



HATE | CRIMES | WORKING | GROUP

Submission of the Hate Crimes Working Group:

Prevention and Combating of Hate Crimes and Hate Speech Bill [B9-2018]

Submitted: 1 October 2021

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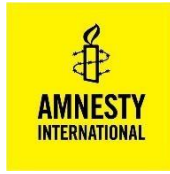
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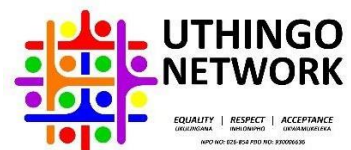
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SAME LOVE TOTI
DIFFERENT FAMILIES, SAME LOVE



Contents

Introduction	4
The Preamble	4
1. Definitions (Section 1)	6
2. Objects of the Bill	7
3. Offence of Hate Crime (Section 3)	7
<i>Section 3(1)</i>	7
<i>Section 3(2)</i>	9
<i>Section 3(3)</i>	9
4. Offence of Hate Speech (Section 4)	9
<i>Section 4(1)</i>	9
<i>Section 4(3)</i>	10
5. Victim Impact Statement (Section 5)	11
<i>Section 5(1)</i>	11
<i>Section 5(2)</i>	12
6. Penalties or orders (Section 6)	12
<i>Sentencing of hate crimes</i>	12
7. Directives (Section 7)	13
8. Reporting on the Implementation of the Act (Section 8)	14
9. Prevention of Hate Crimes and Hate Speech (Section 9)	15
10. Regulations (Section 10)	18
11. Costing	18
12. Conclusion	19

Introduction

The Hate Crimes Working Group (**HCWG**) welcomes the opportunity to make submissions on the draft Prevention and Combating of Hate Crimes and Hate Speech Bill (**the Bill**).

The HCWG is a multi-sectoral network of civil society organisations and private individuals set up to spearhead advocacy and reform initiatives pertaining to hate crimes in South Africa and the region. Members of the network work in diverse sectors, namely: in LGBTQI+ and sexual orientation, gender identity and expression and sex characteristics (**SOGIESC**) rights; sex worker rights; migrant, refugee and asylum seeker rights; religious organisations; academic and research entities; gender-based entities; and broader human rights organisations. All our members combined have extensive track records in advocacy work in these and other focus areas. They all share a common concern regarding the impact of hate crimes in South Africa from the perspective of victims or from a legal, service provision, research-based or advocacy perspective.

This submission will deal with specific provisions of the Bill that we believe are important for its functioning and operation. We deal with the Bill section-by-section and include suggested changes to the wording in a text box at the end of each section.

At the outset, we note that in various parts of the Bill the term “his or her” is used. We submit that this must be replaced by the gender neutral “they/their” throughout. We make note of this at each instance in our submissions.

The Preamble

The preamble to any legislation exists not only to describe the reason for that particular law but may also be of assistance to legal practitioners and courts in interpreting the law. For this reason, its importance should not be overlooked.

We note that the Bill, in its preamble, refers to just two international commitments, namely Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban (**the Durban Declaration**), and the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**). There are many other international instruments that are applicable.

The HCWG feels strongly that this appears to create a hierarchy of prejudice and discrimination, prioritising racial discrimination at the top. While we appreciate that South Africa is now attempting

to meet its obligations under the CERD, **we submit that this Bill should not create a hierarchy of prejudice and discrimination and therefore should not refer only to those instruments dealing with racism and racial discrimination.**

With this in mind, we particularly support the mention of the “severity of the emotional and psychological impact of hate crimes and hate speech extends beyond the victim, to the group to which the victim belongs or is perceived to belong.”

However, we caution against the express mention of only the CERD and the Durban Declaration, to the exclusion of other relevant international law instruments to which South Africa is a signatory, and which commit South Africa to non-discrimination. We submit that if international instruments are to be referenced, and we strongly believe that they should, then all the applicable international instruments must be included. This will ensure that the content of the Bill captures the importance of the intersectionality that exists in preventing and combating hate crimes, and guide interpretation.

We propose including the following international and regional human rights instruments in the Preamble:

- African Charter on Human and People’s Rights
- African Charter on the Rights and Welfare of the Child
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and its Optional Protocol
- Convention on the Rights of the Child
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Resolution 275 of the African Commission on Human and People’s Rights, on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.
- Universal Declaration of Human Rights
- Yogyakarta Principles Plus 10: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. These principles have regularly been applied and cited in judgments handed down by South African courts, in deciding matters relating to SOGIESC.

