

# LGBTI Rights and South Africa's Proposed Hate Legislation

*by Katherine Sutherland  
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**The proposed hate crime and hate speech bill is a step towards combatting hate directed at vulnerable groups and ensuring alignment between practice and constitutional provisions.**

South Africa was the first nation to clearly prohibit discrimination based on sexual orientation in its constitution, the fifth to legalise same sex marriage, and a signatory of the first UN resolution affirming the rights of LGBTI (lesbian, gay, bisexual, transgender and intersex) people: all victories visible on the world stage. These are only a few, of many, examples of SA's progressive LGBTI policies that have tried to improve the lives of those vulnerable to discrimination.

There has been a significant improvement in the state of LGBTI rights in SA since 1996. Nevertheless, given the history of LGBTI rights in SA, the bar from which we measure our progress is especially low. Whilst we can say that we are closer than we were in 1996 to achieving the aspirational goals of equality set out in our constitution, we cannot blind ourselves to the violent inequality that continues to pervade the lives of LGBTI persons living in SA.

In response to the high prevalence of violence and discrimination targeted at specific identity groups, the Department of Justice and Constitutional Development (DJCD) has taken a great leap forward by drafting the Prevention and Combatting of Hate Crimes and Hate Speech Bill. The bill will allow for a judge to take prejudice, bias or intolerance into account as an aggravating factor when prosecuting a perpetrator. A hate crime is a criminal offence where the perpetrator is motivated by prejudice towards characteristics or "perceived characteristics of the victim or his or her family member"<sup>1</sup>.

<sup>1</sup> Department Of Justice and Constitutional Development (2016) *Prevention and Combating of Hate Crimes and Hate Speech Bill*, Government Gazette, pg. 6, 3(1)

Hate speech is defined as communication that advocates hatred and/or is threatening toward a person or group based on their characteristics, regardless of whether acted upon or not.<sup>2</sup>

Hate speech and hate crimes are message crimes. They differ from base crimes as they target the victims' identity and subsequently send a message to an entire group.

There are three significant implications of the bill.

Firstly, an additional three to ten years could be added to a sentence. This may act as a further deterrent to those likely to commit such crimes. Studies, however, show sentencing to be an ineffective deterrent.<sup>3</sup> An alternative is a suspended sentence which allows for a more rehabilitative approach: one in which the judicial officer delays sentencing in favour of a conditional probation period. Possible conditions include community work in a field advocating for LGBTI rights, a public apology or counselling. Whilst this is not a deterrent, it has been considered a potential means of reducing the rate of recidivism. There are two key critiques of suspended sentences. The first being that it is left to judiciary discretion and the wish of the victim, whilst an influential factor, does not hold much weight. The second is that mandatory community service has, in the past, resulted in increased tension and occasionally violence. This is perhaps an indication that there is need for a more intensive rehabilitative approach when considering effective restorative justice, one that provides mechanisms of support and transformation for both the victim and the perpetrator.

Secondly, law enforcement could go through sensitivity training to both recognise and document hate crime and hate speech. This will mean that the prevalence rate, and nature, of hate crimes will be better understood. South Africa has the highest prevalence of rape in the world and rape often takes the form of a hate crime. An example of this is corrective rape. This is rape under the false assumption that it is possible to cure someone of their sexual orientation or gender. Cases of corrective rape are exceptionally underreported for many reasons. Through sensitivity training, the bill potentially addresses two of the most common reasons for underreporting, namely, inability to recognise and therefore document hate crime and, secondary victimisation by law enforcement.

Thirdly, there is a concern that criminalising hate speech will infringe upon freedom of speech. Although this issue seems to have sparked the fierce public debate, freedom of expression is not synonymous with hate speech. The hate speech provision is, however, problematic for other reasons. The chairperson of the Hate Crimes Working Group steering committee, Sanja Bornman, stated that the first draft of the bill included a hate crimes provision as well as measures of restorative justice. However, as a direct result of multiple hate speech acts committed on social media, the Department of Justice (DoJ) included a hate speech provision at the expense of the restorative justice measures that were under consideration. The haste in which the hate speech provision was included meant that there was not much discussion around the provision and, therefore, it has been described as haphazard, unimaginative, and confusing, even to those with a legal background.<sup>4</sup> There are also concerns that the hate speech provision could be used against those it is meant to protect, marginalised identities, as it does not reflect the realities of identity privilege and unequal power relations in South Africa.<sup>5</sup> Another concern is that the controversy caused by the hate speech provision will delay the bill's introduction to parliament.

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<sup>2</sup> Department Of Justice and Constitutional Development (2016) *Prevention and Combating of Hate Crimes and Hate Speech Bill*, Government Gazette, pg. 7-8, 4(1)

<sup>3</sup> M. Windzio (2006), *Is There a Deterrent Effect of Pains of Imprisonment: The impact of 'social costs' of first incarceration on the hazard rate of recidivism*, SAGE Journals, Vol. 8 (3), pg. 341-364

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<sup>4</sup> P. de Vos (2017) *Bill Criminalising Hate Speech May Protect Racists, Sexists and Homophobes*, Constitutionally Speaking. < <http://constitutionallyspeaking.co.za/bill-criminalising-hate-speech-may-protect-racists-sexists-and-homophobes/>>

<sup>5</sup> Ibid.

At the 2017 Annual General Meeting for the Hate Crimes Working Group, estimations were made of when the bill will be introduced into parliament in light of the Deputy Minister of Justice and Constitutional Development, Hon. John Jeffery, promising May 2017. Estimations made by attendees were much less optimistic, ranging from late 2017 to the beginning of 2018.

It should be emphasised that the disillusionment with the hate speech provision is not a means of underestimating the harmful effect of hate speech, as hate speech is closely tied to the incitement of hate crimes and is emotionally and psychologically harmful to the victim as well as to the group to which they belong. Rather, it is merely suggested that the hate speech provision may not have a place within the Prevention and Combating of Hate Crimes and Hate Speech Bill, for the reasons mentioned above. Alternative ways of combating hate speech incidents in South Africa include the strengthening the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), encouraging the use and accessibility of the Equality Courts, or the creation of a separate bill.

Legislation is not the most effective means of bringing an end to social injustice, but it clarifies acceptable and unacceptable social behaviour and provides recourse for people affected by hate-driven actions. It is the responsibility of the state to accommodate for and protect LGBTI individuals. Only once safe inclusive spaces have been created, can one lay the responsibility at the feet of the victim to use legislation and make its impact felt on the perpetrators of hate crimes and hate speech. The Prevention and Combating of Hate Speech Bill could be a step towards creating these spaces and thus has the potential to address the disjuncture between law and practice.

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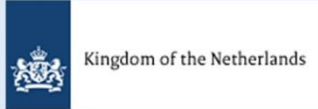
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