



The Hate Crimes and Hate Speech Bill

**23 February 2017
Sunnyside Park Hotel, Johannesburg**

EXCUSIVE SUMMARY

The Prevention and Combating of Hate Crimes and Hate Speech Bill provides for offences related to several forms of discrimination, including those on the basis of race, gender, sexual orientation, religion, and nationality. The bill was originally drafted with only hate crime in mind. However, in response to the recent increase in hate speech incidents, especially on social media platforms, the Department of Justice and Constitutional Development made the decision to include a hate speech provision. The bill, through the criminalisation of hate speech and hate crime, intends to ensure greater alignment between practice and constitutional provisions that protect vulnerable groups. It will not only enforce harsher sentencing and larger fines, but will also implement educational and sensitivity training programmes for both the public and public service staff as a means of making its effect felt on a grass roots level.

The Southern African Liaison Office (SALO) in Partnership with Friedrich Ebert Stiftung (FES), the Kingdom of the Netherlands, and Open Society Foundation for South Africa hosted a dialogue on the '*Hate Crimes and Hate Speech Bill*' on Thursday, February 23rd 2017, at the Sunnyside Park Hotel, Johannesburg. The dialogue aimed to explore whether the Bill will be effective in addressing some of the systematic hate crimes plaguing South Africa. The keynote Speaker was the Honourable Mr John Jeffery, the Deputy Minister of Justice and Constitutional Development. Other speakers included; Ms Roshan Dadoo the Director and Regional Advocacy Officer at Consortium for Refugees and Migrants in South Africa (CoRMSA), Mr Katlego Rasebitse the Advocacy Liaison Officer at Sex Workers Education and Advocacy Taskforce (SWEAT), and Ms Corlett Letlojane the Executive Director of the Human Rights Institute of South Africa (HURISA).

It was chaired by Dr Showers Mawowa, the Deputy Director at SALO. Ms Tamara Naidoo, the Programme Manager at FES gave the opening remarks.

SUMMARY OF PRESENTATIONS

Dr. Showers Mawowa, Deputy Director at SALO



Dr Mawowa opened by commending the Prevention and Combating of Hate Crimes and Hate Speech Bill as it seeks to create an environment where South Africans can live together and peacefully coexist. He expressed that the responsibility to have a peaceful and prosperous society lies on various actors working together and these include government, civil society, and business.

He noted the events of 2015 that led to offensive racial statements coming up through social media, the rising tensions between nationals and non-nationals. He argued that this Bill focuses on these and other pertinent issues in which people express themselves in a way that is prejudicial and hateful. Dr Mawowa concluded by

informing participants that there are going to be more opportunities for engagement after the Bill has been tabled in Parliament.

Tamara Naidoo, Programme Manager at the Friedrich-Ebert-Stiftung (FES)

Tamara started by expressing the relevance of this dialogue in the context of Xenophobic attacks in Gauteng in early 2017. She indicated that Xenophobia is not a South African problem, but a world problem, stating that this is illustrated in the Amnesty International Annual Human Rights Report. She noted the importance of questioning the nation state and the ability of its Constitution to manage the consequences of a highly-interconnected and globalised world.

She stated that the Hate Crimes and Hate Speech Bill is that one step further to protect and promote the rights of all who live in South Africa and that the Bill creates two new criminal offences; hate crimes and hate speech. The Bill seeks to criminalise hate speech towards a person or a group of people and aims to hold perpetrators of hate crimes accountable and provide a means to monitor efforts and trends in addressing such crimes.

She noted three critical areas that the Bill addresses and these include:

- Creating obligations for the police, National Prosecuting Authority, and others to identify hateful motives in crimes
- Creating an unprecedented obligation to report and monitor crimes with a hateful motive



- Focusing on prevention, creates cross cutting mandates for various departments: health, labour, home affairs

These will then allow for proper investigation and prosecution of hate crimes; adding to the national crime statistics. This will help the state and civil society understand the landscape of targeted violence and, thus, enable them to start tackling the prevention and combatting of these crimes. Ms. Naidoo further pointed out that this will create holistic approaches that will relate to prevention programmes. She highlighted the internal programmes to train and sensitise public sector staff and ensure that, where departments interact with the public, they are aware of their duty to prevent and combat these crimes.