1. Definitions (Section 1)

“Associates”

We suggest the inclusion of the term “associates” in the definitions section, defined as family members, colleagues, friends and other possible connections to a victim. It is important to define the term, given it is used in the section on Victim Impact Statements.

We also suggest using the term “associates” in the sections setting out the elements of hate crime and hate speech. It is simpler and easier to read, as a catch-all phrase, in place of listing all possible personal connections to victims in the relevant sections.

“Bona fide”

While this term is easily understood by legal practitioners, it is not a common term in every-day parlance. We submit that its use in Section 4(2) of the Bill requires that it either be added to the definitions section of the Bill or replaced with the more commonly understood term “good faith”.

“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 will cause in the interpretation of the law.

The term “harm” is central to the definition of hate speech. Yet, in consultation with our members, it became clear there is significant confusion about the meaning of the definition as currently formulated. To define harm as “emotional, psychological, physical, social or economic harm” merely adds adjectives, and does not in fact define harm or how it is different to “hurt”. This practical question was central in the matter *Qwelane v South African Human Rights Commission and Another*¹ and will continue to cause legal uncertainty in interpreting the Bill if not addressed at this stage.

To the extent that it assists the Portfolio Committee, we point out that the 2020 UN Handbook on Restorative Justice Programmes makes reference to the UN Declaration of Basic Principle of Justice for Victims of Crime and Abuse of Power which contains an instructive definition of the term “victim”:

“The term victim also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.”

¹ *Qwelane v South African Human Rights Commission and Another* (CCT 13/20)

In addition, the term harm is defined in the Handbook on restorative justice (Johnston & Van Ness: 2007) as “(t)he negative impact of an offence on 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 lawlessness.” We would add to the latter that it could also include rising fear within a group or community with shared characteristics.

“Minister”

We note that the Bill currently contains no definition of “Minister” and suggest that a definition be added to clarify that it is the Minister responsible for Justice and Correctional Services, unless expressly stated otherwise. This makes it clear that the Department of Justice and Correctional Services is the lead department on this Bill.

“Intersex”

We submit that the definition of “intersex” should be removed from the definitions section of the Bill. This is because other listed characteristics and grounds which are included in section 3 and 4, are not defined in the definitions section of the Bill. We submit that in the absence of definitions for all of the listed characteristics and grounds, it is better to not favour one over the others. It is enough to simply ensure that intersex is included as a listed characteristic or ground in the lists provided in section 3(1) and 4(1)(a)(ii). This also allows for progressive interpretation over time, as the understanding of diverse sex characteristics within society more generally deepens, changes, or becomes more nuanced.

2. Objects of the Bill

The HCWG supports the stated objects of the Bill and has no further submission in this regard.

3. Offence of Hate Crime (Section 3)

Section 3(1)

We are broadly supportive of the framing of this offence, including the listed grounds and/or characteristics. However, we submit that:

- 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 (section 3(1)(h)), the listing of “sex” in section 3(1)(p) should include “sex characteristics”.

An alternative wording of Section 3(1) with additions underlined

3. (1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person’s prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or their associates or the victim’s association with, or support for, a group of persons who share the said characteristics:

- (a) age;
- (b) albinism;
- (c) birth;
- (d) colour;
- (e) culture;
- (f) disability;
- (g) ethnic or social origin;
- (h) gender, gender identity, or gender expression;
- (i) HIV status;
- (j) language;
- (k) nationality, migrant, asylum seeker or refugee status;
- (l) occupation or trade;
- (m) political affiliation or conviction;
- (n) race;
- (o) religion;
- (p) sex, sex characteristics which includes intersex; or
- (q) sexual orientation.

Section 3(2)

There is some lack of clarity with regards to how a prosecutor would approach a particular hate crime, with regards to charges, and we will raise this in our discussion on sentencing below.

Section 3(3)

We support the contemplated role of the Director of Public Prosecutions in this section, however, submit that the section should be drafted in a gender-neutral way by replacing “him or her” with “them”.

We strongly submit that there should be an express legal obligation on the Director of Public Prosecutions, or their delegate, to **automatically** provide written reasons to a complainant or their associates when a decision has been taken to decline to prosecute a charge of hate crime. This can be achieved with the addition of a new section 3(4).

3. (3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by them.

