

PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

**BRIEFING TO PORTFOLIO
COMMITTEE ON JUSTICE AND
CORRECTIONAL SERVICES:30
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the doj&cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

Purpose of Bill

The Bill seeks to address the increasing number of incidents motivated by prejudices, in the form of hate crimes and hate speech, and to assist persons who are victims thereof.

The Bill creates the offences of hate crimes and hate speech and puts in place measures to prevent and combat these offences.

The Bill can be linked directly to a number of key targets in the National Development Plan, most notably the need for sustained campaigns against racism, sexism, homophobia and xenophobia and that all people are and feel safe.

The most significant provisions of the Bill requiring elaboration are discussed.

Introductory provisions

Clause 1 contains self-explanatory definitions. The definition of “court” excludes district courts from the application of the Bill. Only the High Court and regional courts, where there are more experienced officers, may deal with the adjudication of these offences. This clause also contains definitions which are necessary for purposes of clause 4(1)(b), when hate speech material is distributed in cyber space. **Clause 2** sets out the objects of the Bill, which are self explanatory.

Clause 3: Offence of hate crime

Clause 3 creates an offence of hate crimes. Hate crimes is committed if a person commits any recognised offence under any law, commonly referred to as the “base crime or offence”, and the commission of that offence is motivated by prejudice or intolerance on the basis of one or more characteristics or perceived characteristics of the victim as listed in the Bill, a family member of the victim or the victim’s association with or support for a group of persons who share the said characteristics.

A prosecution in respect of a hate crime may only be instituted on the authorisation of the Director of Public Prosecutions having jurisdiction.

Clause 4: Offence of hate speech

Clause 4 creates the offence of hate speech. Clause 4(1)(a) provides that 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 be harmful or to incite harm or to promote or propagate hatred based on age, albinism, birth, colour, culture, disability, ethnic or social origin, gender or gender identity, HIV status, language, nationality or migrant or refugee status, race, religion, sex, which includes intersex or sexual orientation, is guilty of the offence of hate speech. Clause 4(1)(b) creates an offence when hate speech material is intentionally distributed or made available in cyber space. Clause 4(1)(c) provides that any person who intentionally displays any material or makes available any material which constitutes hate speech, which is accessible by or directed at a specific person who can be considered to be a victim of hate speech, is guilty of an offence.

Clause 4 (Continued)

Clause 4(2) exempts certain communications from criminal sanction as contemplated in the Bill. The exemptions found in clause 4(2)(a) to (c) of the Bill confirm the right of freedom of expression as enshrined in section 16(1) of the Constitution, which includes, freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity and academic freedom and freedom of scientific research. The provisions of clause 4(2)(a) to (c) of the Bill exclude from the ambit of hate speech anything done in good faith in the course of engagement in any bona fide artistic creativity, performance or other form of expression, academic or scientific inquiry or fair and accurate reporting or commentary, in the public interest. Clause 4(2)(d) excludes from the ambit of hate speech any *bona fide* interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings. Artistic creativity or performance or espousal of religious doctrine will not qualify for exemption from hate speech if it advocates hatred that constitutes incitement to cause harm based on any protected grounds.

Clause 4 (continued)

A prosecution in respect of hate speech may only be instituted on the authorisation of the Director of Public Prosecutions or a person delegated by him or her.

Clause 5 victim impact statement:

Clause 5 sets out what a victim impact statement is, namely a sworn statement by the victim which reflects the physical, psychological, social, economic or any other consequences of a hate crime or hate speech on a victim. The contents of the victim impact statement will be admissible as evidence in court, unless good cause to the contrary is shown.

