

SOUTHERN AFRICA LITIGATION CENTRE

For attention:

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SALC Submission on The Prevention and Combatting of Hate Crimes and Hate Speech Bill

Department of Justice and Constitutional Development Notice 698 of 2016

This submission is made by the Southern Africa Litigation Centre (SALC). SALC is a regional NGO based in Johannesburg and operating in 11 southern African countries. SALC's mandate is to promote human rights and protect the rule of law. We make this submission from a regional perspective.

1. Introduction and Overview

Recognising that South Africa has experienced xenophobic violence on numerous occasions on a scale which has been unprecedented in its democratic history, this Bill needs to recognise and strengthen those provisions which will promote tolerance and cater for appropriate sanctions for perpetrators of xenophobia. Worldwide migrants and refugees are the targets of hate crimes and prejudice. South Africa should take a leading role to ensure that the human rights of refugees, migrants, LGBTI persons and other marginalised groups are protected.

Elsewhere in the world, xenophobia is seldom separated from the issue of racism, but in South Africa historical racial categories still dominate the public imagination, often obscuring the link between xenophobia and ethnic prejudice. Yet this connection is clearly demonstrated by the victimisation of national minorities and the deaths of over 20 South Africans during the 2008 xenophobic attacks. As a form of ethnic prejudice, xenophobia often claims justification from immigration laws; hence,

stereotypes reduce all members of the ethnically, linguistically or culturally different group to “illegal immigrants” regardless of their actual immigration status.¹

Hate crimes are violent manifestations of intolerance and have a deep impact on not only the immediate victim but the group with which that victim identifies him or herself. They affect community cohesion and social stability. A vigorous response is therefore, important both for individual and communal security. Hate crimes are distinguished from other types of crime by the motive of the perpetrator; since motive is usually irrelevant in proving the essential elements of a crime, it is rarely investigated in sufficient detail to bring out the real reason for the crime. If a criminal justice system does not use the concept of “hate crime”, the motive is not recognized as an essential element of the offence and the existence of hate crimes will therefore remain invisible.²

The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, asks states to “combat manifestations of a generalised rejection of migrants” and to discourage “xenophobic behaviour and negative sentiments towards, or rejection of, migrants.” Recognising the potentially destabilising impact of violence against non-nationals, the declaration also stresses the need for states to “put an end to impunity for violations of the human rights and fundamental freedoms of individuals and groups of individuals who are victimised by xenophobia.”³

¹ Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals
http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/101124sahrcprep_0.pdf

² Hate Crimes Laws, A Practical Guide, OSCE Office for Democratic Institutions and Human Rights
<http://www.osce.org/odihr/36426?download=true>

³ WCAR Declaration

2. SAHRC Report on xenophobia⁴

The SAHRC Report made recommendations to several government departments. It is worth noting the recommendations made to the Department of Justice and Constitutional Development (DoJCD) which are included here verbatim (with our added emphasis):

- 1) Together with SAPS, compile an evaluation of the 2008 joint agreement on xenophobia-related cases and the challenges in its implementation, providing concrete recommendations to minimise the weaknesses and promote the strengths of the response in case of a similar situation arising in the future.
- 2) Together with SAPS, draw up best practice guidelines to make the most efficient use of resources in the judicial system if faced with a similar scenario in future.
- 3) **In opposing bail, draw the attention of any court to the potential for intimidation of witnesses or complainants, and its wider ramifications for justice and the rule of law.**
- 4) **Where charges relate to public violence, consider making representations to the court in support of community service sentences or formal restorative justice solutions.**
- 5) Where appropriate, proactively offer witness protection to complainants and witnesses under the Witness Protection Act 1998.
- 6) **Establish a regularly maintained database of interpreters who are willing to place themselves on standby to render translation services in the wake of a crisis.**
- 7) **In monitoring xenophobia-related cases on an ongoing basis, partner with the SAPS desk on crimes against non-nationals to identify areas in which xenophobia-related cases are likely to have arisen.**
- 8) **Partner with SAPS, Metro Police, the Civilian Secretariat of Police and the Independent Complaints Directorate (ICD) to develop a community-based campaign to promote the justice system.**
- 9) **Ensure that sporadic prejudice-related crimes against non-national individuals, and opportunistic crimes exploiting the marginal position occupied by non-nationals, receive adequate focus and judicial response.**
- 10) **Advocate for the establishment of a specialised implementation agency in relation to the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. Ensure that the NAP is popularised among residents from at-risk communities.**
- 11) **Develop hate crimes legislation and support measures to institute it. The Prohibition of Racism, Hate Speech, Xenophobia and Related Intolerance Bill, to be submitted before Cabinet in June 2010, may be a first step in this process.**

⁴ Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/101124sahrcprep_0.pdf

3. Submissions on the Bill

3.1 Definition in Section 3(1)

A hate crime is an offence recognised under any law the commission of which is motivated on the basis of that person's prejudice bias, intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim of her or her family member.

The definition should not restrict applicability to victims and family members only. We recommend the amendment of the definition as follows:

A hate crime is an offence recognised under any law the commission of which is motivated on the basis of that person's prejudice bias, intolerance towards the victim of the hate crime in question because of one or more of the following characteristics or perceived characteristics of the victim or her or her family member *or associate*.

Justification

The addition of "or associate" would include persons who are perceived to be family members or members of the group who are being targeted. Hate crimes are not limited to family groups and the definition needs to take account of that.

3.2 The sections below also need to be more inclusive with regard to including gender identity. Prejudice directed at transgender and intersex person is on the rise and this legislation needs to be progressive and sufficiently forward looking to accommodate these complexities.

Section 3(1) f refers to prejudice on the basis of sexual orientation. We submit that this should include *sexual orientation and gender identity*

Section 3(1) (n) refers to prejudice on the basis of nationality. We submit that this should be extended to include *nationality and immigration status*. The repeated outbreaks of xenophobic violence and ongoing tensions in South Africa require that immigration status is recognised overtly as a specific ground relevant to the South African context.

Justification

Community Impact

The community that shares the characteristic of the victim may also be frightened and intimidated. Other members of the targeted group can feel not only at risk of future attack, they may experience the attack as if they were themselves the victim. These effects can be multiplied where a community has historically been victims of discrimination.⁵

Security issues

Hate crimes present potentially serious security and public order problems. Hate crimes affect a far wider circle of people than ordinary crime, and have the potential to cause social division and civil unrest. By creating or emphasizing existing social tensions, these crimes can have the effect of causing division between the victim group and society at large.⁶

Submitted 16 January 2017

Southern Africa Litigation Centre

<http://www.southernafricalitigationcentre.org>

⁵ Hate Crimes Laws, A Practical Guide, OSCE Office for Democratic Institutions and Human Rights
<http://www.osce.org/odihr/36426?download=true>
at P20

⁶ Hate Crimes Laws, A Practical Guide, OSCE Office for Democratic Institutions and Human Rights
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