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

Mr. Jeffery started his presentation by stating that there is a Hate Crimes Working Group that is working on the Prevention and Combating of Hate Crimes and Hate Speech Bill. He indicated this Bill provided for existing crime, which is committed due to a list of prejudice, bias, or intolerance towards the victim. The list is closed and includes the following identities: race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism, or occupation or trade. Occupation or trade is primarily aimed at protecting sex workers.



Once passed, the Bill will provide for minimum sentencing for these crimes. He mentioned that there are some contentious issues, which include:

- Certain things in the list that are provided for in PEPUDA [*Promotion of Equality and Prevention of Unfair Discrimination Act*] that are not on this list.
- Whether rehabilitation should be allowed for hate crimes
- The hate speech provision of the Bill

He expressed that there is a provision responsible for the prevention of hate crimes and hate speech and the duty is on government for that. Mr. Jeffery pointed out that both hate crimes and hate speech are in compliance with international obligations. He stated that the Human Rights Committee in Geneva has asked South Africa about when the Bill on hate crimes and hate speech will be passed.

In PEPUDA, there is a section that prohibits hate speech and the requirements there are one or more of the prohibited grounds against any person that could reasonably be construed to demonstrate a clear intention to:

- Be hurtful
- Be harmful or to incite harm
- Promote or propagate hatred

He expressed that the issue with PEPUDA is that it is a civil remedy and the onus is on the individual, who is feeling aggrieved, to actually go to an Equality Court. It must be noted that the intention of the Bill was not to limit freedom of expression, it only intends to limit incitement to cause harm. On the issue of the common-law crime of *crimen injuria*, which is a central element and defined as an insult to the dignity of the person, he explains that it has in fact been used for prosecution.

Roshan Dadoo, Director of Consortium for Refugees and Migrants South Africa (CoRMSA)



Roshan Dadoo started by talking about the process to arrive at this draft Bill as one that signals positive reaction from both government and civil society. While, initially, the focus was to bring several actors to seek some solution or at least some legal provision for the protection of everybody who faces hate crimes, hate speech has now been added.

She expressed some concerns about combining the two issues because a lot of time had been spent on hate crimes and the late inclusion of hate speech has thus derailed the process.

According to Dadoo, the hate crimes Bill is not criminalising something but is rather just adding

a motive to the crime. This could either mean stronger sentencing or restorative justice measures, of which most are not convinced should be done. There have also been those who suggest that work should be done to strengthen the already existing mechanisms, such as PEPUDA and the Equality Courts. This would be aimed at ensuring that they are used effectively, instead of developing a new legislation.

Corlett Letlojane, Executive Director of the Human Rights Institute of South Africa (HURISA)

Letlojane stated that South Africa is known to be a champion of Human Rights. She stated that she was pleased that government was making every effort to make the process of drafting the Hate Crime and Hate Speech Bill as inclusive and participatory as possible. She stated that the Bill aims to give effect to constitutionalism and to international instruments such as the Conventional Elimination of Racial Discrimination process, including the Universal Periodic Review, which requires South Africa to give periodic reports in some of the treaties it has ratified.

She indicated that South Africa played a role through sensitisation programmes and offering training to the police, to the judiciary, to the courts, to the lawyers, and the civil society. Letlojane stated that this work was a collaboration between the Department International Relations, Department of Justice, and South Africa Human Rights Commission. Equality Courts are not known by many people and there should be a forum that is accessible to people who cannot afford to approach the Constitutional Court. She argued that are a lot of issues with the Equality Courts and those include:



- Workers are afraid to report their bosses
- There is no education that is provided there
- The lawyers are inexperienced, they do not know how to deal with the matter
- The police do not know how to deal with the matter, they don't know how to further the matter

It is important to clarify what the Bill aims to achieve and how people can benefit from it, because the priority is for justice to be done and for remedies and prosecutions to be provided.

