

REPUBLIC OF SOUTH AFRICA

PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL

*(As agreed to by the Portfolio Committee on Justice and Correctional Services (National
Assembly))*
(The English text is the official text of the Bill)

(MINISTER OF JUSTICE AND CORRECTIONAL SERVICES)

[B 9D—2018]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

BILL

To give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations; to provide for offences as hate crimes and the offence of hate speech and the prosecution of persons who commit those offences; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech; to provide for the reporting on the implementation, application and administration of this Act; to effect consequential amendments to certain Acts of Parliament; and to provide for matters connected therewith.

PREAMBLE

SINCE the Constitution of the Republic of South Africa, 1996, commits the Republic of South Africa and its people to establish a society that is based on democratic values of social justice, human dignity, equality and the advancement of human rights and freedoms, non-racialism and non-sexism;

AND MINDFUL THAT—

- section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law;
- section 9(3) and (4) of the Constitution provides that neither the State nor any person may, directly or indirectly, discriminate unfairly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, and that national legislation must be enacted to prevent or prohibit unfair discrimination;
- section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected;
- the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000), prohibits unfair discrimination, hate speech and harassment and requires the State to promote the constitutional imperatives enshrined in section 9 of the Constitution; and
- section 16 of the Constitution gives everybody the right to freedom of expression, including—
 - freedom of the press and other media;
 - freedom to receive or impart information or ideas;

- freedom of artistic creativity; and
 - academic freedom and freedom of scientific research,
- but that the right to freedom of expression does not extend to—
- propaganda for war;
 - incitement of imminent violence; or
 - advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm;

AND BEARING IN MIND THAT—

- section 7(2) of the Constitution provides that the State must respect, protect, promote and fulfil all the rights enshrined in the Bill of Rights, which is the cornerstone of democracy in South Africa;
- section 8(2) of the Constitution provides that a provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right;
- the severity of the emotional and psychological impact of hate crimes and hate speech extends beyond the victim, to the group to which the victim belongs or is perceived to belong; and
- South Africa has committed itself to uphold the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban;

AND SINCE the International Convention on the Elimination of All Forms of Racial Discrimination, to which the Republic is a signatory, requires States Parties to declare, among others, an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin,

PARLIAMENT of the Republic of South Africa therefore enacts as follows:—

Definitions

1. In this Act, unless the context indicates otherwise—

“characteristics” means any of the following characteristics:	5
(a) Age;	
(b) albinism;	
(c) culture;	
(d) disability;	
(e) ethnic or social origin;	10
(f) gender;	
(g) HIV or AIDS status;	
(h) language;	
(i) nationality, migrant, refugee or asylum seeker status;	
(j) occupation or trade;	15
(k) political affiliation or conviction;	
(l) race;	
(m) religion;	
(n) sex;	
(o) sexual orientation, gender identity or expression or sex characteristics; or	20
(p) skin colour;	
“communication” includes any—	
(a) display;	
(b) written, illustrated, visual or other descriptive matter;	
(c) utterance;	25
(d) representation or reference; or	
(e) electronic communication,	
and “communicates” and “communicated” have a corresponding meaning;	
“data” means electronic representations of information in any form;	

- “data message”** means data generated, sent, received or stored by electronic means;
- “electronic communication”** means a communication by means of data messages;
- “electronic communications system”** means any electronic communications infrastructure or facility used for the conveyance of data; 5
- “grounds”** means any of the following grounds:
- (a) Albinism;
 - (b) ethnic or social origin;
 - (c) gender; 10
 - (d) HIV or AIDS status;
 - (e) nationality, migrant, refugee or asylum seeker status;
 - (f) race;
 - (g) religion;
 - (h) sex; 15
 - (i) sexual orientation, gender identity or expression or sex characteristics; or
 - (j) skin colour;
- “harm”** means substantial emotional, psychological, physical, social or economic detriment that objectively and severely undermines the human dignity of the targeted individual or groups; 20
- “hate crime”** has the meaning assigned to it in terms of section 3(1);
- “hate speech”** has the meaning assigned to it in terms of section 4(1);
- “prescribed”** means prescribed by regulation;
- “social detriment”** means detriment that undermines the social cohesion amongst the people of South Africa; 25
- “this Act”** includes the regulations made in terms of the Act; and
- “victim”** means a person, including a juristic person, or group of persons, against whom an offence referred to in section 3 or 4 has been committed.

