



WHY DOES SOUTH AFRICA NEED **HATE** **CRIMES** **LEGISLATION?**



HATE | CRIMES | WORKING | GROUP



**OPEN SOCIETY FOUNDATION
FOR SOUTH AFRICA NPC**

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WHY DOES SOUTH AFRICA NEED HATE CRIMES LEGISLATION?

IN MAY 2013, Somali national, Abdi Nasir Mahmood Good (25) was stoned to death in Port Elizabeth by a mob - including school children - after he tried to protect his shop from looters.



ON 4 FEBRUARY 2006, Zoliswa Nkonyana (19), who was open in her community about being a lesbian, and her friend were at a tavern in Khayelitsha, Cape Town, where they were called 'tomboys' and taunted for 'acting like men'. They were followed outside by a group of young men - many of whom attended the same high school as them - where they were attacked. Her friend managed to break away but Zoliswa was stabbed and stoned to death in the street, a few hundred meters from her home.



ON 7 JANUARY 2008, Johan Nel entered the Skierlik informal settlement in Swartruggens, North West, armed with a hunting rifle. Nel pleaded guilty to the racially motivated killing spree that claimed the lives of Enoch Tshepo Motshelanoka (10), Sivuyile Banani (35), Anna Moiphitlhi (31) and Anna's three-month-old baby, Elizabeth Moiphitlhi, who was on her mother's back when she was shot.

WHAT ARE HATE CRIMES?

HATE CRIMES are defined based on two factors. The first is that the act is considered *a crime under existing South African criminal law* (such as arson, damage to property, assault, rape or murder). The second is that the act is *motivated in whole or in part by prejudice or hatred* regarding an aspect of the victim's identity (such as their race, nationality, religion, sexual orientation).

Crime affects us all in South Africa. What makes crimes committed against minority groups such as foreign nationals, specific religious minorities, or people with disabilities distinct from those committed against other South Africans?



HATE CRIMES are not simply crimes committed against vulnerable groups. Instead hate crimes are *crimes committed against individuals because of a prejudice the perpetrator holds against an entire group of people, but directed at an available victim.* For example, a Jewish person may be targeted for an assault because the perpetrator harbours anti-Semitic sentiments. Because of the random nature of the attack, other Jewish people may feel they could just as easily have been the target. Because of this, hate crimes impact not only on the victim of the crime, but also have devastating effects on the entire community that the victim belongs to (or is perceived to belong to).

This is why hate crimes are different to other crimes; they serve as a message of *intolerance and intimidate and harass not just the victim, but whole communities.* As a result, they undermine social cohesion and the creation of a society based on equality.

**HOW
PREVALENT
ARE HATE
CRIMES? IS
THIS REALLY
A SERIOUS
ISSUE?**

THE MEDIA often report on incidents of hate crimes, yet an accurate indication of prevalence is hard to come by. Part of the necessity of hate crimes legislation is that it would enable government and civil society to have more accurate statistics relating to hate crimes. Currently there is no related official crime category, nor monitoring of hate crime. So even when such a crime is committed, it is not officially recorded as a ‘hate crime’ in government statistics.

Particular government departments have made their own efforts to record crimes against lesbian, gay, bisexual, transgender or intersex (LGBTI) persons or crimes they consider motivated by xenophobia, but these are not guided by a shared definition of hate crime and a common strategy to tackle hate crimes. In the absence of official monitoring, the work of recording hate crimes is currently being done by several different civil society organisations in various sectors and being collated by the Hate Crimes Working Group. These efforts are aimed at building a systematic and accurate evidence base that can inform policy makers of the nature and extent of hate crimes in South Africa, the impact of these crimes on social cohesion, and trends in government and civil society responses to incidents of hate crime.

**WHAT WILL
ANOTHER
PIECE OF
LEGISLATION
ACHIEVE?**

IT SHOULD BE NOTED that the objective of hate crimes legislation is not only to prevent hate crimes (which no law alone can really do), but its enactment will enable government and civil society to be provided with vital information about the nature and prevalence of this type of crime, to help provide appropriate tools for tackling hate crimes.

Former Minister of Justice and Constitutional Development, Jeff Radebe, noted that hate crimes legislation would not only provide necessary tools to monitor and combat such crimes but would send a clear message that these violations will not be accepted. In other countries, hate crimes legislation has been backed by extensive training for a variety of service providers, targeted policing strategies as well as the development of prosecutorial guidelines on hate crimes. Currently police in South Africa rarely investigate evidence of specific prejudice as a motivating factor in an offence.

Hate crimes legislation also has symbolic value: it sends a clear message to society that such crimes are not tolerated. Hate crimes legislation that includes robust duties for stakeholders and is fully implemented will be a powerful tool to combat these crimes.

