

The State of LGBTI Rights Protection in SA, with a focus on the proposed Hate Crimes Bill



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Alliance Française du Cap

EXECUTIVE SUMMARY

On the 24th of October 2016, the Department of Justice and Constitutional Development released the Prevention and Combating of Hate Speech and Hate Crime Bill to the public for comment. The Bill aims to provide better protection to those who experience hate speech and who are victims of hate crimes. On December 5th, 2016, the Southern Liaison Office (SALO) hosted a dialogue that aimed at providing a space for public comment on the Hate Crimes and Hate Speech Bill and to encourage engagement on the topics concerned. Speakers included Ms Sanja Bornman from the Hate Crimes Working Group and Deputy Minister John Jeffrey. The workshop was facilitated by Ms Marissa van Rensburg from SALO.

The chair welcomed the panellists and the audience members. In addition, the chair stated a change to the program, the community coordinators from Triangle sent their apologies for their absence, as a result, the chair encouraged the audience members engaged at the grassroots level to express their views and concerns in relation to the Bill. There was a

moment of silence observed for Novulo Swelindawo, a lesbian woman who lived in Driftsands, near Khayelitsha, who was brutally murdered and for all victims of hate crimes.

SUMMARY OF PRESENTATIONS

Ms Sanja Bornman, Chair of the Hate Crimes Working Group

Ms Sanja Bornman began by encouraging members of the audience, and public at large, to directly engage with the Bill in order to familiarise themselves with the language used. She argued that they should think about ways in which the Bill could be translated into practice. She stressed the need to operationalise the Bill in a way that reflects the reality of people's lives. Ms Bornman provided the context on who are the Hate Crimes Working Group, stating that they are a coalition of civil society organisations that operate in various sectors, including the LGBTIQA+ sector, the refugee sector, religious organisations and the gender sector.

Ms Bornman commended the Department of Justice on completing the Bill and opening it up for public comment. She highlighted that the Bill would go through a Parliamentary law process after the public debate deadline of 31 January 2017. Ms Bornman expressed that the Hate Crimes Working Group was happy that the Bill was finally being passed as formal legislation. She indicated that the group commended the formulation of the hate crimes section of the Bill. However, Ms Bornman cautioned that the Bill is not perfect, as such, public engagement is meant to facilitate dialogue around the limitations and disputable aspects of the Bill.

Whilst acknowledging the interesting public discourse surrounding the Bill, Ms Bornman stated that debate seemed to be based on the hate speech provision of the Bill, more than the hate crime aspect. In support of her statement, she highlighted hate crime as a significant and urgent issue for the LGBTI community and therefore further delays in terms of the promulgation of the Bill could not be afforded as a result of the controversy around the hate speech section. She also noted that the Hate Crimes Working Group was excitement about the inclusion of a definition of hate crimes, stating that this was first time in South African law such a definition had been articulated.

Ms Bornman highlighted that in the past, one of the problems of not having a definition that framed hate crimes was the lack of real responsibility on Police Officers and Prosecutors to investigate hate crime related cases. This is because of the way evidence is used to establish facts in Court. According to her, the motive is usually not relevant, this has resulted in the disappearance of the prejudice element out of the criminal justice system. Ms Bornman stated that, we as society, have become blind to the pervasive nature of prejudice and that can hurt vulnerable people in ways that range from property damage or murder, simply for being perceived as belonging to a particular group of people.

In relation to her point on having hate crimes as a fixed category in law, Ms Bornman added that through this, we can gather statistics on how many hate crimes occur, how many victims there are and who the perpetrators are. In this way it will be easier to assess how prevalent

hate crimes are and to assist those who are primarily affected, through the formulation of strategies and programmes to prevent future hate crimes.