Objects of Act

2. The objects of this Act are to— 30
- (a) give effect to the Republic’s obligations regarding prejudice and intolerance as contemplated in international instruments;
 - (b) provide for the prosecution of persons who commit offences referred to in this Act and provide for appropriate sentences;
 - (c) provide for the prevention of hate crimes and hate speech; 35
 - (d) provide for effective enforcement measures;
 - (e) provide for the co-ordinated implementation, application and administration of this Act;
 - (f) combat the commission of hate crimes and hate speech in a co-ordinated manner; and 40
 - (g) gather and record data on hate crimes and hate speech.

Offence of hate crime

3. (1) A hate crime is—
- (a) an offence recognised under any law (hereinafter referred to as an “underlying offence”), excluding the common law offence of *crimen injuria* or an offence referred to in section 4(1); and 45
 - (b) committed by a person who is motivated by their prejudice or intolerance—
 - (i) towards the victim, the victim’s family member or the victim’s association with or support for a person with one or more characteristics or a group of persons who share one or more of the characteristics; and 50
 - (ii) which was based on one or more of the actual or perceived characteristics.
- (2) (a) Any person who commits an offence referred to in subsection (1), is guilty of the underlying offence as a hate crime and liable on conviction to a sentence as contemplated in section 6(1). 55
- (b) The criminal record of a person who has been convicted of an offence referred to in paragraph (a) must explicitly record the underlying offence as a hate crime.

(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by the Director concerned.

Offence of hate speech

4. (1) (a) Any person who intentionally publishes, propagates, advocates, makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—

(i) be harmful or to incite harm; and

(ii) promote or propagate hatred,

based on one or more of the grounds, is guilty of the offence of hate speech.

(b) 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—

(i) accessible by any member of the public; or

(ii) accessible by, or directed at, a specific person who can be considered to be a victim of hate speech,

is guilty of an offence.

(2) The provisions of subsection (1) do not apply in respect of anything done as contemplated in subsection (1) if it is done in good faith in the course of engagement in any *bona fide*—

(a) artistic creativity, performance or expression;

(b) academic or scientific inquiry;

(c) fair and accurate reporting in the public interest or the publication of any information, commentary, advertisement or notice; or

(d) interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings,

that does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds.

(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by the Director concerned.

Victim impact statement

5. (1) For purposes of this section, a victim impact statement means a sworn statement or affirmation by the victim or someone authorised by the victim to make such a statement on behalf of the victim, which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and the victim's family member or a group of persons with whom the victim associates or supports.

(2) (a) The prosecutor must furnish the court with a victim impact statement provided for in subsection (1).

(b) Where it is not possible to obtain a victim impact statement provided for in subsection (1), the prosecutor must provide the court with reasons for the absence of such a statement: Provided that a prosecutor may obtain a victim impact statement from—

(i) someone, in the event of the victim's death, authorised by a family member of the victim or a group of persons with whom the victim associated or supported; or

(ii) an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.

(3) The contents of a victim impact statement are admissible as evidence, unless the court, on good cause shown, decides otherwise.

Penalties or orders

6. (1) Subject to subsection (2), any person who is convicted of an offence referred to in section 3 is liable, on conviction, to any of the following forms of penalties which the court sentencing the person considers appropriate and which is within that court's penal jurisdiction:

- (a) Imprisonment, periodical imprisonment, declaration as an habitual criminal, committal to any institution established by law, a fine, correctional supervision or imprisonment from which a person may be placed under correctional supervision, as contemplated in section 276 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977); or 5
- (b) postponement or suspension of the sentence or a caution or reprimand, as contemplated in section 297 of the Criminal Procedure Act, 1977.
- (2) If a person is convicted of an offence referred to in section 3, the court that imposes the sentence must—
 - (a) if section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), is not applicable; and 10
 - (b) in the case of—
 - (i) damage to, the loss of or the destruction of property or the loss of money;
 - (ii) physical or other injury; or
 - (iii) loss of income or support, 15
 suffered by the victim as a result of the commission of the offence, regard the fact that the person has been convicted of an offence referred to in section 3 as an aggravating circumstance.
- (3) Any person who is convicted of an offence referred to in section 4 is liable to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such 20 imprisonment.

