

REPUBLIC OF SOUTH AFRICA

PREVENTION AND COMBATING OF HATE CRIMES BILL

.....
*(As submitted to Cabinet (proposed section 75); explanatory summary of Bill
published in Government Gazette No. of 2015) (The
English text is the official text of the Bill)*
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(Minister of Justice and Correctional Services)

[B - 2015]

BILL

To give effect to the Republic's obligations concerning racism, racial discrimination, xenophobia and related intolerance in terms of international agreements; to provide for the offence of hate crimes and the prosecution of persons who commit hate crimes; to regulate bail in respect of persons who commit hate crimes; to provide for appropriate sentences that may be imposed on persons who commit hate crimes; to provide for the prevention of hate crimes; to provide for effective enforcement measures; to provide for the coordinated implementation, application and administration of this Act; 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 peoples 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; and
- * 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, prohibits unfair discrimination, hate speech and harassment and

requires the State to promote the constitutional imperatives enshrined in section 9 of the Constitution;

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; 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,

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

Definitions

1. In this Act, unless the context indicates otherwise -
 - “**acknowledges responsibility**” for purposes of section 8, means acknowledges responsibility for an offence without a formal admission of guilt;
 - “**community service**” for purposes of section 8, means work for a community organisation or other work of value to the community performed by a person without payment;
 - “**court**” means a Division of the High Court or a magistrate’s court for any district or any regional division;
 - “**Criminal Procedure Act**” means the Criminal Procedure Act, 1977 (Act No. 51 of 1977);
 - “**Director of Public Prosecutions**” means a Director of Public Prosecutions appointed in terms of section 13 of the National Prosecuting Authority Act, 1998

(Act No. 32 of 1998);

“diversion” for purposes of section 8, means diversion of a matter involving a person who has been charged with an offence under this Act away from the formal court procedures in a criminal matter by means of the procedures established by section 8, and **“divert”** has a corresponding meaning;

“diversion option” means a diversion option referred to in section 8(3);

“National Director of Public Prosecutions” means the person appointed in terms of section 10 of the National Prosecuting Authority Act, 1998 (Act No. 32 of 1998);

“prescribed” means prescribed by regulation under section 12;

“public official” means any person holding public office and exercising or purporting to exercise a public power or a public function in terms of any legislation;

“symbolic restitution” for purposes of section 8, means the giving of an object owned, made or bought by a person or the provision of any service to a specified person, persons, group of persons or community, charity or welfare organisation or institution as symbolic compensation for the harm caused by a person who has committed a hate crime; and

“victim of a hate crime” means a person against whom an offence referred to in section 4 has been committed, and **“victim”** has a corresponding meaning.

Application of Act

2. (1) This Act does not exclude or limit the concurrent application of any other law in so far as the provisions of that other law are not inconsistent with this Act.

(2) If any conflict relating to a matter dealt with in this Act arises between this Act and any other law, other than the Constitution or an Act of Parliament expressly amending this Act, this Act prevails.

Objects of Act

- 3.** The objects of this Act are to—
- (a) give effect to the Republic's obligations against racism, racial discrimination, xenophobia and related intolerance in terms of international agreements;
 - (b) provide for the prosecution of persons who commit offences referred to in this Act and for appropriate sentences;
 - (c) provide for the prevention of hate crimes;
 - (d) provide for effective enforcement measures;
 - (e) provide for the co-ordinated implementation, application and administration of this Act; and
 - (f) combat the commission of hate crimes in a co-ordinated manner.

Offence of hate crime

4. (1) (a) Any person who commits a hate crime is guilty of an offence.

(b) Any person who —

- (i) attempts to commit or performs any act aimed at participating in the commission of;
- (ii) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or
- (iii) conspires with any other person to commit,

a hate crime is guilty of an offence and is liable, on conviction, to the same sentences which may be imposed for the offence referred to in paragraph (a).

(2) A hate crime is an offence recognised under any law / the common law or any statute, committed solely or in part because of the fact or perceived fact of the victim's race, gender, sex, nationality, ethnic or social origin, colour, sexual orientation, gender identity, age, disability, religion, conscience, belief, culture, language, birth or HIV status.

(3) Any prosecution in terms of this section must be authorised

in writing by the National Director of Public Prosecutions / the Director of Public Prosecutions having jurisdiction.

Bail in respect of hate crimes

5. Notwithstanding the provisions of any other law, an accused person who is in custody in respect of an offence referred to in section 4 of this Act may only be released on bail in terms of the provisions of section 60 of the Criminal Procedure Act, 1977.

Impact of offence on victim

6. (1) For purposes of this section, a victim impact statement means a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.

(2) The prosecutor may, when adducing evidence or addressing the court on sentence in respect of an offence under this Act, consider the interests of a victim of the offence and the impact of the offence on the victim, and, where practicable, furnish the court with a victim impact statement provided for in subsection (1).

(3) If the contents of a victim impact statement are not disputed, a victim impact statement is admissible as evidence on its production.

