervention are focusing on victims and offenders. Offenders are important targets for crime prevention efforts at a tertiary level for the following reasons:

- Unless risk factors are addressed, it is very likely that offenders will re-offend
- Apprehended offenders are accessible
- A small number of offenders may be disproportionately responsible for a large number of crimes
- Research has shown that victims of violence were significantly more likely than non-victims to become violent offenders, and violent victimisation and violent offending share many of the same risk factors, such as previous violent victimisation and offending, drug and alcohol use, and depression.³⁷

In the light of the understanding of the nature of hate crime referred to above, it seems clear that the idea of referring offenders to some programme either at a pre-trial or post-sentence level should be maximised. This view is strengthened by members of the HCWG confirming that most incidents that they deal with are less severe in nature and would be well suited to this kind of resolution (see also the section on South African research above.) It also makes little sense to not give serious attention to programmes in view of the known ineffectiveness of relying only on a punitive approach.

10. CONCLUSIONS AND RECOMMENDATIONS

In general, the RJC supports the Prevention and Combating of Hate Crimes and Hate Speech Bill.

However, we believe it is essential that South Africa take careful note of the well-documented shortcomings of the retributive approach, contrasted by the promising evidence of a restorative approach.

³³ Walters, M.A. 2014. Hate Crime and Restorative Justice: exploring causes, repairing harms. Oxford University Press Executive Summary of Findings, accessed from <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms/> on 30 October 2015

³⁴ See <http://www.ncpc.org/topics/hate-crime/strategies/strategy-counseling-for-offenders-involved-in-hate-groups>

³⁵ This section draws on RAPCAN's submission to the Portfolio Committee on the Child Justice Bill

³⁶ Pease, K. Crime Prevention. In M Maguire, R Morgan and R Reiner (Eds) The Oxford Handbook of Criminology, 2nd edition, Oxford University Press. New York. P.963.

³⁷ Schaffer, J.N and R B Ruback. Violent Victimisation as a Risk Factor for Violent Offending. Juvenile Justice Bulletin. Office of Juvenile Justice and Delinquency Prevention. December 2002.

It is recommended that:

- the following definition be used to amend the definition of harm in the Bill:
The negative impact of an offence upon a person, group or community. Examples of direct harm include property loss, damage or destruction; physical and psychological injury; and death. Examples of indirect harm include rising fear in a neighbourhood or a growing sense of lawlessness³⁸.
- Specific attention be given to making encounter, counselling and educative programmes available at
 - A prevention and early intervention stage. The current version of the Bill, in section 9, focuses on equipping officials to deal with hate crime and the State providing information and education services as a preventative form. These are obviously essential. However, the Bill is silent on the perspective referred to above about early intervention. The existing infrastructure of probation services, social crime prevention and civil society partners should be harnessed and strengthened for this purpose. It is important to connect the sanctions inherent in the Bill with these interventions, rather than viewing them as separate from the perspectives in the National Plan of Action;
 - a pre-trial stage (as part of diversion practice)
 - a sentencing stage (as part of non-custodial sentences)

The framework of the Child Justice Act (CJA), 2008 regarding diversion and diversion options should be used as the fundamental point of reference. Section 52 (2) and (3) of the CJA on diversion, section 61 on sentencing and the Promotion of Equality and Prevention of Unfair Discrimination Act of 4 of 2000, are specifically relevant.

Further points of reference include existing practice of the NPA to refer cases (children and adults) for diversion programmes and informal mediation and the existing infrastructure of probation services, social crime prevention and civil society partners. Some specific matters for attention in this regard include:

- Using the definition of restorative justice contained in the Draft National Policy Framework for Restorative Justice
 - Making provision for different levels of diversion programmes as has been done in the CJA
 - Using the generic term 'RJ process' rather than Victim Offender Mediation or Victim Offender Dialogue
 - Specifying that the utilisation of mediation is without prejudice (CJA section 61 (9))
- Civil society organisations, supported by the State be used to make these options available. Accredited training in restorative justice mediation and hate incidents should be mandatory for all practitioners.

The RJC would appreciate an opportunity to make an oral presentation about the Bill to the Portfolio Committee.

³⁸ Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice*, US and Canada: Willan Publishing, 2007, p 633