



## An easy-to-read explainer on the **PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL**

### What is the Bill about?

The Prevention and Combating of Hate Crimes and Hate Speech Bill (the Bill) is moving through the next stages of the law-making process. The official number for the Bill is **B9-2018**.

On Thursday 26 August 2021, the parliamentary Portfolio Committee on Justice and Correctional Services published the Bill and called for public comments to be sent in writing. This is the public participation process, which is a cornerstone of our participatory democracy. This is your chance to have your say about the Bill, what is in it and what is not in it, and whether you support it or not.

The deadline for written comments on the Bill is **1 October 2021**. But before writing to the Portfolio Committee to express your opinion, it is important to understand the content of the Bill and its implications.

This document is a brief, plain-language summary of what the Bill says, and how this Bill will change the law if it becomes an Act of Parliament. **This document contains no analysis, or critique, or advice.** This document also does not provide information on what might be missing from the Bill. It is up to individual stakeholders to understand what is in the Bill, so that they can assess if there are gaps.

### In a nutshell...

The Bill, for the first time in South Africa:

1. Creates the new criminal offence of a “hate crime,” and makes rules for how this will be punished in terms of the criminal laws in South Africa
2. Creates the new criminal offence of “hate speech,” and make rules for how this will be punished in terms of the criminal laws in South Africa
3. Creates legal obligations on the state to prevent and combat hate crimes and hate speech
4. Creates legal obligations on the state to gather and record data on hate crime and hate speech

## The new criminal offence of a hate crime

The Bill says a “hate crime” is when a person commits a criminal act that is already a crime in our law, while being motivated by hate, prejudice, or intolerance for certain kinds of people. The focus of this Bill is on the **motivation** for the crime.

It will be a “hate crime” to commit a crime against any person or group if the motivation for the crime is because of the person’s or group’s:

- a) age;
- b) albinism;
- c) birth;
- d) colour;
- e) culture;
- f) disability;
- g) ethnic or social origin;
- h) gender or gender identity;
- i) HIV status;
- j) language;
- k) nationality, migrant or refugee status;
- l) occupation or trade;
- m) political affiliation or conviction;
- n) race;
- o) religion;
- p) sex, which includes intersex; or
- q) sexual orientation.

### Some examples of hate crimes

- Assaulting someone, and destroying their property **because** they are a foreign national = hate crime
- Raping **someone** because they are gay or lesbian = hate crime
- Burning down a Mosque **because** it is a holy place for Muslim people = hate crime
- Breaking the windows of a **business** you thought it was owned by a Black person = hate crime, even if it turns out later that what you thought is incorrect.
- Murdering a person’s family member **to punish** that person for being transgender = hate crime
- Assaulting someone **because** they stood up for their friend with albinism = hate crime

It will also be a hate crime to commit a crime against any person or group:

- Because you **think** they may be a part of one of the groups with the listed characteristics (even if it turns out later, they are not). The key is **why** the crime was committed, and whether that “**why**” has to do with a perpetrator’s hatred or prejudice.
- Because they support or associate with a group with any of the listed characteristics.
- Because their family member(s) is part of a group with any of the listed characteristics.

Before an alleged hate crime can be prosecuted in a criminal court, the Director of Public Prosecutions will have to give their authorisation. The Director of Public Prosecutions is the person in charge of all the prosecutors of a specific province, which means the choice is made at a high level.

The Bill says that **it will never be too late for a victim to report a hate crime to the police, and seek prosecution**, no matter how much time has gone by since the hate crime happened.



## The new criminal offence of hate speech

The Bill will say that “hate speech” is when a person **intentionally** publishes, shares, or promotes anything that a reasonable person could interpret as wanting to:

- (i) be harmful or to incite harm; **AND**
- (ii) promote or propagate hatred.

The “and” here is important because it means that both (i) and (ii) must be present for speech to be hate speech.

It will be “hate speech” to intentionally publish, share, or promote anything that a reasonable person could interpret as wanting to be harmful, or promote hatred against any person or group of people **because** of their:

- a) age;
- b) albinism;
- c) birth;
- d) colour;
- e) culture;
- f) disability;
- g) ethnic or social origin;
- h) gender or gender identity;
- i) HIV status;
- j) language;
- k) nationality, migrant or refugee status;
- l) race;
- m) religion;
- n) sex, which includes intersex; or
- o) sexual orientation.

### Some examples of hate speech online

- If you post hate speech on your Facebook page you will have used an electronic system to put hate speech where it can be publicly accessed by one or more people. The same will apply if you post hate speech to someone else’s profile, where it will be seen by others. You will have committed the offence of hate speech.
- If you send hate speech to someone using WhatsApp or email, because you believe they are transgender, you will have used an electronic system to direct hate speech at a particular person because of their gender identity. You will have committed the offence of hate speech.
- Even if you share hate speech that you found on someone’s Facebook page to a WhatsApp group, for example, you will have shared and published hate speech. This means you may have committed the offence of hate speech, even though the words are not your own.