Sentences

7. (1) Subject to subsection (2), any person who is convicted of an offence referred to in section 4 is liable on conviction to any sentence, as provided for in section 276 of the Criminal Procedure Act which the court sentencing the person considers appropriate and which is within that court's

penal jurisdiction.

(2) If a person is convicted of an offence referred to in section 4, the court that imposes the sentence must, if section 51 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), is not applicable, regard the fact that the person has been convicted of a hate crime, as an aggravating circumstance.

(3) (a) A court which convicts a person of any of the offences referred to in section 8(1)(a) to (e) may, despite the provisions of subsections (1) and (2), impose as a sentence any of the diversion options referred to in section 8(3) or any combination thereof.

(b) The provisions of section 8(2)(b), (4), (5)(a), (6)(a) and (b) apply with the changes required by the context in respect of the monitoring and reporting on compliance with a diversion option which has been imposed as a sentence contemplated in paragraph (a).

(c) If a person who is required to monitor and report on compliance with a diversion option which has been imposed as a sentence contemplated in paragraph (a), reports to the court which imposed the sentence referred to in paragraph (a), that the person has failed to comply with that sentence, the person who has so failed to comply may, in the prescribed manner, be brought before the court which imposed the original sentence for the holding of an inquiry into the failure of the person to comply.

(d) If upon conclusion of the inquiry contemplated in paragraph (c), it is found that the person has failed to comply with the sentence provided for in paragraph (a), the court may confirm, amend or substitute the sentence.

Diversion by prosecutor of certain hate crimes¹

8. (1) A prosecutor may, before a person pleads to a charge in

¹ This clause does not make provision for any accreditation of diversion programmes or diversion service providers which possibly needs to be done. However, accreditation of service providers may have financial implications, unless the NGO's in this environment are prepared to do this for free.

terms of the Criminal Procedure Act, and in accordance with the directives issued by the National Director of Public Prosecutions provided for in section 10(2)(a)(iii), divert a matter involving a person who is alleged to have committed an offence of –

- (a) common assault;
- (b) malicious injury to property, where the amount involved does not exceed R1 500;
- (c) *crimen iniuria*; or
- (d) trespass,

which constitutes a hate crime referred to in section 4 and may, for this purpose, select any diversion option set out in subsection (3) or any combination thereof, if the prosecutor, after consulting with the police official responsible for the investigation of the matter, is satisfied that –

- (i) the person acknowledges responsibility for the offence;
- (ii) the person has not been unduly influenced to acknowledge responsibility;
- (iii) there is a *prima facie* case against the person; and
- (iv) the person and the victim consent to diversion.

(2) (a) If a matter is diverted in terms of subsection (1), the person referred to in subsection (1) must appear before a magistrate in chambers in order to have the diversion option that has been selected by the prosecutor, made an order of court.

(b) When making a diversion order contemplated in paragraph (a), the magistrate, where applicable, must identify a suitable person to monitor the person's compliance with the diversion order.

(3) For purposes of subsection (1) the following diversion options, or any combination thereof, are applicable:

- (a) An oral or written apology to a specified person or persons or institution;
- (b) a formal caution, with or without conditions;
- (c) placement under an order issued in the prescribed manner, placing the person referred to in subsection (1) under the supervision and guidance of a specific person in order to monitor the behaviour of the person referred

- to in subsection (1), known as a “supervision and guidance order”;
- (d) placement under an order issued in the prescribed manner, requiring a person referred to in subsection (1) to report to a specific person at a time or at times specified in the order so as to enable that person to monitor the behaviour of the person referred to in subsection (1), known as a “reporting order”;
 - (e) referral to counselling or therapy;
 - (f) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose;
 - (g) symbolic restitution to a specific person, persons, group of persons or community, charity or welfare organisation or institution;
 - (h) restitution of a specified object to a specified victim or victims of the alleged offence where the object can be returned or restored;
 - (i) community service under the supervision or control of an organisation or institution, or a specified person, persons or group of persons identified by the prosecutor;
 - (j) provision of some service or benefit by the person to a specified victim or victims;
 - (k) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution;
 - (l) where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or institution; or
 - (m) “victim-offender mediation.

(4) If a person fails to comply with a diversion order, the person identified in terms of subsection (2)(b) must, in the prescribed manner, notify the magistrate in writing of such failure.

(5) (a) The person identified in terms of subsection (2)(b) must, where a person has successfully complied with a diversion order, submit a prescribed report to the prosecutor referred to in subsection (1).

(b) If a matter has been diverted by a prosecutor as contemplated in subsection (1) and the diversion order has been successfully complied with, a prosecution on the same facts may not be instituted.

(c) A diversion order made in terms of this section does not constitute a previous conviction referred to in the Criminal Procedure Act.

(d) A private prosecution in terms of section 7 of the Criminal Procedure Act may not be instituted against a person in respect of whom a matter has been diverted in terms of this section.