National instructions and Directives

- 7. (1) (a) The National Commissioner of the South African Police Service must, after consultation with the Director-General: Justice and Constitutional Development and the National Director of Public Prosecutions, issue national instructions regarding all matters which are reasonably necessary or expedient to be provided for, and which must be complied with by all members of the South African Police Service who are tasked with investigating the alleged commission of hate crimes and hate speech in order to achieve the objects of this Act, including the manner in which— 25
 - (i) the reporting of an alleged hate crime or hate speech is to be dealt with by police officials; and 30
 - (ii) hate crimes and hate speech are to be investigated by police officials, including the circumstances in which an investigation in respect of a hate crime or hate speech may be discontinued.
- (b) The National Commissioner of the South African Police Service must develop training courses, which must— 35
 - (i) include training on the national instructions referred to in paragraph (a);
 - (ii) include social context training in respect of hate crimes and hate speech; and
 - (iii) provide for and promote the use of uniform norms, standards and procedures, with the view to ensuring that as many police officials as possible are able to deal with hate crimes and hate speech cases in an appropriate, efficient and sensitive manner. 40
- (2) (a) The National Director of Public Prosecutions must, after consultation with the Director-General: Justice and Constitutional Development and the National Commissioner of the South African Police Service, issue directives regarding all matters which are reasonably necessary or expedient to be provided for, and which must be complied with by all members of the prosecuting authority who are tasked with the institution and conduct of prosecutions in cases relating to hate crimes and hate speech, in order to achieve the objects of this Act, including the following: 45
 - (i) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including— 50
 - (aa) the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped; and
 - (bb) the leading of relevant evidence indicating the presence of prejudice or intolerance towards the victim, in order to secure a conviction contemplated in section 3(2); and 55
 - (ii) the collection and analysis of information contemplated in section 8.
- (b) The National Director of Public Prosecutions must develop training courses, which must—
 - (i) include training on the directives referred to in paragraph (a);
 - (ii) include social context training in respect of hate crimes and hate speech; and 60
 - (iii) provide for and promote the use of uniform norms, standards and procedures,

with the view to ensuring that prosecutors are able to deal with hate crimes and hate speech cases in an appropriate, efficient and sensitive manner.

Reporting on implementation of Act

8. (1) The Cabinet member responsible for the administration of justice must—
- (a) after consultation with the Cabinet member responsible for policing, prescribe the information that must be collected and collated by the South African Police Service; 5
 - (b) after consultation with the National Director of Public Prosecutions, prescribe the information that must be collected and collated by the National Prosecuting Authority; and 10
 - (c) prescribe the information that must be collected and collated by the clerks of the court and Registrars of the High Court,
- in order to enable effective monitoring, analysis of trends and interventions in respect of the prevention and combating of hate crimes and hate speech.
- (2) The information contemplated in subsection (1) must be made available in the prescribed manner and at the prescribed times to— 15
- (a) Parliament;
 - (b) the Chairperson of the South African Human Rights Commission;
 - (c) the Chairperson of the Commission for Gender Equality; and
 - (d) the Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. 20

Prevention of hate crimes and hate speech

9. (1) The State, the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities have a duty to promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences. 25
- (2) Without derogating from the general nature of the duty referred to in subsection (1), one or more Cabinet members, designated by the President, must cause programmes to be developed in order to— 30
- (a) conduct education and information campaigns to inform the public about the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences;
 - (b) provide assistance and advice to any person who wants to lodge a complaint of a hate crime or hate speech; and 35
 - (c) train public officials on the prohibition, prevention and combating of hate crimes and hate speech, which training must include social context training.
- (3) The South African Judicial Education Institute established in terms of section 3 of the South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008), must develop and implement training courses, including social context training courses, for judicial officers for purposes of presiding in court proceedings, for the purposes of this Act. 40

