

SALO Public Dialogue Hate Crimes and Hate Speech Bill



Executive Summary

On the 28th of September 2021, the Southern African Liaison Office (SALO), in partnership with the Norwegian People's Aid, hosted an online dialogue on the Hate Crimes and Hate Speech Bill with a particular focus on the LGBTQIA+ community, racism, and crimes against other marginalised communities such as migrants. The keynote speaker was the **Deputy Minister of Justice and Constitutional Development, John Jeffery**.

The speakers were **Advocate Letlhogonolo Mokgoroane**, Legal Practitioner and SOGIE activist; **Busisiwe Nxumalo**, Deputy Chairperson of the ANC Gaby Shapiro Branch; **Muluti Phiri**, Advocacy Officer at the Consortium for Refugees and Migrants in South Africa and **Bishop Paul Verryn**. The session was moderated by **Lwazi Somya**, SALO Research, Development and Programmes Coordinator.

Summary of the Presentations

Busisiwe Nxumalo, Deputy Chairperson of the ANC Gaby Shapiro Branch

Busisiwe Nxumalo began the discussion by emphasising that the implementation of the Bill needs to happen concurrently with efforts to change societal attitudes and perceptions that favour heteronormativity. The Bill is an integral part of changing societal views because it fosters compliance and ensures the prosecution of people who commit hateful acts.

South Africa is a country that prides itself in having a progressive Constitution that protects the freedoms and respects the diversity of all its citizens. However, the lived experiences of gender minorities do not reflect the values espoused by the Constitution. Queer individuals endure heinous attacks on their bodies which undermines the democratic gains South Africa has made. The Hate Crimes and Hate Speech Bill is a critical framework to safeguard the rights of gender and sexual minorities in South Africa and, eventually, the broader African continent, where the rights of gender minorities are significantly infringed upon.

Another group that deserves attention on hate crimes is sex workers. The criminalisation of sex work exposes sex workers to exploitation and abuse, particularly from law enforcement officials, who are supposed to be protecting this group. The criminalisation of sex work also makes sex workers vulnerable to injustices and persecution when reporting crimes against them.

Xenophobia and intolerance are also used as avenues for hate speech. The Bill, introduced five years ago, is yet to be implemented, which is a cause for concern. There needs to be greater collaboration between civil society and government in bringing awareness to the harmful nature of hate speech and hate crimes.

Advocate Letlhogonolo Mokgoroane, Legal Practitioner and SOGIE activist

Advocate Mokgoroane highlighted the need to normalise asking people for their pronouns to respect the humanity of others. The advocate referred to specific sections in the Constitution, including section 9, which speaks to equality before the law and prohibits the state and private individuals from unfairly discriminating against people based on their race, gender, and nationality. They also referenced section 12 of the

Constitution, which stipulates the right to protection and PEPUDA, i.e. the Equality Act, which allows "civil remedies for hate speech" and came under scrutiny.

They highlighted the importance of distinguishing gender identity from sexual orientation. They noted that while the Bill does speak to gender identity, it omits gender expression and offered the following example of gender expression:

"If you are a cis-gendered queer person who dresses in drag, let us say for a particular event, and you are then killed or hurt as a result of that, what people will assume it is because of your sexual orientation. That is not true because when people attack you, they do not know your sexual orientation. That is a gender expression."

Advocate Mokgoroane also celebrated the inclusion of offensive and derogatory language being classified as hate speech asserting that it essentially denies another human being their humanity. They also highlighted how the Bill goes further with hate speech in persecuting individuals who share hateful content on social media platforms but acknowledges possible challenges in the implementation. It states,

"any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is accessible to members of the public, or accessible to a specific person, will be guilty of hate speech."