**BURNING A
SHOP, USING
INSULTING OR
THREATENING
LANGUAGE,
MURDER
AND SEXUAL
VIOLENCE
ARE ALREADY
CRIMES. WHY
CAN'T WE
JUST USE
WHAT WE'VE
GOT?**

ALL OF THE ABOVE and other crimes are of course illegal. But distinguishing hate crimes from other types of crime in policy and legislation is necessary for three reasons:

1. It enables greater monitoring of violence motivated by prejudice and helps authorities to track trends of hate crime around the country so as to determine where specific interventions are necessary. Greater monitoring may also provide an early warning of possible mob violence motivated by prejudice such as xenophobic violence.

2. It helps recognize the social impact of hate crimes because of the message such crimes send to a victim's community. Currently an assault motivated by a person's race or sexual orientation, or the burning and looting of foreign nationals' shops may only be treated as an assault or public violence, respectively, and thus not responded to accordingly by the criminal justice system¹. Addressing hate crimes consistently through the courts, public statements and other means would help send a clear message that hate crimes will not be tolerated and offenders cannot commit such crimes with impunity.

3. It introduces a multi-sectoral, comprehensive approach to addressing hate crimes, currently lacking in government and civil society responses. Hate crimes require a variety of service providers including police officers, hospital and clinic staff as well as court officials to develop strategies to prevent or respond to hate crimes. This may include requiring police to investigate evidence of a prejudice motive, hospitals and clinics to take steps to prevent secondary victimization when assisting hate crime victims, and prosecutors and courts to apply the available tools.

1. The SA Human Rights Commission for instance found that of the nearly 600 cases opened following the xenophobic violence of 2008, only 16% resulted in a guilty conviction. In addition nearly all these convictions were for minor crimes such as theft and assault and all with the option of a fine.

**DOESN'T
HATE CRIME
LEGISLATION
VIOLATE THE
EQUALITY
CLAUSE?**

**TREATING ONE
KIND OF ASSAULT
(FOR EXAMPLE)
AS WORSE
THAN ANOTHER
BECAUSE OF A
LISTED GROUND?**

IN THE SOUTH AFRICAN CONSTITUTION, the understanding of equality is a substantive one. This means that it is interested not only in equal opportunities for all but that each person actually *experiences* equality with others. To this end, the equality clause directs itself in such a way to offer relief. Substantive equality means that we are not all treated equally, but can be treated differently if the end result is that we all then experience equality.

For LGBTI persons, religious minorities, disabled persons, refugees and non-nationals living in South Africa and those that have been attacked because of their race, this equality can be realized by the extra protection given to them by virtue of their status as targets.

WHAT ABOUT FREEDOM OF EXPRESSION?

Freedom of expression and opinion is a cherished constitutional right and the bedrock of any democracy. Freedom of expression is, however, already expressly limited in the Bill of Rights. According to the Bill of Rights, freedom of expression does not extend to propaganda for war, incitement of imminent violence or advocacy of hatred that is intended to incite harm. In this way, when something is deemed to be advocacy of hatred intended to incite violence, it automatically is no longer covered under the provisions providing for freedom of expression. While 'hate crime' is a term used to define aggression and violence targeting people because of their actual or perceived belonging to a particular group, 'hate speech' consists of public expressions which spread, incite, promote or justify hatred, discrimination or hostility towards a specific group. Hate speech not only has a negative affect on the dignity of the target, but also plays a role in contributing to negative attitudes in society towards a specific group. Public comments that perpetuate negative and Islamophobic stereotypes, for example, are not merely offensive, but serve to create a hostile environment for entire religious communities.

Hate crime legislation can further strengthen legal responses to hate speech. Current South African understandings of hate speech from a jurisprudential standpoint seem to indicate that a statement is only hate speech to the extent that it is an incitement to violence. While the Constitution's S16(2)(c) limits freedom of expression when such speech amounts to "advocacy of hatred based on race, ethnicity, gender or religion and that constitutes incitement to cause harm", this current formulation only views hate speech as that which is an incitement to cause (presumably) actual harm. Freedom of expression is also limited through the Promotion of the Elimination of Unfair Discrimination Act (PEPUDA). PEPUDA includes a prohibition not only on speech that is an incitement to violence but also speech that constitutes harassment.

Case law on this issue is still developing and guidelines that provide more clarity as to what constitutes hate speech are keenly needed. From the above it is clear that the South African law can impinge on freedom of expression when that expression constitutes hate speech. What is also clear is that the current piecemeal approach of the judiciary has led to a situation of uncertainty regarding this very important right, uncertainty which hopefully would be dealt with by hate crimes and hate speech legislation.

This brief was developed by the Hate Crimes Working Group with reference to the following resources:

Breen, D. & Nel, J.A. 2011. South Africa – A home for all? A need for hate crime legislation to provide equal protection. *South African Crime Quarterly*, 38, December, 33-43.

Nel, J.A. & Breen, D. 2013. Victims of hate crime. In Peacock, R. (Ed.) *Victimology in South Africa*. Second edition. Pretoria: J.L. van Schaik.

For more information, visit the **Hate Crimes Working Group** website at www.hcwg.org.za. The Hate Crimes Working Group is a civil society collective with the organisations on the following page forming part of the steering committee.



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Your hate
won't
change us



Sexuality is
AFRICAN!

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still y
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