Regulations

10. (1) The Cabinet member responsible for the administration of justice may, where applicable, make regulations regarding any matter which is required or permitted by this Act to be prescribed by regulation or any other matter which is necessary or expedient to prescribe in order to achieve the objects of this Act. 45
- (2) Regulations made under this section—
- (a) must be submitted to Parliament for approval 60 days prior to the publication thereof in the *Gazette*; 50
 - (b) which are not approved within the 60-day period referred to in paragraph (a) are deemed to have been approved by Parliament; and
 - (c) which may result in expenditure for the State, must be made in consultation with the Cabinet member responsible for finance.

Laws amended

11. The laws referred to in the second column of the Schedule are hereby amended to the extent indicated in the third column of the Schedule.

Short title and commencement

12. This Act is called the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 5

SCHEDULE

AMENDMENTS

(Section 11)

Number and year of law	Short title	Extent of amendment
Act No. 51 of 1977	Criminal Procedure Act, 1977	1. The amendment of section 18— (a) by the substitution for paragraph (a) of the following paragraph: <u>“murder, including murder which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;”</u>; (b) by the substitution for paragraph (c) of the following paragraph: <u>“robbery, if aggravating circumstances were present or if the victim of the robbery was also a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;”</u>; and (c) by the substitution for paragraph (f) of the following paragraph: <u>“any sexual offence in terms of the common law or statute including any such offence which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;”</u>. 2. The insertion after section 269A of the following section: “Hate crimes 269B. <u>If the evidence on a charge for a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023, does not prove the commission of the offence so charged but proves the commission of the underlying offence on which the hate crime is based, the accused may be found guilty of the underlying offence in question so proved.”</u>. 3. The amendment of Schedule 5 by the insertion after the item 10 of the following item: <u>“Arson, housebreaking, whether under the common law or a statutory provision, with the intention to commit an offence, or an offence referred to in section 1 of the Intimidation Act, 1982 (Act No. 72 of 1982), any of which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023.”</u>.

Number and year of law	Short title	Extent of amendment
		4. The amendment of Schedule 6— (a) by the deletion in item 1 of the word “or” at the end of paragraph (b)(i); (b) by the insertion in item 1 of the word “or” at the end of paragraph (b)(ii); (c) by the addition in paragraph (b) of item 1 of the following subparagraph: (iii) <u>a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u>”; (d) by the substitution in paragraph (c) of item 1 for subparagraphs (i) and (ii) of the following paragraphs: “(i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, <u>including rape or compelled rape which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u> or (ii) robbery with aggravating circumstances <u>or if the victim of the robbery was also a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u> or”; (e) by the deletion in item 2 of the word “or” at the end of paragraph (b)(ii); (f) by the insertion in item 2 of the word “or” at the end of paragraph (b)(iii); (g) by the addition in paragraph (b) of item 2 of the following subparagraph: “(iv) <u>is a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u> or”; (h) by the substitution for item 4 of the following item: “Robbery[, involving]— (a) <u>involving</u> the use by the accused or any co-perpetrators or participants of a firearm; (b) <u>involving</u> the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; [or] (c) <u>involving</u> the taking of a motor vehicle; or (d) <u>where the victim is a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023.</u>”.

Number and year of law	Short title	Extent of amendment
Act No. 105 of 1997	Criminal Law Amendment Act, 1997	1. The amendment of Part I of Schedule 2— (a) by the substitution in item 1 for paragraph (b) of the following paragraph: “(b) the victim was— (i) a law enforcement officer performing his or her functions as such, whether on duty or not; [or] (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act No. 51 of 1977), at criminal proceedings in any court; <u>or</u> (iii) <u>a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u>”. (b) by the substitution in paragraph (c) of item 1 for subparagraphs (i) and (ii) of the following subparagraphs: “(i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, <u>including rape or compelled rape which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u> or (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) <u>or if the victim of the robbery was a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023;</u>”. (c) by the substitution in paragraph (b) of item 2 for subparagraph (ii) of the following subparagraph: “(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; [or]”; (d) by the addition in paragraph (b) of item 2 of the following subparagraph: “(iv) <u>is a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023; or</u>”;

