



International liaison, dialogue and research

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The Southern African Liaison Office (NPC)

Regus - Black River Park  
1st Floor, Block B, North Park, Black River Park  
2 Fir Street, Observatory, Cape Town, 7925

Email: [info@salo.org.za](mailto:info@salo.org.za)  
[www.salo.org.za](http://www.salo.org.za)  
[@salo\\_info](https://twitter.com/salo_info)

Policy Dialogue Report

14 September 2022, Zoom Platform

# Public Dialogue on the Prevention and Combating of Hate Crimes and Hate Speech Bill

**SALO PUBLIC POLICY DIALOGUE:  
THE PREVENTION & COMBATING OF HATE  
CRIMES AND HATE SPEECH BILL**

**WEDNESDAY 14 SEPTEMBER  
14:00 TO 16:00**

**zoom**

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**JOHN JEFFERY**  
DEPUTY  
MINISTER FOR  
JUSTICE AND  
CONSTITUTIONAL  
DEVELOPMENT



**BISHOP RUBIN  
PHILLIP**  
SALO BOARD CHAIR  
AND CO-CHAIR OF  
THE KZN SOCIAL  
COHESION AND  
MORAL  
REGENERATION  
COUNCIL



**NOMZAMO ZONDO**  
DIRECTOR,  
SOCIO-ECONOMIC  
RIGHTS  
INSTITUTE OF  
SOUTH AFRICA



**MULESA LUMINA**  
COMMUNICATIONS &  
LEGAL OFFICER,  
INTERNATIONAL  
COMMISSION OF  
JURISTS



**CORLETT  
LETLOJANE**  
EXECUTIVE  
DIRECTOR, HUMAN  
RIGHTS INSTITUTE  
OF SOUTH AFRICA



**MODERATOR:  
LWAZI SOMYA**  
SALO



## Executive Summary

SALO, in partnership with the Norwegian People's Aid, hosted a Public Multi-Stakeholder dialogue to discuss the Prevention of Hate Crimes and Hate Speech Bill, particularly concerning blatant xenophobic attitudes that result in violence. Speakers included **Nomzamo Zondo**, Socio-Economic Rights Institute of South Africa (SERI);

**Mulesa Lumina**, International Trade Commission of Jurists; **Corlett Letlojane**, Human Rights Institute of South Africa; **Bishop Ruben Phillip**, the SALO Board; Deputy Minister **John Jeffery**, Department of Justice.

## Summary of Presentations

### **Nomzamo Zondo, Socio-Economic Rights Institute of South Africa**

Nomzamo Zondo started her input by explaining how SERI has increasingly focused its attention on protecting migrants. This has had several consequences for the organisation:

*“In fact, only a month ago, we closed our office because of threats to attack us in relation to work that we have been doing to support informal traders for the last nine years. And really, those threats were put on Twitter by people who identified as members of Put Africa First, and others who just were members of the public. And in the process, we started to consider how Afrophobia has become mainstreamed and has become the centre of [the] conversation.”*

Political actors, such as Herman Mashaba, who misrepresent facts about migrants – e.g. when he claimed that 80% of the people who live in the inner city of Johannesburg are undocumented migrants - create an anti-migrant sentiment. Millions of people who live in the inner city are threatened with eviction and evicted again and again, undermining their constitutional rights. This has been taken up by xenophobic groups such as Operation Dudula and Put South Africa First where they knock on people’s doors, telling them they have been evicted while threatening them with violence.

The continued rise of xenophobic groups is concerning, according to Zondo, as they not only engage in anti-migrant activities but also harass people who are favourable towards migrants. They have also changed their tune – initially, they were adamant that they are opposed to undocumented people but it has become clear that they wish to rid South Africa of migrants more broadly. There have been several occasions where the South African Police Service (SAPS) and the Department of Home Affairs have followed up on the activities of these groups by questioning people that they harassed.

She continues: *“And it’s so important for us in relation to our work, to find ways to hold those people accountable, both to make sure that we create a society that is welcoming to everyone and end intolerance, but also, on the other hand, to protect rights that have become instilled in protecting South Africa, like the right to your home, like the rights against arbitrary eviction.”*

Under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, (1998), any evictions that are done without a court order are unlawful and can be prosecuted, however, this rarely happens. The Hate Crimes and Hate Speech Bill will

strengthen the ability to legally prosecute people who carry out these unlawful evictions.