Regarding timeframes, they acknowledged that the process would take up to 24 months to be finalised because of the many layers involved, ending with being assented by the president. The advocate also applauded that the Bill has adopted a victim-centred approach. This is where a victim would be able to make a sworn statement, i.e. a victim-impact-statement that responds to the questions *"what is the physical, psychological, social, economic, and other consequences the offence had on them, as well as their family or an associate?"*. This is a positive element as it also assesses the impact on communities, which should be adopted in South Africa's broader criminal justice system.

In terms of prosecution, an individual who commits a hate crime can face several penalties, i.e. a fine or imprisonment. The Bill also has a section that stipulates that it must create effective awareness campaigns:

"They say three things. They must conduct education and information campaigns to inform the public; ensure that all public officials who may be involved in the investigation and prosecution of the crimes are educated and informed of the Bill; [and] provide assistance and advice to any person who wants to lodge a complaint and train public officials on the prohibition, prevention, and combatting."

Finally, the advocate pointed out their concerns around the Civil Unions Act, which would allow civil society members to be trained and educated on manifestations of hate crimes and hate speech. However, innate prejudices around homophobia and heterosexism may still feature.

A participant posed the following question to Advocate Mokgoroane via the zoom chatbox:

“Hi, Letlhogonolo; how can we deal with cultural and social norms and standards that see certain things as acceptable? When taking the information to the public, how do we communicate this effectively to the public and create a mind shift?”

They shared that they believe that this shift starts with developing language that says that LGBTQIA+ have always existed. People did not know what they were. She added,

“Often people say, it is not in our home language, but a window was not in our home language, a computer was not in our home language, and we began to sort of create these words. In the same way, we can create words for people to exist, and people [can] find humanity in cultural norms and standards.”

They emphasised that culture is not stagnant, and society needs to think about culture as a continuous evolving continuum.

Another participant asked, *“How far and wide can this communication travel? Changes are mandatory for every citizen”*. The advocate responded by saying there should be roadshows in remote areas about preventing hate speech and hate crimes.

Muluti Phiri, Advocacy Officer at the Consortium for Refugees and Migrants in South Africa (CoRMSA)

Muluti delivered a presentation on the following theme: Hate Crimes and Hate Speech Bill to address refugees' and migrants' challenges. Does it address their concerns and the precarious situation migrants find themselves in?

She began her presentation by giving a brief overview of the work and objectives of CoRMSA, which include the promotion and protection of the human rights of asylum seekers, refugees, and other international migrants in ways that promote the well-being of the poor in South Africa, the region, and globally. They achieve this by engaging in advocacy and lobbying, including the Hate Crimes and Hate Speech Bill.

She emphasised the importance of empowering victims of hate speech and hate crimes to be involved in making submissions to the Bill. South Africa is regarded as one of the major destinations for migrants due to commercial and economic factors or

irregular migration. Stereotypes and myths about foreign nationals have fuelled xenophobic attacks in South Africa, and some foreign nationals have lost their lives. Migrants live in constant fear in the communities as they are usually the targets of aggrieved community members bearing the brunt of inequality and poverty. There is a persistent dangerous narrative that foreign nationals are taking jobs away from citizens, and no research supports these claims.

Muluti applauded the Bill for being progressive and explicit in what speech and conduct will be classified as a hate speech and hate act, which would also impact leaders who use inflammatory rhetoric to gain support in communities during the election period. Media outlets will also fall under the umbrella of entities that can be held accountable for perpetuating hate speech and inciting violence through the content they produce and broadcast – something that was never in effect in the past.

Muluti concluded by offering recommendations to strengthen the Bill, including training police officers on issues of the Bill, migration and xenophobia. She also recommended raising awareness and training in the community *“The communities need to know about it; they need to be aware that xenophobia and other intolerance towards migrants constitute a hate crime.”*

Bishop Paul Verryn

In speaking about racial tensions in the country, Bishop Verryn acknowledged that the church is one of the biggest perpetrators of racism despite South Africa’s liberation from colonialism. He noted that it would be helpful for the courts to establish a commission of enquiry into racism and hate speech in the church, which they accomplish by using religious language to make people feel disempowered when trying to confront these prejudices.