Ms Bornman stressed the importance of not placing sole responsibility onto the department of justice, and emphasised the need for a coordinated effort with other actors in government and broader society. She stated that the inclusion of roles and responsibilities of other departments is another aspect that the Hate Crimes Working Group is pleased that it is defined within the Bill; especially as the criminal justice system can only do so much in changing people's perceptions and beliefs. Ms Bornman stated that hate crimes are not solely message crimes against a particular individual, as they ultimately affect the whole community. She pointed out that these crimes do not only affect the victim, but the community to which the victim belongs to as well. According to her, it is fitting that the law recognizes this and sends back the message that prejudice and hate will not be tolerated. She encouraged the audience to participate in the public comment debate and to put in a submission before the 31 January deadline.

Deputy Minister John Jeffery, Deputy Minister of the Department of Justice and Constitutional Development

The Deputy Minister welcomed the crowd and thanked them for their willingness to provide public comment on the Prevention of Hate Crimes and Hate Speech Bill. He clarified the definition of a hate crime, which he defined as an existing crime which has been committed with the underlying motive based on a dislike of the identity or perceived identity of the person. To illustrate this, he used the example of a brick thrown at a mosque, it would be malicious damage of property, however, if the brick is thrown at the mosque because you do not like Muslims, then it is a hate crime. The Deputy Minister stated that there are three levels of courts that try these cases: district, regional and high Courts.

The Honourable Jeffrey stated that the aim of the Bill is to elevate hate crimes to start trial at the regional level where it is more difficult to get bail and there are heavier sentences for hate crimes. In addition, he acknowledged problems relating to implementation within the justice system to address this, for instance, in relation to a rapid response that is meant to monitor cases of hate crimes against the LGBT community. This requires the joint effort of all stakeholders on this issue, including civil society groups.

The Deputy Minister stated that so far there had been no real controversy surrounding what is in the Bill, however, one crucial category pertains to the characteristics listed under Clause 3 that note reasons why people might be targeted. These include:

“the person's race, gender, sex (includes intersex), their ethnic or social origin, their colour, their sexual orientation, their religion, their belief, culture, language, birth, disability, nationality, gender identity, albinism, HIV status and occupation or trade, which is aimed specifically at sex workers”.

He indicated that characteristics that were not included are, for example, pregnancy. He further explained that, this was because women who are pregnant and are attacked, are most

likely attacked by either their intimate or ex intimate partner or close family members. In addition to this, age was left out, as older people might be attacked for financial reasons rather than as part of a hate crime.

The Deputy Minister then explained that hate speech as the part of the Bill had the most controversy. He discussed the examples of comedians, who have freedom of artistic expression, protected in the constitution under Section 16, and therefore the aim of the Bill is not to stifle their creativity. At the same time, if a comedian crosses the line, the Bill is there to prevent the spreading of hateful messages. Due to the increase of racist and homophobic incidents, Deputy Minister Jeffrey explained that it was necessary to include hate speech within the Bill. In addition to a response to these incidents, the international community has placed pressure on the government to pass legislation on hate speech and hate crimes. These were recommendations made by the International Covenant for Social and Political Rights and the Human Rights Committee in Geneva.

The Deputy Minister highlighted some groups that have expressed concerns such as the Evangelical Christians. They have expressed concerns regarding their ability to preach their understanding of the bible. Honourable Jeffrey stated that while religious freedom needs to be protected, cases like the Steven Anderson case, a man who is a religious person, but who was advocating extreme homophobia need attention. The Deputy Minister expressed his hope that the public hearings would be a forum for people to comment on the Bill, where they felt the Bill missed the mark, what it should include before it goes back to cabinet and then into Parliament for discussion.

The Deputy Minister raised the debate of why should there be a Prevention of Hate Crimes and Hate Speech Bill, if the Promotion of the Equality and Unfair Discrimination Act (PEPUDA) already exists. He responded to this by stating that hate speech was a civil act and complainants would have to go through the trouble of finding evidence against that person, so, by making it a crime, this places more responsibility on the police and the prosecution to investigate so that a case could be brought forward -therefore PEPUDA was not sufficient in that regard. He also stated that where PEPUDA considers an incitement to cause harm, the hate speech aspect of the Bill states that something can be brought forward for merely being offensive. He then highlighted some current constitutional challenges to PEPUDA. Some of which include: Jon Qwelane, a columnist, who wrote an article on why “being gay is not okay”; as well as Dianne Barnard from the Democratic Alliance (DA) who shared an offensive and hurtful racial post on her social media platform, and has been taken to the Equality Court.

