
The Prevention and Combating of Hate Crimes and Hate Speech Bill



UCT, 11 March 2019

Executive Summary

On 11th March 2019 the Southern African Liaison Office (SALO) facilitated a dialogue on Hate Crimes and Hate Speech Bill at the University of Cape Town (UCT). The dialogue was part of the ongoing series of engagements by the Deputy Minister of Justice and Constitutional Development, Hon John Jeffrey. SALO has been conducting these engagements with communities, civil society formations and other stakeholders for a number of years. Youth and student formation contributions towards the drafting of the Bill have been essential during the public hearing phase of the Hate Crime and Hate Speech Bill. SALO has facilitated forums for youth and student stakeholders to engage around the formulation and drafting of the Bill.

The purpose of the Bill is to give effect, in accordance with international law, to obligations that arise from the Constitution of South Africa and from international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerances.

Key Issues

In South Africa, the rights of lesbian, gay, bisexual, transgendered and intersexed (LGBTI) people are protected by the Equality Clause of the Constitution. The clause articulates that no person should discriminate against another person based on their sexual orientation. Furthermore, there is a Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), passed in 2000, which states that there needs to be national legislation to promote the right to equality. Through such legislation, the recognition of the rights of LGBTI persons by the South African government has been appreciated locally and abroad as a step in the right direction for the country¹. Yet, a number of studies have identified homophobia and intolerance against the LGBTI community as a prominent challenge. The past few years have seen a growing trend with regards to homophobia, hate crimes and other related intolerances. According to Jagessar and Msibi (2015), the LGBTI community in South Africa continues to experience many forms of violence and victimisation. These include, “sexual abuse/rape, gay-bashing, hate speech, domestic violence, attack on their property, physical abuse/assault and domestic violence – in their homes, communities and even in institutions of education”². These observations have resulted in the criticism of the Equality Clause in PEPUDA, and highlighted the need to create an alternative, noting PEPUDA’s limitations.



Failures of PEPUDA

Whilst the Act generally prohibits unfair discrimination, its primary focus is on discrimination based on race, disability, and gender. It does not really focus on other categories, such as nationality or sexual orientation. In the realm of law, it is viewed as a civil remedy, as it does not criminalise hate speech. For PEPUDA, hate speech must be referred to the prosecutor but there is no binding legal definition clearly defining and delineating what constitutes hate speech. The Act has failed to effectively set up Equality Courts, which essentially serve as civil courts for dealing with discrimination cases.

The South African government has therefore committed itself to the broader programs necessary to combat racism, racial discrimination, xenophobia and related intolerance, including homophobia. This arises from the World Conference Against Racism in Durban held from 31 August to 8 September 2001. Countries that attended the conference committed themselves to coming up with National Action Plans to combat racism,

¹ Ngidi, N., and M. Diamani. 2017. “Challenging Heteronormative Scripts through Film and Transformative Pedagogy among TVET College Students.” *South African Journal of Higher Education* 31 (4): 267–285

² Jagessar, Valenshia and Thabo Msibi. 2015. ‘It’s not that bad’: Homophobia in the residences of a university in KwaZulu-Natal, Durban, South Africa. *Agenda* 29(1): 37–41.

racial discrimination, xenophobia and related intolerance. South Africa's plan was drawn from UN Guidelines, and contributions from civil society and related stakeholders. The process has involved the general legislative framework, ranging from parliament, through public comment, to cabinet approval. It is a broader and more holistic program dealing with racism and xenophobia, including homophobia and hate crimes. Noting that the shortcomings of PEPUDA resulted in a context where racism, racial discrimination, xenophobia and hate crimes against the LGBTI community incrementally increased, the government took an initiative to create platforms like the National Task Team (NTT), under the auspices of the Ministry of Justice. In brief, the NTT has been tasked with the responsibility of developing a National Intervention Strategy to end gender and sexual orientation-based crimes. Furthermore, it has to develop an approved Intersectoral Implementation Plan to align parallel and complementary programmes between government and civil society.