Number and year of law	Short title	Extent of amendment
		(e) by the deletion in paragraph (b) of item 3 of the word “or” at the end of subparagraph (ii); and (f) by the addition in paragraph (c) of item 3 of the following subparagraph: “(iv) is a victim of a hate crime as defined in section 1 of the <u>Prevention and Combating of Hate Crimes and Hate Speech Act, 2023</u>; or”. 2. The amendment of Part II of Schedule 2— (a) by the substitution for item 2 of the following item: “Robbery— (a) when there are aggravating circumstances; [or] (b) involving the taking of a motor vehicle; or (c) where the victim is a victim of a hate crime as defined in section 1 of the <u>Prevention and Combating of Hate Crimes and Hate Speech Act, 2023</u>.”; and (b) by the addition of the following item: “Arson, housebreaking, whether under the common law or a statutory provision, with the intention to commit an offence or an offence referred to in section 1 of the Intimidation Act, 1982 (Act No. 72 of 1982), any of which constitutes a hate crime as contemplated in section 3 of the <u>Prevention and Combating of Hate Crimes and Hate Speech Act, 2023</u>.”.
Act No. 75 of 2008	Child Justice Act, 2008	The amendment of Schedule 3— (a) by the substitution for item 3 of the following item: “3. Murder, including murder which constitutes part of a hate crime as contemplated in section 3 of the <u>Prevention and Combating of Hate Crimes and Hate Speech Act, 2023</u>.”; (b) by the substitution for items 6 and 7 of the following items, respectively: “6. Robbery— (a) where there are aggravating circumstances; [or] (b) involving the taking of a motor vehicle; or (c) where the victim is a victim of a hate crime as defined in section 1 of the <u>Prevention and Combating of Hate Crimes and Hate Speech Act, 2023</u>. 7. Rape or compelled rape referred to in sections 3 and 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No.32 of 2007), respectively, including rape or compelled rape which constitutes a hate crime as contemplated in section 3 of the <u>Prevention and Combating of Hate Crimes and Hate Speech Act, 2023</u>.”; and

Number and year of law	Short title	Extent of amendment
		(c) by the addition of the following item: “23. Arson, housebreaking, whether <u>under the common law or a statutory provision, with the intention to commit an offence or an offence referred to in section 1 of the Intimidation Act, 1982 (Act No. 72 of 1982), any of which constitutes a hate crime as contemplated in section 3 of the Prevention and Combating of Hate Crimes and Hate Speech Act, 2023.</u>”.

MEMORANDUM ON THE OBJECTS OF THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL, 2018

1. BACKGROUND

1.1 The founding provisions of the Constitution of the Republic of South Africa, 1996, in section 1, set out certain basic values, amongst others, human dignity, the achievement of equality and the advancement of human rights and freedoms and non-racialism and non-sexism. The Bill of Rights, in section 9 of the Constitution, prohibits direct or indirect unfair discrimination against anyone on the grounds set out in section 9(3) of the Constitution, namely, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. The Bill of Rights, in section 10, gives everyone the right to dignity and, in section 12, gives everyone the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources. In section 16, the Bill of Rights gives everyone the right to freedom of expression. This right is, however, limited in that it does not extend to propaganda for war, incitement to imminent violence or advocacy of hatred that is based on race, ethnicity, gender or religion, which constitutes incitement to cause harm. The State must, in terms of section 7(2) of the Constitution, “respect, protect, promote and fulfil the rights in the Bill of Rights”.

1.2 It is against this backdrop that the Prevention and Combating of Hate Crimes and Hate Speech Bill (“the Bill”) has its origins. The Bill is intended to address frequently occurring and sometimes violent conduct of persons who are motivated by clear and defined prejudices.

