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The Hate Crimes and Hate Speech Bill is a step closer to becoming law

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On 14 March 2023, the National Assembly passed the [Prevention and Combating of Hate Crimes and Hate Speech Bill](#) [B9B-2018] ("Bill"). According to its preamble, this Bill was introduced to create criminal offences for hate crimes and hate speech. By doing so, it is envisaged that the Bill gives effect to South Africa's obligations in terms of the Constitution and international human rights instruments (dealing with racism, discrimination, xenophobia, and other forms of intolerance).

Since the Bill's introduction to the Portfolio Committee of Justice and Correctional Services ("Committee") – a parliamentary committee of the National Assembly – in April 2018, it has been met with political and public contestation regarding the scope of its content. Following a call for comments, it was reported (during one of the Committee's meetings) that approximately one hundred thousand petitions or submissions had been received from various stakeholders.

Due to the large volume of submissions, the Committee's consideration of the Bill was delayed. An additional contribution to the delay was that the Committee elected to await the outcome of two cases in the Constitutional Court – namely, *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22 (see: <https://werksmans.com/legal-updates-and-opinions/this-is-hate-speech-the-constitutional-court-has-spoken/>); and *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* (CCT 14/19) [2022] (see: <https://werksmans.com/legal-updates-and-opinions/death-and-life-are-in-the-tongue-a-case-of-hate-speech/>) – both of which dealt with the interpretation of "hate speech" as defined in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("Equality Act").

Following these judgments, the Committee scheduled public hearings to hear submission regarding the Bill, before deliberating the suitability of various provisions of the Bill. From these deliberations, three main criticisms are notable.

First, it was argued that the definitions are overly broad and/or vague (which is inconsistent with the principles of the Rule of Law).

Secondly, it was also argued that the proposed offence of hate speech will unjustifiably limit the constitutional right to freedom of expression.

Thirdly, it was further argued that the offence of hate speech is unnecessary and may amount to a duplication of provisions, as hate speech is already explicitly prohibited by the Equality Act. However, in response to these criticisms the Committee noted that while they are mindful of these criticisms, *"it is clear from the rise in incidents of hate in South Africa, including incidents of racism that the existing law is inadequate and does not act as a deterrent. As these incidents are extremely harmful to our society, there is need for a clear message that conduct motivated by hate will not be tolerated and, as such, perpetrators will be harshly punished"* (Committee Report, dated 2 March 2023).

Following various amendments of the Bill, the term **"hate crime"** is defined as an offence – excluding the offences of *crimen injuria* or hate speech – committed by a person motivated by their prejudice or intolerance towards the victim, the victim's family member, or the victim's association with or support for a group of persons who share one or more of the following actual or perceived characteristics: age; albinism; culture; disability; ethnic or social origin; gender; HIV or AIDS status; language; nationality, migrant or refugee status or asylum seekers; occupation or trade; political affiliation or conviction; race; religion; sex; sexual orientation, gender identity or expression or sex characteristics; or skin colour.

With reference to **“hate speech”** the Bill states 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 promote or propagate hatred, based on one or more listed grounds is guilty of an offence. The listed grounds are: albinism; ethnic or social origin; gender; HIV or AIDS status; nationality, migrant or refugee status or asylum seekers; race; religion; sex; sexual orientation, gender identity or expression or sex characteristics; or skin colour.

This provision in the Bill also provides that a person will be guilty of an offence if they intentionally distribute an electronic communication which that person knows constitutes hate speech through an electronic communications system which is accessible by any member of the public; or accessible by, or directed at, a specific person who can be considered to be a victim of hate speech. A set of exceptions are also listed in the provision.

The Bill further stipulates that perpetrators who are convicted of the above offences may be sentenced to possible imprisonment, or payment of a fine, or both (amongst other things).

Now that the Bill has been passed by the National Assembly, it is due to be considered by the National Council of Provinces.

Death and Life are in the Tongue – A Case of Hate Speech



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