Indeed, contemporary South Africa has faced a huge increase in hate speech and hate crimes over the past few years, from racist utterances to high levels of gender-based violence against LGBTI individuals. There has also been a high prevalence of homophobia concentrated in the higher education sector in the country. Therefore, in general, assaults, rapes and murders of LGBTI persons remain disturbingly commonplace. It became clear that PEPUDA was inadequate, and that the continued prevalence of hate speech and hate crimes required new legislation to be put in place, that will effectively combat hate crimes and hate speech in South Africa. The Hate Speech and Hate Crime Bill has been viewed as a positive step in the right direction by the general public and the LGBTI community. The Hate Speech and Hate Crimes Bill has been formulated with contemporary challenges in mind, in a milieu where social media is increasingly becoming influential.

The Role of the Hate Speech and Hate Crime Bill

The Hate Crimes and Hate Speech Bill started off as only a Hate Crimes Bill, since there was growing concern about hate crimes in South Africa. It was further developed to include hate speech, given the difficulty of differentiating between what definitively constitutes hate crime or hate speech, and as such, incites violent crime acts. The Bill provides an opportunity to charge people for hate crime and hate speech related criminal offences. Unlike PEPUDA, the Hate Speech and Hate Crimes Bill is applied as common law (and not merely civil law). The Hate Speech and Hate Crimes Bill then provides an opportunity for prosecution of persons who commit offences relating to hate speech and hate crimes. It provides a framework for appropriate sentences that may be imposed against these crimes (hate speech and hate crimes). It also provides a framework for the prevention of hate crimes and hate speech, which includes stipulations around the processes that underpin reporting pertaining to: the implementation, application and general administration of the Bill. This Bill will allow judges to consider prejudice, bias or intolerance in the perpetration of a crime as an aggravating factor in terms of sentencing.

The creation and development of the Hate Speech and Hate Crimes Bill emanated from the realisation that our society is faced with many challenges relating to prejudice and intolerance, and the law attempts to not only, regulate behavioral patterns but to also protect the people in our society. In this sense the Bill seeks to be a preventive measure against hate motivated crimes. It is worth noting that the Bill tasks the police and prosecutors to include considerations of hate bias in their investigations and prosecutions They will also be

responsible for the effective monitoring of the situation, analysis of trends and interventions, and for the provision of both qualitative and quantitative data on hate crimes.

In terms of Hate Speech, the only judgments that have set precedent are outside of the PEPUA legal framework, and fall under criminal law as *crimen injuria*, which has been used to prosecute and convict people of hate speech. The case of Penny Sparrow saw her pleading guilty to *crimen injuria*, while Vicky Momberg was also found guilty of this crime. These crimes fall under common law, not civil law as is the case of PEPUA. The Hate Speech and Hate Crimes Bill is therefore an important step in the fight against hate crimes against LGBTQ people and other vulnerable groups in South Africa.

Concerns About the Hate Speech and Hate Crimes Bill

The fact that such an urgently needed legislation has had to wait for the 6th Parliament of the Republic of South Africa to be formally promulgated is problematic, given the long process of enacting legislation. The Bill should already have been enacted, noting the contemporary context in which the country is experiencing high levels of racial discrimination, hate crimes, as well as violence against the LGBTI individuals. Poor access to justice and lack of knowledge of, or belief in, rights instruments, remains a challenge amongst minority groups. At the same time, it is worth noting that formulation of the Hate Speech and Hate Crimes Bill shows that there is evidence of a shift in social attitudes towards the LGBTI community. However, the Bill must reflect thoroughly on the ongoing challenges faced by LGBTI persons. It is crucial that the LGBTI community remains vigilant, in order to robustly advocate for the guarantee of their human rights and dignity.

The hate speech aspect of the Bill should also consider religious protection, since some groupings with distinct religious beliefs and doctrines continue to face challenges in freely expressing their beliefs. There is a view in religious circles that the hate speech aspect may infringe on freedom of religion. Some religious groups have submitted comments on the Bill in this regard.