Clause 6: Penalties and orders

Clause 6(1) provides that a person who is convicted of a hate crime is subject to the penalties set out in section 276 or 297 of the Criminal Procedure Act, 1977, subject to the penal jurisdiction of that court, (whether it be the High Court or the regional court). Section 276 of the Criminal Procedure Act, 1977, provides the sentencing options which courts may impose, including imprisonment, periodical imprisonment, a fine and correctional supervision. Section 297 of the Criminal Procedure Act provides for the conditional or unconditional postponement or suspension of sentences, cautions and reprimands. If a person is convicted of a hate crime which is not subject to the obligatory minimum sentencing regime and in the case of any damage, injury or loss of income or support, the court must regard the fact that the person has been convicted of a hate crime as an aggravating circumstance. A fine or imprisonment for a period not exceeding 3 years in the case of a first conviction or a fine or imprisonment for a period not exceeding 5 years in the case of a subsequent conviction may be imposed for a conviction for hate speech.

Clause 6: Alternatives to fines and imprisonment: Restorative Justice Approach

The question has arisen whether there is place in legislation dealing with prejudice, bias or intolerance for a restorative justice approach in terms of sentencing and the diversion of matters in appropriate circumstances. It would seem as if there are very divided views on the desirability of introducing the concept of diversion in this legislation because diversion does not result in a criminal conviction. The question has been raised and will continue to be raised whether diversion or any other form of restorative justice has any place in any form of hate or bias crime legislation, bearing in mind the realities in South Africa. Financial implications also need to be borne in mind because the diversion of matters usually results in persons being placed in special programmes which will require resources. However, presiding officers can, in terms of existing legislation, among others, section 297 of the Criminal Procedure Act, 1977, impose creative sentences which keep convicted persons out of prison, for instance suspended sentences and the postponement of sentences, with appropriate conditions.

Clauses 7 and 8: Directives and reporting

Clause 7 requires the National Director of Public Prosecutions (NDPP), after consultation with Director-General: Justice and Constitutional Development and the National Commissioner of the South African Police Service (SAPS), to issue directives on relevant matters and these directives must be complied with by prosecutors in the execution of their functions under the Bill.

Clause 8 requires the Minister, after consultation with the Minister responsible for policing and the NDPP, to make regulations on the information to be collected and collated by the SAPS and the National Prosecuting Authority, respectively. The information obtained must be made available to Parliament and to the Chairpersons of the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

Clauses 9 and 10: Prevention of hate crimes and hate speech and regulations

Clause 9 deals with the prevention of hate crimes and hate speech and requires the State to promote awareness of the prohibition against these offences, aimed at the prevention and combating thereof. Training programmes, including social context training programmes, must be developed by the State and the South African Judicial Education Institute on the prohibition, prevention and combating of hate crimes and hate speech.

Clauses 9 and 10: Prevention of hate crimes and hate speech and regulations

The implementation of the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance will go a long way in giving effect to the obligations created by clause 9. **Clause 10** empowers the Minister to make certain regulations in order to achieve the objects of the Bill.

Clause 11, read with the Schedule to the Bill

Clause 11, read with the **Schedule** to the Bill, sets out the consequential amendments of other Acts of Parliament, required by the Bill, namely amendments to the Criminal Procedure Act, 1977, the Criminal Law Amendment Act, 1997 (dealing with compulsory minimum sentences), and the Child Justice Act, 2008. The amendments in the Schedule to the Bill only relate to hate crimes and not to hate speech. The hate crimes to be included in Schedules 5 and 6 to the Criminal Procedure Act, relating to bail, in Parts I and II to the Criminal Law Amendment Act, 1997, relating to compulsory minimum sentences and in Schedule 3 to the Child Justice Act, 2008, relating to the most serious offences committed by children, constitute the most serious offences known in our law. They are all characterised by the most violent infringements of the right to the security of the person or serious damage to property.

Financial implications:

The main financial implications for the State will be in the form of developing and implementing directives in terms of clause 7 and implementing training under clause 9 in line with the duty of the State to promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention of these offences. No additional funding will be required. Existing funds will be used for this purpose.

Consultation

The Bill was published for public comments on 24 October 2016. Initially, the closing date for submission of comments was 1 December 2016. Due to public and stakeholder interest and requests, the closing date for comments was extended to 31 January 2017. Approximately 75 854 submissions, which included petitions, were received on the Bill. The majority of these comments were submitted by religious groups in respect of clause 4 of the Bill, dealing with hate speech. These comments were taken into consideration in the finalisation of the Bill.