### **Mulesa Lumina, International Trade Commission of Jurists**

Mulesa Lumina pointed out that the Hate Crimes and Hate Speech Bill is a step in the right direction, however long delays in finalising the Bill have cost people their lives and severely undermined efforts to curtail hate speech and incitement of violence toward marginalised groups such as migrants and refugees.

Furthermore, there remains a pressing need for more specific guidance on how such human rights violations must be tackled by law enforcement and the courts, which is a gap that the Hate Crimes Bill would help fill, particularly as there has been some confusion and uncertainty around differing interpretations of what constitutes hate speech.

In terms of international law, at the heart of all matters related to hate speech is the right to freedom of expression; both offline and online. Article 19 of the International Covenant on Civil and Political Rights and Article 19 of the African Charter on Human and People's Rights states that South Africa, as a state party, will guarantee the right to freedom of expression as is also protected under the South African constitution. However, this is not an absolute right and can be restricted when restrictions are lawful, necessary and proportionate:

*“While the state must create the enabling environment for free expression, this must also be balanced with protecting the rights of others to life, dignity, equality, [the] spirit of the person and freedom from torture. So, it is important to also bear in mind that over-criminalisation could also severely hinder the exercise of the right to freedom of expression but it is also very necessary for there to be increased accountability for expression that constitutes hate speech. And this is a delicate balancing act that could be bolstered by legislation that is specifically on hate crimes and hate speech, which would specifically outline particular prohibitive forms of expression that would incite harm and hatred.”*

Impunity for hate speech, hate crimes, and other forms of violence directed towards migrants and refugees is another major area of concern. The lack of accountability as well as the government's silence or responses to these incidents has led to a proliferation of violent anti-immigrant groups such as Operation Dudula. This further underscores the urgency for the Bill's enactment. Anti-migrant public commentary by key government officials has also contributed to threatening environment for migrants living in South Africa, also spurring anti-immigrant groups. This was seen in the anti-migrant commentary by Limpopo Health MEC Dr Phophi Ramathuba towards a Zimbabwean patient undergoing treatment in a local hospital. The comments ignited significant public criticism, but also demonstrations in support of the MEC by anti-migrant groupings.

Government officials should be leading by example by speaking out in support of the human rights of non-citizens, as well as publicly and unequivocally condemning hatred, violence, intolerance and discrimination against migrants, refugees and other non-citizens consistently. Other policy measures, as outlined by international law and standards, that would bolster the enactment and implementation of the Bill, include education and awareness raising, protection of media freedom, facilitating community engagements, creating mechanisms responding to specific tensions between different communities, and training government officials on effective strategies to promote tolerance.

### **Corlett Letlojane, Human Rights Institute of South Africa**

Corlett started her input by explaining that the situation of violence and hatred has been present in South Africa for quite some time. In 2001, South Africa hosted the World Conference on Racism, Xenophobia and Related Intolerance. This was hailed as a bold step by the South African government to address intolerance in a country that was once ruled based on racism and Apartheid. However, she believes that currently, the violent attacks on migrants have reached disproportionate levels and are equivalent to genocide.

The National Action Plan on Racism, Racial Discrimination, Xenophobia And Related Intolerance was a five-year plan that gave the government the ability to work with civil society. This was a useful tool but did not go far enough due to a lack of resources, lack of consistency, and no awareness of these policies in communities.

Corlett concluded by stating that her organisation wishes to see government be more proactive and preventative of hate crimes and hate speech:

*“[We want] programs that are sustainable, programs that involve civil society - it could be academia, the grassroots, at the institution[al] level. We need to be sure that there's consistency, [that] the politicians, they speak one language. We need to be given an opportunity by the government to be recognised, to be accredited to conduct such programs, including educational programs for politicians [and] opposition parties. It seems like if you're in opposition, you have the license to attack and abuse migrants because you've got power and then you are trying to mobilise for support and deviate [from] the real issues that affect South Africa.”*

### **Bishop Ruben Phillip, SALO Board**

Bishop Phillip reflected on the life of Steve Biko and how there is a connection between that and the quest for true humanity as well as the debate of this dialogue. He claims that, after establishing a freer political system, South Africa continues to struggle with its relationship with hate crimes.