He also spoke of sexism in the church and gave an example of the current presiding Bishop, a woman and the resistance she has faced from her peers. He suggested that she report the guilty party to the equity court to highlight the seriousness of this issue.

Bishop Verryn acknowledged the flaws in the Truth and Reconciliation Commission that did not effectively unite a country divided along racial lines. He emphasised that until issues of prejudice are properly articulated from the formative years of a child’s life to shift the discourse, then racism will remain rampant. He stated, *“we need to recognise that, yes, you can put in place punishment for people who let it slip out, but there’s a far deeper psychological [and] philosophical work that has got to be done.”*

He noted that because of South Africa's politically sensitive position in 1994, it was not the best time to unpack the devastating consequences of racism in the country effectively. However, the time has come when people are ready to face these issues. He stated that the same is valid with LGBTQIA+ issues, sharing a story of his visit to a community in KwaZulu Natal where the major problem facing them was cannibalism,

mainly targeted at women. Many of the households in this community were child-headed, and many of the men were absent. Thus, their suggestion was to start working with small children in the Early Childhood Development Programs, highlighting education as a crucial tool for change.

Bishop Verryn then focused on xenophobia perpetrated by political figures in the country. He highlighted the fact that xenophobia is institutionalised in this country, and this must be addressed in order to remedy the situation effectively, "the perpetuation of xenophobia, right from Home Affairs, through the police, the health systems, [and] education, somehow belies the fact that people are human in this country. Unless we come to terms with dealing with that systemically, we're not going to move in any direction."

Finally, Bishop Verryn proposed three suggestions for bridging differences in the country. Firstly, foreign nationals must be thought of as a gift from God. He shared his positive experiences with immigrants, "I have seen how foreign nationals have sacrificed their lives to educate South African and foreign national children." He also stated that he hoped that as a result of this dialogue, a group would be formed that can think about how to change and propagate a new narrative around foreign nationals in South Africa that focuses on the value they bring to the country.

Secondly, he acknowledged that South Africa is still struggling with the legacies of apartheid which divided the country from the rest of Africa. He cautioned that the country needs to take seriously the trust placed in its hands when visitors from the African continent come to South Africa. He also reflected on whether people who have victimised foreign nationals have been brought to justice as "*we're all supposed to be equal in this country if you live in this country*". Lastly, Bishop Verryn expressed his belief that foreign nationals have contributed considerably to South Africa's economy, which needs to be exposed extensively.

John Jeffery, Deputy Minister of Justice and Constitutional Development

The Deputy Minister began his address by acknowledging that the Bill is not meant to be the panacea for racism or homophobia but to serve as a punishment for people who commit those acts. He gave a brief overview of the background before the Bill was introduced. He noted that hate crimes were never an explicit category of a criminal act; on the other hand, hate speech has been prosecuted under *crimen injuria*, but in many of these cases, people conceded, for example, Penny Sparrow. The Bill started addressing only hate crimes but expanded its scope to deal with hate speech, and submissions were made to the Legislature.

The Bill makes provisions for religious preaches that reference sections of the bible that condemn the act of men having sex with men, which may be construed as hate speech. He stated, "*one of the amendments that was made before the Bill was introduced [was] to put in a sort of partial exemption for proselytising, for preaching, in*

that you – effectively the way it's worded – can say nasty things about gays and lesbians, but you can't have conducted or said things which constitute an incitement to cause harm."