It will also be hate speech for any person to **intentionally** distribute or make available an electronic communication which that person knows constitutes hate speech, using electronic tools, that:

- can be seen or accessed by **any** member of the public; or
- can be seen or accessed, or is directed at, a specific person, because they have one or more of the listed characteristics.

Even if you did not come up with or write the hateful or harmful words yourself, you will have committed the offence hate speech if you share, distribute, or publish them in any way.

## The most recent case law on hate speech

The Constitutional Court wrote a judgment in the Jon Qwelane case that tells us what hate speech is. Jon Qwelane was a journalist who wrote and published a newspaper column in 2008 called, "Call me names but gay is not ok." In the article he compared homosexual people to animals, among other harmful homophobic opinions. The Constitutional Court found Mr Qwelane guilty of hate speech because he targeted individuals based on their sexual orientation. The Court found that what he had written and published would be interpreted by any reasonable person in the public as hateful and harmful.

## What about freedom of speech?

First, the Constitutional Court recently ruled (in the Qwelane case) that it is not enough for speech to be offensive or hurtful, for it to be hate speech. Speech must rise to the level of being harmful or inciting others to do harm or hate.

Secondly, the Bill intentionally creates **exceptions to hate speech to protect freedom of speech**, in our open and democratic society. **It will not be hate speech to:**

1. Say, publish, share, or promote any artistic creativity, performance or other form of expression, that is done in good faith, and which does not advocate hatred, or incite harm.
2. Say, publish, share, or promote any academic or scientific inquiry.
3. Say, publish, share, or promote fair and accurate reporting or commentary in the public interest.
4. Interpret, proselytise (preach), or promote any religious tenet, belief, teaching, doctrine or writings, on condition that such interpretation and proselytization does not advocate hatred or incite harm.

Before any alleged hate speech can be prosecuted in a criminal court, the Director of Public Prosecution will have to give their authorisation.

## Hate crimes and hate speech are message crimes...

Hate speech and hate crimes do not only affect victims individually but create fear among the entire group or community to which that victim belongs. The brutal murder of a person with albinism, for example, simply because they are living with albinism, has the potential to make all other people with albinism afraid. It sends the message that people living with albinism are hated and will be hurt.

For this reason, it will always be important for the court in hate crime or hate speech prosecutions to understand the full impact of the offence on the victim(s). To assist the court in this, the Bill makes it a requirement for prosecutors to get **Victim Impact Statements (VIS)**.

## What is a Victim Impact Statement?

A VIS is a sworn statement or affirmation by the victim(s), or someone who has the permission of the victim(s), which contains the physical, psychological, social, economic or any other consequences of the offence for the victim(s) and their family members or associates. This could include the victim's friends or community. A sworn statement is something as simple as a handwritten statement signed by the person writing it, including a promise that the statement is true. It can also be an affidavit signed at a police station, or signed in front of a commissioner of oaths.

The Bill says that when showing evidence in court (like getting witnesses to testify) or addressing the court on sentencing, a prosecutor **must** consider the interests of the victim and the impact of the offence on the victim. If the prosecutor can, they must give the court a VIS.

This means the impact of the hate crime or hate speech on the victim(s) should always play a role in deciding how to punish the offence. This includes the length of time the guilty person may have to spend in prison, the amount of any fine they may have to pay, and other types of punishments.

## How will hate crime be punished?

The Bill says that if you are convicted of a hate crime you will be subject to specific punishments. The court can sentence you to one or more of the following punishments, depending on the court's jurisdiction:

- imprisonment
- periodical imprisonment
- declaration as an habitual criminal
- committal to any institution established by law
- a fine
- correctional supervision
- imprisonment followed by correctional supervision
- postponement or suspension of the sentence
- a caution (this is the legal term for a warning and does go on the offender's record so that if they commit a crime in the future, this will make the court less lenient on them in future)
- a reprimand.

When deciding what sort of sentence to give, the court must first see if there is "**minimum sentence**" that already applies to the crime. There is a law in South Africa that says what the minimum sentence should be at the very least, if someone is found guilty of certain serious crimes. The more serious the crime, the harsher the minimum sentence will be.

Judges have to impose the minimum sentences, unless there are substantial and compelling reasons given why they should give a lower or higher sentence than the minimum. If the offender is between 16 years and 18 years old at the time of the offence, then the court can suspend up to half of the minimum sentence.