Katlego Rasebitse, Acting Provincial Coordinator for Sisonke Media Liaison Office, Sex Workers Education and Advocacy Taskforce (SWEAT)

Rasebitse expressed his excitement for the opportunity to speak about hate crimes around sex workers. He stated that in the South African context, sex work refers to adult consent transaction. This includes females, males, and trans. He expressed the importance of interrogating the reasons for hatred of sex workers and he stated that the reasons include:

- Stigma
- Beliefs pushed by culture and religion
- Lack of consultation and research about sex workers
- The media informs the biggest pusher towards hate crime
- The misconception that sex workers are HIV/Aids carriers
- Lack of sensitisation at all levels



He indicated that, in South Africa, sex work is governed by a 60-year-old law, Act 23 of 1957 on Sexual Offence, which was essentially formed to control women’s bodies. The Act on sexual offences states that you have committed a crime when you:

- Are buying sex
- Are selling sex
- Are earning from the profits of sex work
- Own a brothel or a sex house
- Know of a sex worker and you do not report to the Police

He stated that criminalisation of sex work has led to many hate crimes against sex workers. Sex workers have been denied access to health care and other services including the justice system. There are a lot of homeless sex workers. He argued that there is a need to start integrating programmes that will sensitise our communities. Rasebitse stated that in civil society organisations, those programmes aimed at sensitising our communities should be led by sex workers. There also needs to be a reform within the media to ensure that the media feeds the public correct images on sex workers. He argued that indicatives, such as the ‘say her name’ campaign, which aims to ensure that crimes committed on sex workers, must be reported with human dignity.

Rasebitse concluded by quoting the Deputy President, who said, “*Let us build a South Africa with a more human face*” and expressed that that human face also includes sex workers.

DISCUSSION SESSION

Contributions from the floor

There were views that the Bill should be split into two Bills in order to ensure that the Hate Crimes Bill moves faster through Parliament and allowing for more time to work on the Hate Speech Bill. It was noted that the Hate Crimes Bill is more urgent because of the current levels of secondary victimisation of LGBTI community

and sex workers when they go to report cases. Participants expressed that the contentious nature of the Hate Speech Bill is slowing down the process and, hence, should be addressed separately.

Regarding hate speech, there were a few differing views; it was expressed that hate needs a serious focus, because through text and voice, people can commit genocide. It was pointed out that people in powerful and respectable positions tend to normalise certain languages. Some felt that this can be used by those with money to victimise those who express themselves. Regarding legislation of hate speech, one participant expressed that racism is deeply institutionalised in South Africa. As such, any effort to legislate it will be met by the same challenges faced by hate speech and free speech, hence it will not change the equation.

Regarding sex work, one participant suggested that SWEAT should probably concentrate on dealing with the legalisation of sex work before we talk about funding. The fact that sex work is illegal may scare away funders. One participant advised that caution be heeded as far as the decriminalisation of sex workers, because this may lead to having laws that fail to restrict trafficking of young girls, which is big issue in the whole of South America.

One participant questioned how South Africa could promote human rights when the country has failed to acknowledge and expose the third force which caused the 2008 Xenophobia. He felt that the green paper on International Migration is quite contrary to promotion of human rights and is inciting xenophobia. Participants felt that during the processes of creating legislation, the elite tend to take on the whole process by themselves whilst excluding community organisations. It was suggested that community organisations be given a chance to comment on the Bills and speak for themselves.