The Deputy Minister then made a comment on the extended deadline. He explained that the aim was to get the Bill to Parliament as soon as possible, which is why its submission has been extended to the end of January 2017.

Contributions from the Floor

Round One

The following comments are questions were made from the floor:

- The need for clarity on the definition of hate speech and how to distinguish between hate speech and an insult.
- If there would be education in Public Service Departments regarding the Bill and if we will know where to access information as the public.
- How hate speech could be proven in cases of he said/she said, and where would the victim be able to find evidence to prove hate speech in a Court of law?
- The Deputy Minister was asked about “delay techniques” in Parliamentary processes with regards to the implementation of laws, and how this might impact government’s aims.
- Whether a special unit to deal with hate speech and hate crime would be established.
- A call for public debate and monitoring of the implementation of the Bill.

Responses by Presenters:

Deputy Minister John Jeffery

The Deputy Minister responded by providing clarity that the final decision to prosecute would be taken by the Senior Prosecutor, Provincial Head, Director of Prosecutions or somebody who is delegated by them. The Deputy Minister stated that the Director of Public Prosecutions would need to consider the amount of evidence, and acknowledged that in cases of he/she said, a point raised by an audience member, it would be more difficult to prosecute. However, he highlighted how technology and social media have transformed the way evidence is acquired, citing the Penny Sparrow case as an example.

The Deputy Minister suggested the establishment of diversion programmes (a form of restorative justice) to educate people, rather than jailing offenders for hate speech. He mentioned that there was however contention about these diversion programmes raised by the Hate Crimes Working Group. The Deputy Minister responded to the question on hate speech as a grey area by stating the importance of the Courts in developing the parameters of what currently exists. At the same time, he acknowledged that the criminalization of hate speech would not mean an immediate end to racism. There remains a need to address socioeconomic issues to do that, however, it is hoped that this would act as a deterrent.

The Deputy Minister responded that as it stands now there is no definition of hate crime, therefore stringent records have not been kept. However, once the Bill becomes law, records can be kept and then precedent can set. He added that they did not want to rush the Bill and the process needs careful consideration. The deputy Minister pointed out that debates

around tradition and cultural practise and how different people interpret tradition has shown that there are complex issues to be addressed in terms of culture and tradition in relation to the Bill.

Ms Sanja Bornman

Ms Bornman acknowledged that the relationship between the South Africa Police Services (SAPS) and the LGBTI community needs to be enhanced and strengthened, therefore the inclusion of roles and responsibility of other Departments in the Bill is a positive step. However, she was pessimistic about how effective sensitivity training would be and that it might take some time for there to be a real change. Therefore, she placed importance on the role of civil society to ensure that education and sensitisation is happening and that through sharing knowledge we can be on the same page.

Ms Bornman, noted however, that the Hate Crimes Working Group was sceptical about that wording in the hate speech provision because of the power imbalance in the country. She was at the same time the law needs to apply to everyone equally. She argued that this imbalance stems from a lack of attention paid to reconciliation, and with that, hate speech fans the flames of what is already there. In this same vein, she cautions that adding an element of criminalization to the hate speech Bill could backfire negatively onto the people it is meant to protect

Ms Bornman noted that although culture does play a role in how we think about hate speech, however, no one's cultural beliefs should be used to justify hurting someone. She went on to argue that, in a multicultural society we must find ways of living together. Ms Bornman stated that there were many reasons why society is afflicted by violence and hate. She made reference to the role of patriarchy, economic inequality, and social inequality as some of these reasons.

Tawanda Sachikonye

Consolidating the concerns that came from the floor, Mr Sachikonye highlighted questions on:

- How do we align the proposed hate crimes Bill to come into government framework?
- How are we going to make sure the Bill complements the frameworks that are already there?
- How do we make sure that public servants are sensitised and informed about the Bill and how it will be operationalised?
- How do we deal with prejudices of those in positions of power who are then supposed to help with the application of that Bill too?