For example, in our law, the minimum sentence for raping a person who is under the age of 18 is life in prison. **The Bill now includes certain hate-motivated crimes in South Africa's minimum sentencing framework**, in the following ways:

- Life in prison for murder when the victim was killed by hate crime
- Life in prison for murder when it was caused during rape or compelled rape (or attempted rape or compelled rape) motivated by hate
- Life in prison for aggravated robbery motivated by hate
- Life in prison for rape or compelled rape motivated by hate
- Life in prison for certain kinds of dangerous intimidation motivated by hate

In cases of robbery, arson, or housebreaking with the intention to intimidate motivated by hate, the minimum sentence will be:

- 15 years in prison for the 1st offence
- 20 years in prison for 2nd offence
- 25 years in prison for 3rd or subsequent offense



In cases where any hate-motivated crime caused:

- damage to, the loss of, or the destruction of, property, or the loss of money
- physical, or other injury, or
- loss of income or support

the court must treat the hate-related motivation as an aggravating factor that justifies a more severe sentence.

**The Bill also makes bail much harder to get bail if you are charged with a crime motivated by hate**, such as:

- Arson or housebreaking with intent to commit offence, motivated by hate
- Murder, motivated by hate
- Rape or compelled rape, motivated by hate
- Robbery with aggravating circumstances, motivated by hate

## How will hate speech be punished?

If you are convicted of hate speech, the Bill states that court must sentence you as follows:

- A fine or imprisonment of three years or less, or both for 1st conviction; and
- A fine or imprisonment for five years or less, or both, for 2nd conviction

## How will prosecutors know what to do?

The Bill says that the National Director of Public Prosecutions must consult with the Director-General: Justice and Correctional Services and the National Police Commissioner. After this consultation, the National Director of Public Prosecutions must issue directives to all prosecutors that tell will tell them:

- How and when hate crime or hate speech charge can be withdrawn or a prosecution stopped
- How to lead evidence that shows the presence of prejudice or intolerance towards the victim
- How to collect and analyse hate crime data

Directives are an official document with instructions which must be followed by government officials.

## Hate crime statistics



The Bill says the Minister of Justice must:

1. Consult with the Minister of Police, and then make regulations about the hate crime and hate speech information that must be collected and collated by the police.
2. Consult with the National Director of Public Prosecutions, and then make regulations about the hate crime and hate speech information that must be collected and collated by the National Prosecuting Authority

This has to be done for the effective monitoring, analysis of trends and interventions, and to provide quantitative and qualitative data that will help the state to prevent and combat hate crimes and hate speech. Regulations are usually published and put into effect after a Bill has become a law. They help to operationalise the law, and give more detail about how the law should be implemented.

## Who gets to see the hate crime and hate speech information collected by SAPS and the NPA?

The Bill says the statistical and other information collected and collated by SAPS and the NPA must be made available to:

- Parliament, which means the public will have access to the information too
- the Chairperson of the South African Human Rights Commission
- the Chairperson of the Commission for Gender Equality
- the Chairperson Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities

It is not yet clear how often this information must be shared in this way. That prescribed later, in regulations made by the Minister of Justice.

## How will hate crimes and hate speech be prevented?

The Bill makes it clear that the state, the South African Human Rights Commission, and the Commission for Gender Equality have a duty to promote awareness of the prohibition against hate crimes and hate speech.

The Bill creates a legal duty for the **President to designate certain state departments**, and these designated departments must develop programmes to:

- conduct education and information campaigns to inform the public about the prohibition against hate crimes and hate speech
- ensure that all public officials who may be involved in the investigation and prosecution of hate crimes and hate speech are educated and informed of the prohibition against these offences;
- provide assistance and advice to any person who wants to lodge a complaint of a hate crime or hate speech; and
- train public officials on the prohibition, prevention and combating of hate crimes and hate speech, which training must include social context training.

It is not clear from the Bill which departments will be designated. The decision rests with the President.

The Bill also says the **South African Judicial Education Institute** must develop and implement training courses, including social context training courses, for judges and magistrates who preside over criminal cases.



## What now?

You can write to the **Portfolio Committee on Justice and Correctional Services**, to tell them which parts of the Bill you support, which parts of the Bill you do not support, and which parts you think look fine on paper but may have unintended consequences in practice.

Your letter must be received by no later than **1 October 2021**, and you should indicate whether you would like a chance to make a verbal presentation to the Portfolio Committee when public hearings are held.

Comments must be sent by email to Mr V Ramaano, at [hatecrimes@parliament.gov.za](mailto:hatecrimes@parliament.gov.za).

### About the Hate Crimes Working Group

The HCWG is a multi-sectoral network of civil society organizations set up to spearhead advocacy and reform initiatives pertaining to hate crimes in South Africa and the region. Members of the network work in diverse sectors, namely in LGBTI rights; migrants, refugees and asylum seeker rights; gender rights; religious rights; and broader human rights organizations. They all share a common concern on the impact of hate crimes in South Africa from the perspective of the victims or from a legal, service provision, research-based or advocacy perspective.

The HCWG seeks to contribute towards sound national policy and legislative interventions to combat hate crimes by seeking to contribute towards the speedy enactment of comprehensive hate crimes laws; improve the policing of, and judicial responses to hate crimes; and assist in the development of effective mechanisms to monitor hate crimes incidents.

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