

The Prevention and Combatting of Hate Crimes and Hate Speech Bill



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INTRODUCTION

On the 5th of December 2016, the Southern African Liaison Office held a dialogue on the Prevention and Combatting of Hate Crimes and Hate Speech Bill. The panel consisted of two speakers, including the key-note speaker, Honourable John Jeffery, Deputy Minister of the Department of Justice and Constitutional Development, as well as Sanja Bornman, Chairperson of the Hate Crimes Working Group Steering Committee. The context and timing of the dialogue was especially relevant, as the bill was nearing the end of its public consultation process. This had a significant impact on the aim of the dialogue, as both speakers had the intention of creating an open space in which questions from the audience aimed at strengthening the Bill and enhancing the public consultation process could be openly raised.

KEY ISSUES RAISED

How will the Bill operationalise the ideals already set out within the constitution

The disjuncture between law and practice was a consistent theme within the dialogue. Questions were raised in relation to how and whether the effects of the Hate Crimes and Hate Speech bill would be felt on a grassroots level. It was noted that it is vital that legislation is sensitive to the realities of the individuals it aims to protect and, thus, the process of creating legislature should be guided by this. One of the ways in which the bill will be operationalised is through the use of sensitivity training for law enforcement. The existence of a legal definition of hate crime, combined with sensitivity training, will directly impact on the ability for law enforcement to recognise and document hate crime incidents and therefore, create a safer and more effective means for victims to hold their perpetrators accountable.

The urgent need for the establishment of hate crime and hate speech legislation in South African law

It was stated that hate crime provision in the bill has been ten years in the making. With hate crime incidents as prevalent as ever in South Africa, there is both an urgency to get the bill through the parliamentary process as well as a need to spend time on creating effective and exhaustive legislature with regards to hate crime. The hate speech provision was introduced into the bill in the beginning of 2016. This has caused concern over whether the bill is being hastily brushed through. Due to the extent of hate crime incidents in South Africa, it was noted that it would be regrettable if the promulgation of the bill was impeded by the controversy caused by the hate speech provision. Parliament aspires for the bill to become legislation by 2019. It was noted by Hon. Jeffery that challenges in terms of passing a disputable bill had been previously experienced in relation to with the Protection of State Information Bill, where controversial bills had caused complications to arise and thus delayed the signing of the bill by the president.

Potential unintended consequences of the Hate Speech provision

It frequently came out that one of the consequences of the hate speech provision has been the derailing of the debate at the expense of the hate crime provision. The panellists urged the audience, and the public at large, to spend time getting to know and evaluating the hate crime provision. They cautioned against being blinded by the controversy caused by the hate speech provision. Another concern was raised that the bill may result in harming the very people it is meant to protect, for example marginalised identities. Due to the fact that legislation will apply equally to all, the bill is not sensitive to existing power imbalances. This could potentially allow for historically privileged identity groups to prosecute marginalised groups for hate speech in a context characterised by adverse levels of inequality and racial tensions.

International and internal pressure for the establishment of hate speech and hate crime legislation in South Africa

2016 gave rise to a string of hate speech incidents, especially on social media platforms. These resulted in a great source of internal pressure to create hate speech and hate crime legislation in South Africa and directly confront rising racial and gendered tensions. The creation of such legislation would also align practice with the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. South Africa is also a signatory to international treaties such as the International Covenant for Social and Political Rights, the Human Rights Committee in Geneva, and the International Convention on the Elimination of All Forms of Racial Discrimination. South Africa has an obligation to create hate crime and hate speech legislation in order to better align itself with the values of these treaties and organisations.

Is the Hate Crime and Hate Speech Bill relevant to a multicultural South African context?

Questions were raised around whether the bill would be sensitive to varying cultural practices as well as complement the legal framework of customary law. On the first point, it was noted by both panelists that whilst culture does play a significant role, culture may not be used as a means of justification when being held accountable for committing a crime against another person. With regards to the legal framework of the bill, it was made clear that the bill is being created through an extensive public consultation and democratic process and therefore fairly representative of customary law.

RECOMMENDATIONS

The promotion of alternative forms of accountability for hate speech

Due to the fear that criminalisation of hate speech might have unintended and harmful consequences. It was recommended that provisions be put in place to hold perpetrators of hate speech accountable through PEPUDA (Promotion of Equality and Prevention of Unfair Discrimination Act) and, more specifically, the Equality Courts. The popularisation of the Equality Courts would allow for greater accessibility to justice as well as an opportunity to allow time for the creation of a more robust and comprehensive definition of hate speech. There was a call for South African Human Rights Commission and the Gender Commission to strive towards updating PEPUDA to include hate speech committed in online spheres.

The need for more effective and exhaustive rehabilitative measures as a means of deterrence

During the formulation of the bill, there was no unanimous agreement on how prominent the role of restorative justice should be in the bill. It was stated that diversion programmes¹ are the main

¹ A diversion programme is a system of sentencing in which the perpetrator takes part in a mandatory rehabilitation process in an attempt to directly address the behaviour that lead to the criminal act.

method of restorative justice and deterrence. However, as noted by Hon. Jeffery, diversion programmes have not had ideal results in the past and thus it was suggested that other methods of deterrence should be implemented, specifically primary, secondary and tertiary prevention programmes.²

There is a necessity for a coordinated effort

A reoccurring theme throughout the dialogue was the need for a coordinated effort between government departments, the education system, civil society, and the public at large. In the democratic process of creating the bill, the responsibility lies on the public and civil society organisations to engage and to popularise the debate around the bill. This could take place through education and sensitivity programmes as well as a greater amount of public hearings. There is also a need for increased discussion on the roles of other key governmental departments, such as the Home Affairs.

Costing of the bill in light of sensitivity programmes

The significant costs related to sensitivity training programmes have to be factored into the broader financial expenses associated with operationalising the bill. Especially since civil society has noted that there could be substantial financial costs if concerns relating to how effective and far-reaching sensitivity training programmes will be when the bill comes to effect are to be considered. Hence, the importance of the role of civil society with regards to ensuring that education focused on sensitivity is prioritised, and that through sharing knowledge all stakeholders can be on the same page regarding the importance of sensitivity training programmes.

The removal of the 'Occupation' category within the hate speech provision

There was much concern around inclusion of the occupation category as an identity group that can experience hate speech. The reason for the category of occupation being included in the bill is to allow for the protection of sex workers against hate crime and hate speech. However, there is a concern that this will limit freedom of speech, especially in political discussions. It was suggested that the category of occupation therefore, be taken out of the hate speech provision and left in the hate crime provision. According to Deputy Minister Jeffery, this is due to the fact that incidents of hate crime are much more prominent for sex workers.

² Primary, secondary and tertiary prevention programmes are interventions aimed at reducing the risk of asocial behaviour. Primary prevention intervenes before asocial behaviour (behaviour that impacts negatively on other people) occurs, i.e.: educational programmes. Secondary prevention intervenes when the behaviour is occurring, i.e.: support mechanisms. Tertiary prevention intervenes after the behaviour has occurred and aims at lessening the severity of the impact on the perpetrator, the victim and the community/family members involved, i.e.: counselling.

*List of Speakers

1. Hon. John Jeffery, Deputy Minister of Justice and Constitutional Development
2. Ms. Sanja Bornman, Chairperson of the Hate Crimes Working Group Steering Committee

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