He argued that it cannot be left to the Deputy Minister and the other Honourable Ministers to effectively address hate related crimes and implement the Bill, hence there has to be supportive input from society.

Contributions from the Floor Round Two

The following comments and question were presented:

- How to create curriculums within schools about gender sensitivity to educate children from a young age.
- How will the Bill protect the digital sphere, as there are cases where comments in the digital sphere translate into reality?
- How would one prove motive in the instance someone committed hate speech, especially since there is insufficient precedent in terms of cases relating to hate speech in courts?
- A member of the National Prosecuting Authority (NPA), made a comment on the accusation of the NPA as a politicised institution, and they asserted that its job is focused on implementing and upholding constitutional mandates
- The idea of prosecution for hate based on occupation which could be exploited by those in positions of power; and second, in terms of the debates surrounding criminalization, are there other jurisdictions where deterrence has been proven?
- If there was a timeline for how long it would take to get the Bill implemented.
- There needs to be a more coordinated approach in understanding hate crimes and how it affects the LGBTI community.
- The importance of having both political will and resources, in terms of ensuring that the Bill will be passed.
- How the Hate Crimes Bill would cover refugees living in South Africa, as well as those who identify as LGBTI.
- Education of police officers about hate crimes, should extend further to Home Affairs officials who refugees encounter daily

Responses by Presenters/Closing Remarks

Ms Sanja Bornman

Ms Bornman encouraged people who believe that the Bill should be aligned to Customary Law to make their comments and submit them to parliament. She stated that the Bill is underpinned by South African law, as such it is open to constructive criticism. She encouraged the promotion of monitoring and evaluation, which are essential in terms of ensuring accountability.

Ms Bornman stated that the presence of traditional leaders is not only necessary but critical, and they should be part of the conversation. She argued that deterrence is more centred on education and public campaigns. She noted the importance of financial resources to buttress the implementation of the Bill. On the question regarding refugees, Ms Bornman stated that she was satisfied that the Bill provided enough coverage for refugees, as well as in cases where refugees are also members of the LGBT community.

Deputy Minister John Jeffery

On the question around training extending beyond the police service, he acknowledged that there was always going to be problems within the public service when it comes to implementation. But they can be resolved through effective training. By establishing channels of accountability, the government has set up a National Task Team on LGBT issues in conjunction with civil society organisations, this is an addition to the Rapid Response Team he had discussed earlier. In terms of implementation, the Deputy Minister stated that usually, Bills that are less controversial are signed by the president. However, he acknowledged that this Bill is complicated, particularly the provision on hate speech. He cited the Qwelane and Barnard case as examples of testing the limits of freedom of speech, and warned that no right is absolute.

In response to the question on protection within social media spaces, the Deputy Minister stated that a Bill dealing with cybercrime would be coming out soon. He indicated that while this Bill does not specifically deal with hate speech, it does provide protection in relation to the internet space. However, he acknowledged that with issues concerning the internet, jurisdiction is a problem. The Deputy Minister ended by thanking the audience, Ms Bornman and Ms van Rensburg and encouraged everyone to read the Bill.

Conclusion

Mr Sachikonye stressed the importance of citizens playing a part in supporting not only Deputy Minister Jeffery and Ms Bornman, but other NGOs in their work around this issue; and pleaded with the broader community to support and engage with the process.

The analysis and recommendations included in this Policy Dialogue Report do not necessarily reflect the view of SALO or any of the donors or conference participants, but rather draw upon the major strands of discussion put forward at the event. Participants neither reviewed nor approved this document. The contents of the report are the sole responsibility of SALO, and can under no circumstances be regarded as reflecting the position of the donors who provided financial assistance for this policy dialogue session.

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The Southern African Liaison Office (SALO) is a South African-based not-for-profit civil society organisation which, through advocacy, dialogue, policy consensus and in-depth research and analysis, influences the current thinking and debates on foreign policy especially regarding African crises and conflicts.

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