(4) Where the Director of Public Prosecutions, or a person delegated by them, declines to prosecute a charge of hate crime, written reasons for this decision must be provided to the complainant or their associate(s).

4. Offence of Hate Speech (Section 4)

Section 4(1)

We submit, based on the judgment in the matter of *Qwelane v South African Human Rights Commission and Another* that the connecting phrase “or” in section 4(1)(a) should be replaced with “and” for the section to be read conjunctively.

We submit that where we have made recommended inclusions of listed characteristics for section 3(1), that the same recommendations are included in the listed grounds included in section 4(1)(a)(ii).

4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

(i) be harmful or to incite harm; and

(ii) promote or propagate hatred,
based on one or more of the following grounds:

- (aa) age;
- (bb) albinism;
- (cc) birth;
- (dd) colour;
- (ee) culture;
- (ff) disability;
- (gg) ethnic or social origin;
- (hh) gender, gender identity, or gender expression;
- (ii) HIV status;
- (jj) language;
- (kk) nationality, migrant, asylum-seeker, or refugee status;
- (ll) race;
- (mm) religion;
- (nn) sex, sex characteristics which includes intersex; or
- (oo) sexual orientation,

is guilty of an offence of hate speech.

Section 4(3)

We reiterate our submission regarding section 3(3), and submit that a decision to decline to prosecute a hate speech charge should be subject to an express legal obligation on the Director of Public Prosecutions or their delegate to provide a complainant or their associates with written reasons.

(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by them.

(4) Where the Director of Public Prosecutions, or a person delegated by them, declines to prosecute a charge of hate crime, written reasons for this decision should be provided to the complainant or their associate(s).

5. Victim Impact Statement (Section 5)

Section 5(1)

While we are encouraged by the provision that requires a victim's authorisation when a person other than the victim is making a Victim Impact Statement (**VIS**), we wish to point out that hate crimes in South Africa regularly lead to the death of the victim. In other words, a victim may not be able to either make a VIS themselves, or indeed authorise anyone else to do so on their behalf. A hate crime is a message crime, and while there may be an individual victim of the crime, the impact is also felt by the community or group(s) to which they belong.

For this reason, we submit that a prosecutor should be empowered by the Bill to obtain expert input on a VIS from interest groups and organisations who work directly with the community or group(s) to which victims belong. This will greatly assist the court to understand the impact of the hate crime not only on individual victims and their associates, but the broader group(s) to which the victim belongs, especially if a hate crime caused a victim's death.

Also, where a victim died because of a hate crime, there must nonetheless 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 communities or groups of people.

To this end, we submit that section 5(1) 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).

Section 5(2)

While we are encouraged by the fact that under this section a prosecutor **must** consider the interest of the victim and provide the court with a VIS, we are concerned by the addition of “where practicable”, which appears to undermine the mandatory nature of the provision. We submit this can be remedied by creating an obligation on prosecutors to provide the court with written reasons, whenever it is not possible to provide a VIS.

(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.

6. Penalties or orders (Section 6)

Sentencing of hate crimes

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.

It is our understanding, from communication with the Department, that the section contemplates the following:

- 6.(1) Hate crimes may be sentenced in accordance with all the various sentencing options ordinarily available to a court, depending on that court’s penal jurisdiction;
- 6.(2) That if a minimum sentence already applies to the base crime, that sentence should be handed down by the presiding officer, unless there are substantial and compelling reason to deviate from the minimum sentencing framework; and that in certain cases, the hate element of the crime is also to be regarded an aggravating factor for sentencing.

If we are correct in our understanding of the intention of the drafters, the language in the Bill does not express that intention. In fact, the Bill creates a new, self-standing crime of “hate crime.”

Lastly, we understood from the Department that all hate crimes will be heard in the Regional Courts. However, there is no provision to this effect in the Bill.

7. Directives (Section 7)

We support the inclusion of this provision in the Bill, which will provide direction to members of the prosecuting authority on their role in achieving the objects of the Act. However, we recommend that section 7 be subdivided into further additional parts to require training in relation to the Directives.

We further submit that it is especially important to expressly extend the requirement for Directives to the South African Police Service (**SAPS**) in the form of National Instruction(s) and Standing Orders (and 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.