He further expressed disappointment with the church and its deliberate attempt to not get involved in the socio-political transformation of the country:

*“There was a time when the church did do that. But now it's taken a backseat, it's become far too spiritual in [the] wrong way and that needs to be corrected. In fact, the tragedies we see - xenophobia and Afrophobia, deep divisions, a class society, all of these things [fall] within the life of the church. We've become so materialistic, we've lost the vision to be what I think the church and religious organisations, in general, attempted to be in the dark days of Apartheid when we attempted to fight against those things.”*

### **Deputy Minister John Jeffery, Department of Justice**

The Deputy Minister started his input by pointing out some of the root causes for increased xenophobia includes the dire economic situation in South Africa and uncontrolled migration. Racism will not be addressed while South Africa experiences massive disparities in wealth, particularly because it is predominantly black people that are living in poverty. In other African countries such as Ghana and Nigeria, migration was not viewed by the majority as a problem until it reached a critical mass and locals started feeling that their resources were being taken away from them. He believes that this is what is happening to some extent in South Africa. Furthermore, the implementation of migration and other laws needs to be strengthened.

*“Let's not forget that people, whoever they are, generally have a tendency to blame somebody else for their misfortune. And it's then easier to find others such as migrants to blame. But having said all that, any form of violence, threats, [and] intimidation of people on the basis of their ethnic origin [and], their nationality is completely wrong. And those statements need to be condemned in the strongest possible way from [the] government's side.”*

He further explained that the Hate Crimes and Hate Speech Bill will create two different crimes. In the case of a hate crime, the Bill intends to add aggravating circumstances to an existing crime – for example, murder is a crime, but if it is carried out against a person because of the specific group they belong to, it becomes murder as a hate crime. The issue of hate speech is slightly more controversial as in certain parts of the world there are strong aversions to restrictions on freedom of speech. This is the case in South Africa to a certain extent as well, with many groups such as journalists, conservatives and religious groups being wary of these types of restrictions.

The Bill was delayed because it had to wait for the Constitutional Court to rule on several cases, particularly the Qwelane case. After the ruling, the Bill needs to be adapted to take that decision into account, which means that the text in the Bill of ‘promoting or propagating hatred’ needs to be read conjunctively together rather than disjunctively i.e ‘promoting and propagating hatred.’

The Qwelane case was about the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (PEPUDA Act No. 4 of 2000) which raised questions about whether a different Bill relating to hate crimes and hate speech specifically was needed. The Deputy Minister explained that PEPUDA is a civil matter, not a criminal one.

*“We feel we need a criminal law, that there should be a duty on the state to enforce the law rather than leaving it up to individuals to have to exercise their rights in equality court.”*

Another critique towards the Bill is that there already exists a crime to prosecute people for racist statements, that of criminal injuria, which was used to prosecute Penny Sparrow who was sent to prison. The Deputy Minister explains:

*“But our issue is that we think that [there] should be a statutory crime, in other words, a crime developed by parliament rather than a crime that's effectively interpreted and set up by the courts.”*

He concluded by highlighting that the Bill will not be the answer to racism or xenophobia in South Africa and that the root causes need to be addressed, but that it is a tool that can be used to reach a more equal, non-racist society.

## Questions and Contributions from Participants

- **Safoora Sadek:** *“My view is that we do have to tackle the issue of migrants as a matter of urgency. And I am fully aware of the distinction that people make between [the] kind of illegal migrants and legal migrants. And while I understand the need for that distinction, I do personally not agree with the distinction being made in terms of how we respond. So, I think that we focus so much on that definition of whether a person's legal or illegal, that we are forgetting the humanitarian and the equality side of it.” And “I'm not sure that we should be calling it [a] migrant issue, it is an Afrophobic issue. And I really think we need to put that very firmly on the table. We are not having attacks against any other kind of nation that comes [in]; we don't have attacks against the English, the Germans etc... one of our seven priorities of the government for this current term, and has been for the past five terms as well, is a better Africa contributing to a better Africa. I recognise that you would know that I am from the ANC. And I think we as the ANC need to look at this question. How do we begin to integrate our different policy positions in terms of how we address [them]?”*
- **Shawn Mavundla:** *“Does the introduction of this Bill not presuppose that the existing laws and legislation with the intention of protecting, let's say, marginalised and vulnerable communities and persons in our society, were inadequate in executing that kind of function?” And is there anything genuinely substantively new that this Bill is actually bringing to the table?”*