There is a concern regarding the conduct of law enforcement agencies like the South African Police Service (SAPS). It is argued that law enforcement agencies in South Africa are extremely dismissive about cases involving violence against LGBTI persons. While the escalating levels of violence perpetrated against LGBTI persons continue to require more attention, this situation has not been matched by complementary efforts by law enforcement authorities (including the police) to mobilise against homophobic hate crimes. This concern is also extended towards certain government departments that fail to engage the LGBTI community, yet they are central to the issues that affect LGBTI persons.

From a sociological perspective, there is a need to understand how the Hate Speech and Hate Crimes Bill conceptualises 'racism' in the South African context. There has to be a realisation that South Africa is a diverse country, with many cultures. Therefore, the Bill should be able to accommodate cases that fall outside the realm of common law. The tensions between customary law and common law remain a key challenge that is facing the justice system, especially in rural areas. The Hate Speech and Hate Crimes Bill should be implemented in such a way that it works well around the nuances of customary law.

Recommendations

Education

Education of the public in relation to the concerns of LGBTI persons was highlighted as a pivotal initiative that needs to be taken up by the South African government. Other stakeholders are also imperative in providing information and education on the issue relating to the LGBTI community. This task should be addressed from the grassroots upwards, due to the fact that rural areas and townships are the major areas where homophobia and hate crimes are high. The higher education sector has been highlighted as an area of concern, universities, and other tertiary institutions should have clear policies and other complementary mechanisms in place to combat gender discrimination and homophobia.

Protection of minority groups through legislation and equal policies

As a potentially vulnerable minority group, it is essential to ensure that those who violate rights of LGBTI persons are held accountable. More consistency is needed from a justice point of view, in terms of ensuring that reported homophobic hate crime cases ultimately end with the conviction or sentencing of the perpetrator(s). This is a pertinent issue as the justice system depends on the reporting of criminal cases. Given the precarious nature of the LGBTI challenges in South Africa, it is crucial for the government to sensitise police officers through proper training. This will help in countering the victimisation and ill-treatment of the LGBTI community by government personnel.

Importance of the media in spreading information

The role of the media in shaping societal behavior and ideas is significant. As such, it is important to emphasise the importance of widely publishing and disseminating reports on hate crimes and hate speech through media outlets. The role of the media is vital in terms of highlighting the importance of equal rights and Gender Based Violence related issues. In this regard, media coverage on homophobic hate crimes and prejudice against LGBTI persons, helps to generate and spread public awareness around hate crimes motivated by homophobia.

New Initiatives that address discrimination and hate crimes must be given attention and promoted

In the age of social media, new anti-discrimination and hate crimes platforms must be actively promoted in order to reach as many people as possible. Ms Robin Lee Tobias, Chair of Rainbow University of Cape Town indicated that there is a new reporting platform that was launched in March 2018, with the aim of encouraging the victims of LGBTI hate crimes in South Africa, to report harmful criminal acts. Victims can choose to remain anonymous and are offered psycho-social services support from the NGO body called “Love Not Hate” after they have submitted a report. Ms. Tobias stated that there is also “OUT” which caters for the

wellbeing of the LGBTQ community. It provides direct support and advice to LGBTI member, and also releases an annual report on its work. OUT's recent annual report, for 2017/2018, is up on their website.

The importance of the National Action Plan to combat racism, racial discrimination, xenophobia, and related intolerance as a supporting and guiding framework for mobilisation against Hate Crimes

The National Action Plan could provide the overarching framework for the coordination and mobilisation of all government and civil society initiatives and processes targeted at countering as well as preventing hate crimes. Evaluation of the the implementation of the Hate Speech and Hate Crimes Bill could be done through the National Action Plan framework, with the inclusive participation of civil society representation from: LGBTI persons, migrants, cultural and religious groupings amongst others.

The analysis and recommendations included in this Policy Brief 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.

About the Southern African Liaison Office:



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.

SALO would like to thank

Irish Aid and the Embassy of Ireland, Pretoria; and the Royal Norwegian Embassy

For their direct support for this event