7. (1) The National Director of Public Prosecutions must, after consultation with the Director-General: Justice and Constitutional Development and the National Commissioner of the South African Police Service, issue Directives within 90 days of the commencement of this Act regarding all matters which are reasonably necessary or expedient to be provided for, and which must be complied with by all members of the prosecuting authority who are tasked with the institution and conduct of prosecutions in cases relating to hate crimes and hate speech, in order to achieve the objects of this Act, including the following:

- (a) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including—
 - (i) the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped; and
 - (ii) the leading of relevant evidence indicating the presence of prejudice or intolerance towards the victim, in order to secure a conviction contemplated in section 3(2); and
- (b) the collection and analysis of information contemplated in section 8.

(2) The National Commissioner of the South African Police Service must, after consultation with the National Director of Public Prosecutions and the Director-General: Justice and Constitutional Development, issue National Instructions and Standing Orders within 90 days of the commencement of this Act regarding all matters which are reasonably necessary or expedient to be provided for, and which must be complied with by all members of the South African Police Service who are tasked with the opening of dockets and investigation of cases relating to hate crimes and hate speech, in order to achieve the objects of this Act, including the following:

- (a) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including—
- (i) the circumstances in which a charge in respect of such an offence may be withdrawn or a docket closed; and
- (ii) the collection of relevant evidence indicating the presence of prejudice or intolerance towards the victim, in order to secure a conviction contemplated in section 3(2); and
- (b) the collection and analysis of information contemplated in section 8.

8. Reporting on the Implementation of the Act (Section 8)

We welcome provision for the collection and collation of hate crime statistics by the SAPS. However, in its current form, section 8 of the Bill gives the ultimate responsibility for the collection of data and reporting on implementation of the Act to the Minister of Justice and Correctional Services.

While the Minister of Justice has an important role to play in the collection and dissemination of hate crime and hate speech data, we submit that section 8 should also give equivalent responsibility to the Minister for Police regarding the collection and dissemination of crime data by the SAPS. In addition, the specific role of the SAPS and the NPA in the collection and dissemination of data should be addressed in section 8. Specifically, the obligation to publish such data in their respective annual reports, and, with regards to the SAPS, as part of the annual release of the Crime Statistics.

Further, section 8 does not prescribe the levels of detail (disaggregation) of the reported data. We submit that the Regulations promulgated in relation to this Act must include minimum levels of detail and disaggregation of data and statistics required in order to provide an accurate picture of the prevalence and gauge the effectiveness of measures to combat hate crimes and hate speech.

We recommend a reframing of section 8 to provide for:

- (a) the interrelated, but necessarily separate, roles of the Minister of Justice and Correctional Services, National Prosecuting Authority, Minister of Police, and National Commissioner of the South African Police Service in the collection and dissemination of information; and
- (b) that the levels of data disaggregation required to achieve the objects of the Act will be prescribed.

9. Prevention of Hate Crimes and Hate Speech (Section 9)

The HCWG is disappointed with this section of the Bill and cannot support it in its current iteration.

Specific objections are as follows:

- Section 9(1) places a generic legal duty of the “the State” and only two Chapter 9 institutions. It is nonsensical and impractical to expect every single state institution to play some undefined, generalised role in preventing hate crimes. It is entirely unclear how institutions will be held accountable for such an undefined obligation. Furthermore, it is unclear why SAHRC and the CGE would have a role to play in prevention, while the CRL does not.
- Section 9(1), on a plain reading, only creates a duty to promote awareness of the criminalisation of hate crimes and hate speech. This is obviously and wholly insufficient for the prevention of hate crime in South African society. Merely making our society aware that certain actions now constitute a hate crime does not begin to address the root causes of societal hate and prejudice, which gives rise to hate crime. This section will simply not achieve prevention.
- 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)(b) properly belongs under section 7 and should be removed from prevention.
- 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. The section should list the specific departments or state institutions where such help can be sought.
- Similarly, section 9(2)(d) should create certainty about the exact state department(s) responsible for the training of public officials. This particular section also fails to recognise and draw on the wealth of knowledge and skills available in the civil society sector, which could be tapped for training purposes.

- Section 9(3) should not be limited to presiding officers alone and should contemplate similar training for public prosecutors.