The implementation of the Bill was delayed by waiting for the court's judgement on Qwelane, which related to PEPUDA (civil provision). This case also influenced the two aspects of the Bill. Firstly the use of the word hurtfulness as being too broad. There is no hurtful provision in the Bill, and he stated, *"it is simply issues of harmful or inciting harm, and then promoting or propagating hate speech."*

The Deputy Minister explained that the one amendment that will need to be made is that *"the two requirements of harmful or to incite harm and promoting or propagating hatred have to be read conjunctively. So, there is "or" in the Bill currently under Clause 4, that "or" will have to change to an "and"."*

The motivation for hate speech has to be rooted in prejudice and intolerance, which will be easier to prove in court than hatred, as the latter is something that most people will deny. The Deputy Minister added that *"it is a question of existing crime that, because of dislike of the different characteristics, it becomes a hate crime."*

Two provisions are missing from the grounds for hate crimes which are included in the grounds for hate speech. These are political affiliation or conviction and occupation or trade. Occupation or trade was considered to prevent attacks on sex workers, hawkers and truck drivers. However, it was omitted because there were concerns that it may be used to circumvent criticism against politicians. Regarding political affiliation or conviction – when local elections approach, many people have been killed due to political interference, which was why it was considered grounds for hate speech. However, it was decided that it would not be helpful to restrict the ability of people to engage with each other politically. Hence it was ultimately left out as grounds under hate speech.

Regarding the victim impact statement that Letlhogonolo referred to earlier, the Deputy Minister stated that an area of concern was what to do with people that have committed hate crimes and hate speech. He notes that while prosecutors and law officials can be trained, *"the concern was if we put in too much relating to restorative justice, then it may get used by prosecutors to say "no, this crime was not that serious, we are going to mediate it", and the two must speak to each other, and then the case will be withdrawn."*

Concerning the penalties or orders, there are amendments to the Criminal Procedure Act adding murder, rape, and robbery, which are all hate crimes, to minimum sentences. There was discussion around whether it would be too lenient to subject a perpetrator of rape or murder who commits these acts based on hate of the victim's identity to a minimum sentence. However, the sentence for these will be heavier.

Deputy Minister John Jeffery also refers to Clause 8 of the Bill, the statistics to be collected and monitored. There is also the general provision on prevention – this is critical as the Bill is a tool to punish perpetrators for hate crimes and hate speech, but there is still more work to be done with changing attitudes about race and migrants.

Finally, he concluded his address by speaking about the timeframes of the Bill, noting that Bill was out for comment. In November, the Portfolio Committee in Parliament will have public hearings. When the amendments are agreed to, they will go to the National assembly. He added, "the NCOP process will not be as long because it is a Section 75 Bill, which means it is a National Competency Bill." He confirmed that the Bill is being treated as a priority and that "the speed at which a bill moves is very much linked to the amount of disagreement or controversy." The more amendments are wanted, the longer it will take to pass the Bill.

Contributions and Questions from the Floor

- Safoora Sadek from the ANC Gaby Shapiro branch asked Mike Batley to expand on restorative justice as her organisation has a partnership group where individuals and organisations working on LGBTQIA+ issues support each other's campaigns. On the Hate Crimes and Hate Speech Bill, they support each other's submissions.
- Lily Manoim sought clarity from the Deputy Minister about whether the former or the current version of the Bill provisioned for hate speech to be done through religious proselytising.
- A participant joining in from Facebook posed the question:

"since these various organisations that are in support of anti-xenophobia, anti-homophobia and anti-racism [have an] interest with this Bill, has it resulted in greater solidarity networks within South Africa concerning hate crimes and hate speech in particular, and [have] these networks been able to push the greater networks of solidarity in particular?"

Responses from the Panellists

Mike Batley – Restorative Justice Centre (not a panellist, but a question was directed at him regarding restorative justice)

- Restorative justice could minimise the seriousness of hate crimes and hate speech, which serves the opposite purpose of the Bill. However, it also creates opportunities for understanding and engagement and should not be limited to a one-dimensional perspective. It could have a meaningful impact if the victim's

input were included in sentencing – in addition to the victim impact statement. Mike argued that it could be helpful if the Bill expanded its frame of reference to show the value of restorative justice and dialogue.