- **Ineke Stemmet:** *“If the bill was passed, what will be the process of keeping people accountable for hate speech for example, [the] recent rant by Gayton McKenzie, and what would be the process and how can society step up to ensure that the Bill is being used effectively in this way?”*
- **Tapiwa Lukuta:** *“So [the] Bishop mentioned, Steve Biko. And I really love that because I'm a very big fan of Steve Biko and I'm a big fan of Black Consciousness. And how does this connect with what's happening right now [in] the current situation?”*
- **Busisiwe Nxumalo:** *“The legislation does not change mindsets and lived realities. What ideas do speakers have or think about changing the perceptions of the society we live in?”*

## Responses from the Panel

### Nomzamo Zondo

- *“We understand that it's easier to migrate from any of the colonising nations than to migrate even from Swaziland or Lesotho. And we also know that in terms of the enforcement of [the] Immigration Law, that enforcement is classist, firstly, and anti-black. When you see immigration officers, they're mostly in townships, they're in informal settlements; you never see them in any of the suburbs, or even in the middle of Sandton... there are old policies that date as far back as 2013/2014 which really set the tone of the scapegoating of migrants.”*
- *“We have to accept that we do need to see positive government action promoting tolerance. I think everyone in the room keeps saying but [the] legislation doesn't change, [or] won't change behaviour but at times, a government action creates space where people get to see what the consequences for their actual actions are, and those kinds of consequences then mean that they stop acting a certain way.”*
- *“I think for me, one of the possibilities with this Bill is that we don't actually need the direct victims as complainants in these cases. Unfortunately, we still need the police because the police are part of the system of enforcing crime. But at the very least, [it] creates a space for civil society to make complaints directly, not as direct victims, but as people who are trying to hold the line that says ‘we all belong here, we are all Africans.’”*

### Mulesa Lumina

- *“What the legislation does [is] that it helps to expand on what states must do specifically when it comes to changing mindsets. So, things like community engagements, things like introducing programs, sensitisation campaigns and the like. And in that regard, legislation must be enacted to give that guidance*

*to different state authorities as to what needs to be done to give effect to human rights.”*

- *“What else needs to happen is that there needs to be increased collaboration between government departments. And we've seen in various instances how different senior government officials will speak in manners that kind of fuel that xenophobia, fuel that anti-immigrant, anti-migrant sentiment, and there does need to be more collaboration between government departments such as Home Affairs, such as the Department of Trade, to ensure that they put forward a united message against intolerance.”*

### **Corlett Letlojane**

- *“I think we have a responsibility to encourage meetings with the Dudula group, the young group... how long are we going to allow them to carry on this way? It's not sustainable.”*

### **Bishop Ruben Phillip**

- *“First, we need to work hard to reignite the commitment to the BC philosophy and movement. I'm not sure why we've steered away from it and have adopted the kind of philosophical political thought we've been having because fundamentally, whatever philosophy we have, whatever our politics, whatever our strategies, as the people of this great continent, and this great country - South Africa - we are committed to human dignity, it's about our lives, it's about humanity. Despite some of the progress we've made, when you look at the untold suffering, the kind of loss of dignity, the breakdown in communities, the growing poverty, those who benefit are the rich who will get richer.”*

### **Deputy Minister John Jeffery**

- *“It's correct, that when we pass legislation, it should be because existing law is inadequate. [What is new in the Bill is that] existing offences are elevated as Hate Crimes. And that then means as it would apply to Hate Speech, that there [are] some procedural issues such as, for example, the prosecutor must, when they're dealing with sentencing, consider the interests of the victim and the impact that the offence had on the victim. There's [a] tightening of penalties, making the penalties for Hate Crimes more serious.”*
- *“There are two other offences relating to the distribution of material; If you know that what you're distributing, what you're retweeting is Hate Speech, you can be criminally liable. And similarly, there's a second crime of displaying - if you're displaying something, which you know is Hate Speech, that's also a crime. So those are the issues that are new.”*

## **Conclusion**

The dialogue discussed the legal and other implications of the Hate Crimes and Hate Speech Bill for vulnerable groups, especially migrants. It was made clear that this Bill is not a panacea to eradicating racism and xenophobia in South Africa but that it is one tool in a toolbox. Furthermore, the Bill needs to be implemented consistently and should be coupled with social programs to educate people on the Bill and its consequences and to create a more tolerant citizenry.

Nomzamo Zondo summed up: *“It will be really important [to make] sure that the Bill is enacted and that it becomes effective to provide a process where people can use it to protect themselves against these groups and also create an environment of tolerance so that we can live in [a] South Africa that we all wished for, that we all envisioned in 1994.”*

*The analysis and recommendations included in this Policy 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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