Responses from Panelists

Regarding the statement made that decriminalising sex work may lead to increased human trafficking, **Katlego Rasebitse** clarified that, when speaking about sex workers, he is referring to adults and not child exploitation. He acknowledged that human trafficking remains a continuing challenge. Rasebitse stated that, studies have shown that, in countries where sex work has been decriminalised, there is less human trafficking and sex workers are able to work hand in hand with the authorities and are protected.

Corlett Letlojane interrogated the concept of African solutions for African problems, questioning what African solutions were and when Africa would begin to use its own mechanisms. She stated that the problem facing the continent is the lack of political will from the leadership. She expressed that Africa needs a country that can provide solutions and she believes that that country is South Africa. She expressed her belief that lobbying at different levels will assist in keeping government focused and ensure that everyone participates in the process. She emphasised the importance of having adequate resources to implement all the provisions that are anticipated under the Bill.

Regarding South Africa's role as a champion of the continent in Human Rights, **Roshan Dadoo** pointed out its inability to tackle things like xenophobia. She pointed out that this has weakened the country in its effort to influence continental affairs. Furthermore, this has given political credence to other players in the continent who do not want to see South Africa playing a critical role on pertinent issues like human rights. She also warned that, in saying xenophobia is a global issue, South Africans may deem it acceptable, and therefore suggested that South Africa should address it internally.

Roshan Dadoo also concurred with the participants, that there should be more civil society and government community dialogues and such dialogues should be inclusive. She stated that such dialogues would help deflect attention away from violence. Regarding hate speech, she agreed with the view that hate speech often deals with manifestations and does not address the structural issues, like inequality. Dadoo stated that these are the pivotal issues embedded within the South African society, hence criminalising hate speech would be

difficult, as proven by the influence of those with means to enter the Courts. Regarding decriminalising sex work, she stated that there is anti-trafficking legislation, therefore human trafficking cannot be used an excuse to tighten the borders.

Deputy Minister John Jeffery expressed that the Bill on hate speech is not meant to deal with racism but rather the manifestations of racism. He acknowledged that racism will not be dealt with until the structural inequalities are dealt with. He indicated that the Executive of government still has to take a decision as to whether to continue with the hate speech provisions or whether it will be left for later. He clarified that provisions of hate speech are still to be refined and exceptions provided for, but ultimately it will be the Courts that will be deciding what constitutes hate speech, as far as the implementation of Legislation is concerned. Regarding xenophobia, he stated that it needs urgent attention because immigration issues are quite complex, as they do relate to competition for resources and in South Africa that is a prominent debate.

RECOMMENDATIONS

Below are recommendations made by participants, including panelists:

- It is important to note that law is not justice and, hence, it is essential to prioritise justice for the poor and the victim.
- There should be inclusive advocacy programs, education of communities, and ensuring of understanding of the differences between reality and perceptions.
- Political lead needs to be strengthened in Africa and South Africa has to play that role and promote human rights beyond its borders in order address the issue of immigration and human rights violations.
- Civil society needs to assist the government to ensure effective implementation initiatives, such as the national action plan, PEPUDA, PAJA, and NDPA.
- Communities need to be educated on the use the Equality Courts and ensure that these courts are used effectively.
- Combating hate crimes and hate speech are supposed to be a social responsibility and therefore cannot not be adequately addressed by legislation. The evolution of what is supposed to be a South Africa in construction is dependent on education. It is therefore, empirical not focus on the legal argument, but on the spirit of the issues during public consultations and to ensure that the consultation process is about educating society on the evolution of itself.

CONCLUSION

There has not been a decision made on whether the Bill might be split into two separate Bills in order to address the hate crimes Bill speedily. There are concerns that individuals, in particular high profile actors, may abuse the Bill to suit ulterior motives as it provides no exceptions for instances such as artistic license. The responsibility of addressing societal ills should not just be left to government and civil society. Communities should work together to ensure that these issues are tackled.

It is important to acknowledge that hate crimes are a symptom of underlying issues caused by governance, education, and information, and thus everyone has to play a role in addressing them. This includes, media, schools, and the community at large.

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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