Deputy Minister John Jeffery

- The Bill is with Parliament, and it is a public process. On the issue of restorative justice, the NPA will make guidelines on what can and cannot be done. He added, *“often, I feel that the guidelines tend to be abused, and they try and deal with matters to what they call informal mediation.”* He emphasised the importance of regulating informal mediation, which the NPA admits needs regulation.
- On the issue of including restorative justice in sentencing, he reiterated that a lot of the hate crimes had been included under minimum sentences, which the courts are not obligated to follow.
- He noted that their concerns with restorative justice were more from a practical implementation perspective, questioning “can the judicial offices [and] the prosecutors as a whole, not individually, as a whole, actually apply this? Or will there be too many side-steps taken on the issue?”. He urged participants to make their submissions.
- Regarding proselytising, he stated that the exemptions were not in the earlier version of the Bill. However, they looked at international law, and there was a case where a pastor had been saying derogatory things about gay and lesbian people. The lower court found him guilty of hate speech, but the higher court found that it was religious freedom.
- There are three partial exemptions to being prosecuted for hate crimes and hate speech, which the Deputy Minister articulated as

“the one is bona fide artistic creativity, which cannot constitute an incitement to cause harm. There is an academic or scientific inquiry which has no qualifications. Fair and accurate reporting or commentary in the public interest also does not have the incitement to cause harm; that is with the media.”

- There is also the bona fide interpretation of proselytising or espousing any religious tenets as long as it does not constitute an incitement to cause harm. The artistic creativity and the proselytising cannot be an incitement to cause harm. The academic or scientific inquiry and the reporting might be a gap that needs addressing.
- Deputy Minister John Jeffery noted that he forgot to mention Section 16 of the Bill of Rights, where the right of freedom of speech does not include advocacy of hatred based on race, ethnicity, gender, or religion. In Qwelane, they later added sexual orientation, amongst other things, to the list, which could be

deemed unconstitutional, but they hope that all issues on that list will go through.

- He also touched on the debate about the inclusion of intersex in defining sex and whether it is correctly worded. He expects that there will be some submissions on that.

Safoora Sadek – ANC Gaby Shapiro Branch (Safoora answered questions on behalf of Busisiwe, who experienced network problems)

- When the partnership between the organisation and individuals and organisations working on LGBTQIA+ issues was formed, it was based on the Hate Crimes and Hate Speech Bill. When the Bill was released for public submissions, they engaged with the members of the partnership on whether they supported the Bill. They discovered that most people across society opposed the Bill primarily because of the Hate Speech element, which led them to ramp up their campaign. They drafted generic letters, and all of the organisations and individuals in the partnership submitted letters to Parliament in support of the Bill, which they also shared with their networks.
- She noted that although they are a Western Cape branch, their reach has been broad and have been able to swing the support of the Bill to be higher than support against it.
- They also use organisational events such as pride events for advertising supporting the Bill; thus, organisations keep their identities but are united in solidarity on the matters they agree on, even on the amendments.

Busisiwe Nxumalo

- Busisiwe added that they have managed to partner with various higher learning institutions and SRCs from universities such as Wits, Rhodes and others that have submitted the generic letter (that Safoora referred to).

Bishop Paul Verryn

- He proposed two suggestions:
 - Set up a group of people prepared to hold religious institutions accountable for some of the actions they perpetuate that dehumanise people.
 - Form a small think tank aimed at educating people beyond their prejudices.

Muluti Phiri

- She emphasised the need for community sensitisation and understanding of issues of migration.

Conclusion

The dialogue, which aimed to bring together members and allies of the LGBTQIA+ communities and migrant communities, afforded the participants and attendees a platform to address the South African state representatives. Through the workshop, representatives of a wide range of sectors were able to discuss the challenges faced by LGBTQIA+, migrants, women and black people and better understand the similarities and the differences between different marginalised groups of people in society. Each group faces their unique challenges – but overall, the legacy of colonialism remains a challenge to advancing equal rights and protections for all. It is hoped that once the Bill gets passed, with the necessary amendments, it will play a significant role in improving the lives of marginalised groups in South Africa.

The analysis and recommendations included in this 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.

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.

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