2. OBJECTS OF BILL

The primary aim of the Bill is to create the offences of hate crimes and hate speech and to put in place measures to prevent and combat these offences.

3. DISCUSSION AND CLAUSE-BY-CLAUSE ANALYSIS

3.1 Clause 1

Clause 1 of the Bill contains definitions which are self-explanatory. This clause also contains definitions which are necessary for purposes of clause 4(1)(b) when hate speech is distributed in cyberspace.

3.2 Clause 2

Clause 2 sets out the objects of the Bill.

3.3 Clause 3

3.3.1 Clause 3 creates the offence of hate crime. A hate crime is committed if a person commits any recognised offence under any law, referred to as the “underlying offence” and the commission of that offence is motivated by prejudice or intolerance on the basis of one or more characteristics or perceived characteristics of the victim, as listed in the Bill, a family member of the victim or the victim’s association with or support for a person with one or more characteristics or a group of persons who share the said characteristics. The common law offence of *crimen injuria* and the offence referred to in clause 4(1) of the Bill are excluded from the ambit of clause 3.

3.3.2 A prosecution in respect of this offence may only be instituted on the authorisation of the Director of Public Prosecutions having jurisdiction.

3.4 Clause 4

- 3.4.1 Clause 4 creates the offence of hate speech. Clause 4(1)(a) provides that any person who intentionally publishes, propagates, advocates, makes available or communicates anything to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred based on defined grounds is guilty of the offence of hate speech. Clause 4(1)(b) creates an offence when hate speech material is intentionally distributed or made available in cyber space, and the said person knows that such electronic communication constitutes hate speech.
- 3.4.2 Clause 4(2) is critically important because it exempts certain communications from criminal sanction as contemplated in the Bill. The exemptions found in the provisions of clause 4(2)(a) to (c) of the Bill are nothing new but confirm the right of freedom of expression as enshrined in section 16(1) of the Constitution, which includes—
- (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.
- 3.4.3 The provisions of clause 4(2)(a) to (c) of the Bill exclude from the ambit of hate speech anything done in good faith in the course of engagement in any *bona fide* artistic creativity, performance or other form of expression, academic or scientific inquiry or fair and accurate reporting or commentary in the public interest. Clause 4(2)(d) is a new exemption and excludes from the ambit of hate speech any *bona fide* interpretation and proselytising or espousing of any religious conviction, tenet, belief, teaching, doctrine or writings. However, conduct as provided for in paragraphs (a) to (d) will not qualify for the exemption from hate speech if it advocates hatred that constitutes incitement to cause harm based on any protected grounds.
- 3.4.4 A prosecution in respect of this offence may only be instituted on the authorisation of the Director of Public Prosecutions having jurisdiction.

3.5 Clause 5

Clause 5 deals with victim impact statements. Clause 5 sets out what a victim impact statement is, namely a sworn statement or affirmation by the victim which reflects the physical, psychological, social, economic or any other consequences of a hate crime on a victim. The contents of this statement will be admissible as evidence in court, unless good cause to the contrary is shown.

3.6 Clause 6

Clause 6 deals with penalties or orders.

- 3.6.1 Clause 6(1) provides for penalties in respect of hate crimes and provides that a person who is convicted of a hate crime is subject to the penalties set out in section 276 or 297 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), subject to the penal jurisdiction of that court. Section 276 of the Criminal Procedure Act, 1977, provides the sentencing options which courts may impose, including imprisonment, periodical imprisonment, a fine and correctional supervision. Section 297 of the Criminal Procedure Act, 1977, provides for the conditional or unconditional postponement or suspension of sentences, cautions and reprimands.