We remind the Portfolio Committee that Cabinet has adopted the **National Action Plan to Combat Racism and Racial discrimination, Xenophobia, and Related Intolerance (NAP)**. The NAP is a direct result of the Durban Declaration, and incorporates the definitions contained in the CERD. The document sets out the following key actors in South Africa’s commitment to the eradication of discrimination and intolerance it is various forms:

- The state
- Chapter 9 institutions
- Civil society
- Private sector
- Labour sector
- Media
- Academia
- Sporting bodies

If these key actors can be specifically and expressly listed in the NAP, we submit that they ought to be similarly expressly listed in the Bill, which will become primary legislation in due time. This will strengthen the legislation, create accountability, and ensure a proper delineation of legal duties and interdepartmental cooperation while avoiding potential role-confusion at a later stage.

The HCWG further submits that **General Comment No 35, from the Committee on the Elimination of Racial Discrimination** contains critically important observations, and best practices, for the prevention of racial discrimination. A copy of this General Comment accompanies this submission. Its observations and recommendations can easily be extrapolated to include other forms of prejudice, and we submit that the Portfolio Committee and the Department of Justice must be guided by these evidence-based observations and findings.

We submit that the most relevant observation from General Comment No 35, for the purpose of prevention, is the way Article 7 (of the Convention) 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 of the Convention, framed in mandatory language, requires 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. This implicates:

- Chapter 9 institutions
- the Department of Basic Education
- the Department of Cooperative Governance and Traditional Affairs
- the Department of Government and Communication System
- the Department of Higher Education and Training
- the Department of Home Affairs
- the Department of Labour and Employment
- the Department of Social Development
- the Department of Sport, Arts, and Culture
- the Department of Women, Youth and Persons with Disabilities
- the National House of Traditional Leaders

For this reason, we submit that these departments at national and provincial level, **cannot be omitted from the Bill** if prevention efforts are to be meaningful and effective. Their involvement is a bare essential for addressing the root cause of hate and prejudice in South African society, thereby preventing crimes driven by hate and prejudice.

We particularly draw your attention to clause 33 of General Comment No 35, which not only provides insight into the nature of the education needed, but the importance of adequate resources for prevention efforts to be effective:

*“Appropriate educational strategies in line with the requirements of article 7 include intercultural education, including intercultural bilingual education, based on equality of respect and esteem and genuine mutuality, **supported by adequate human and financial resources**. Programmes of intercultural education should represent a genuine balance of interests and should not function in intention or effect as vehicles of cultural assimilation.”*
(own emphasis)

The CERD also recommends that:

“Information campaigns and educational policies calling attention to the harms produced by racist hate speech should engage the general public; civil society, including religious and community associations; parliamentarians and other politicians; educational professionals; public administration personnel; police and other bodies dealing with public order; and legal personnel, including the judiciary.”

10. Regulations (Section 10)

We submit that “may or must” in this section should be replaced by “must”. Without regulations, the Bill cannot be operationalised, and regulations are therefore not optional.

11. Costing

We note that while various versions of the Bill have been available since 2016 the Bill remains uncostered. We strongly contest the assertion in the explanatory memorandum to the Bill that the complicated work involved with the prevention and combating of hate crimes and hate speech, which will involve considerable inter-departmental cooperation, can be done within existing budgets.

The explanatory memorandum to the Bill states that it will be implemented using existing resources and budgets within departments. However, in the absence of a costing accompanying the explanatory memorandum, such an assertion cannot be verified. The HCWG asserts that the Bill will require changes to current ways of preventing, detecting, and prosecuting crimes. Indeed, it is adding new crimes to the statute books and this in itself will necessitate ensuring that changes are made to the way in which SAPS, the NPA, and the courts approach such issues, as well as the way that other stakeholders and government duty bearers deal with such matters.

We submit that it cannot be business as usual, and that a costing will clearly indicate commitment to the implementation of the Bill. The HCWG is deeply concerned that the lack of a costing signals the lack of a plan to implement this Bill. It will be impossible to implement without a substantial commitment of resources, and we remain disappointed that this commitment is still lacking.

12. Conclusion

The HCWG has been advocating for the passage of hate crimes legislation since at least 2009, while the South African government has been committed to passing hate crimes legislation for nearly 20 years – following its commitment at the World Conference Against Racism in 2001.

As the HCWG, we are encouraged that the Bill has reached this important stage and are now anxious that it is passed and implemented as speedily as possible. We also strongly urge the Portfolio Committee to not allow this opportunity to pass it by and to ensure that this legislation includes meaningful timeframes and reporting structures that deliver on its long-awaited promise.

The Hate Crimes Working Group **formally requests and would welcome the opportunity to give an oral submission to the Portfolio Committee.**