- 3.6.2 Clause 6(2) provides that if a person is convicted of a hate crime which is not subject to the obligatory minimum sentencing regime as provided for in section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), and in the case of any damage, injury or loss of income or support, the court must regard the fact that the person has been convicted of a hate crime as an aggravating circumstance.
- 3.6.3 Clause 6(3) provides for penalties applicable in the case of hate speech, namely a fine or imprisonment for a period not exceeding five years or to both a fine and such imprisonment

3.7 Clause 7

- 3.7.1 Clause 7(1) requires that the National Commissioner of the South African Police Service must, after consultation with the Director-General: Justice and Constitutional Development and the National Director of Public Prosecutions, issue national instructions to members of the South African Police Service who are tasked with investigating the alleged commission of hate crimes and hate speech.
- 3.7.2 Clause 7(2) requires the National Director of Public Prosecutions, after consultation with the Director-General: Justice and Constitutional Development and the National Commissioner of the South African Police Service, to issue directives on relevant matters and these directives must be complied with by prosecutors in the execution of their functions under the Bill.

3.8 Clause 8

Clause 8 requires the Cabinet member responsible for the administration of justice, after consultation with the Cabinet member responsible for policing and the National Director of Public Prosecutions, to make regulations on the information to be collected and collated by the South African Police Service and the National Prosecuting Authority, respectively. The information obtained must be made available to Parliament, to the Chairperson of the South African Human Rights Commission, to the Chairperson of the Commission for Gender Equality and to the Chairperson of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

3.9 Clause 9

Clause 9 provides for the prevention of hate crimes and hate speech and requires the State, the South African Human Rights Commission, the Commission for Gender Equality and the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities to promote awareness of the prohibition against these offences, with the view to preventing and combating them.

3.10 Clause 10

Clause 10 empowers the Cabinet member responsible for the administration of justice to make regulations as required by the Bill.

3.11 Clause 11

Clause 11, read with the Schedule to the Bill, sets out the consequential amendments to other Acts of Parliament, required by the Bill, namely amendments to the Criminal Procedure Act, 1977, the Criminal Law Amendment Act, 1997 (dealing with compulsory minimum sentences), and the Child Justice Act, 2008 (Act No. 75 of 2008). The amendments in the Schedule to the Bill only relate to hate crimes and not to hate speech.

3.12 Clause 12

Clause 12 contains the short title and commencement.

4. FINANCIAL IMPLICATIONS

The main financial implications for the State will be in the form of implementing the provisions of clause 7, dealing with instructions and directives, notably training in respect thereof and clause 9, dealing with the duty of the State to promote awareness of the prohibition against hate crimes and hate speech, aimed at the prevention of these offences. Existing budgets will be used for this purpose. No additional funding is being sought to implement the Bill.

5. PARTIES CONSULTED

A notice was published in the *Gazette* on 24 October 2016, inviting comments on the draft Bill. The request for comment on the Bill was also made available on the webpage of the Department of Justice and Constitutional Development. The deadline for comment was set as 1 December 2016, which was subsequently extended to 31 January 2017. Approximately 75 854 submissions, which included petitions, were received on the Bill. These comments were taken into consideration in the finalisation of the Bill.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the procedure for the classification of Bills. A Bill must be correctly classified so that it does not become inconsistent with the Constitution.
- 6.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.
- 6.4 Therefore the issue to be determined is whether the provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The Bill primarily seeks to give effect to the Constitution and the Republic's obligations regarding prejudice and intolerance in terms of international law and also seeks to prevent, combat and to regulate the offence of hate crime and the offence of hate speech and the prosecution of persons who commit these crimes and also provides for the appropriate sentences that may be imposed on persons who commit these offences. The Bill also provides for the prevention of hate crimes and hate speech, for the empowerment and support of victims of hate crimes and hate speech and also for effective enforcement measures. The Bill intends to ensure that there is co-ordinated implementation, application and administration of the envisaged Prevention and Combating of Hate Crimes and Hate Speech Act along with the Criminal Procedure Act, 1977, the Criminal Law Amendment Act, 1997, and the Child Justice Act, 2008.

- 6.6 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.7 The subject matter of the provisions of the Bill does not fall within any of the functional areas listed in Schedule 4 to the Constitution and it does not affect provinces whereby the procedure set out in section 76 of the Constitution would be applicable.
- 6.8 Since the Bill does not deal with any of the matters listed in Schedule 4 of the Constitution, it must be dealt with in accordance with the procedure set out in section 75 of the Constitution.
- 6.9 It is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.

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