(6) (a) If a person fails to comply with any diversion order, the magistrate referred to in subsection (2) may, on being notified of such failure, in the prescribed manner, issue a warrant for the arrest of the person or cause a summons to be issued in respect of the person, to appear before the magistrate.

(b) When a person appears before the magistrate pursuant to a warrant of arrest or summons contemplated in paragraph (a), the magistrate must inquire into the reasons for the person's failure to comply with the diversion order and make a determination whether or not the failure was due to the person's fault.

(c) If it is found that the failure was not due to the person's fault, the magistrate may –

- (i) continue with the same diversion option with or without altered conditions;
- (ii) add or apply any other diversion option; or
- (iii) make an appropriate order which will assist the person to comply with the diversion option initially applied, with or without altered or additional conditions.

(d) If it is found that the failure was due to the person's fault, the prosecutor referred to in subsection (1) may decide to proceed with the prosecution or decide on another diversion option which is more onerous than the diversion option originally decided on.

(e) If the prosecutor decides to proceed with the prosecution as contemplated in paragraph (d), an acknowledgment of responsibility contemplated in subsection (1)(i) does not constitute an admission

in terms of 220 of the Criminal Procedure Act.

(7) (a) For purposes of this section “victim-offender mediation” means an informal procedure which is intended to bring the person who is alleged to have committed a hate crime and the victim together at which a plan is developed on how the person will redress the effects of the offence and this procedure may only take place if both the victim and the person in question consent thereto.

(b) The magistrate, when making the diversion option an order of court as contemplated in subsection (2), must, if victim-offender mediation is decided on as an appropriate diversion option, identify a suitable person to convene the victim-offender mediation and another suitable person, if necessary, to regulate the procedure to be followed at the mediation, to mediate the matter and to monitor and report back to the prosecutor referred to in subsection (1), on compliance with the order.

National instructions and directives

9. (1) The National Commissioner of the South African Police Service must, after consultation with the Directors-General: Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, Social Development, State Security Agency, the Chief Executive Officer, Government Communications and Information System and the National Director of Public Prosecutions, where necessary and relevant, issue national instructions as provided for in section 25 of the South African Police Service Act, 1995 (Act No. 68 of 1995), regarding all matters which are reasonably necessary or expedient to be provided for and which must be complied with by all police officials in the execution of their functions in terms of this Act in order to achieve the objects of this Act, including the following:

- (a) The division or divisions within the South African Police Service to be tasked with the investigation of hate crimes;
- (b) the manner in which hate crime cases are to be investigated, including the

circumstances in which an investigation in respect of a hate crime may be discontinued; and

- (c) the circumstances in which consultation with the national prosecuting authority is required with the view to guiding the investigation of hate crime cases for purposes of obtaining the required evidence and identifying relevant witnesses.

(2) The National Director of Public Prosecutions must, after consultation with the Directors-General: Home Affairs, International Relations and Cooperation, Justice and Constitutional Development, Labour, Social Development, State Security Agency, the Chief Executive Officer, Government Communications and Information System and the National Commissioner of the South African Police Service, where necessary and relevant, 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 conducting of prosecutions in cases relating to hate crimes in order to achieve the objects of this Act, including the following:

- (a) The manner in which cases relating to hate crimes are to be dealt with, including the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped;
- (b) the collection and analysis of information relating to the number of hate crime prosecutions, convictions and the sentences imposed; and
- (c) the diversion of matters by a prosecutor in respect of matters referred to in section 8(1).

(3) The National Commissioner of the South African Police Service and the National Director of Public Prosecutions must each develop training courses, which must—

- (a) include training, also incorporating social context training, on the national instructions or directives, as the case may be, referred to in this section; and

(b) provide for and promote the use of uniform norms, standards and procedures,

to ensure that all police officials and prosecutors are able to deal with matters relating to hate crimes in an appropriate, efficient and sensitive manner.

(4) The national instructions and directives referred to in this section must provide that adequate disciplinary steps are taken against any police official or prosecutor who fails to comply with any duty imposed on him or her in terms of this Act or the national instructions or directives issued in terms of this Act.

(5) Any national instruction or directive issued under this section may be amended or withdrawn in like manner.

(6) (a) The Cabinet member responsible for the administration of justice must submit all directives contemplated in this section to Parliament 30 days before they are issued.

(b) The National Director of Public Prosecutions must, after the expiry of the 30 day period, publish the directives on the website of the National Prosecuting Authority.

Submission of statistics on hate crimes to Parliament

10. (1) The National Director of Public Prosecutions must, in the prescribed manner, not later than 31 August of every year, submit to the Cabinet member responsible for the administration of justice –

(a) information relating to the number of hate crime prosecutions, convictions and the sentences imposed; and

(b) any other prescribed information.

(2) The Cabinet member responsible for the administration of justice must, not later than 30 September of every year, submit a prescribed report to Parliament containing the information contemplated in subsection (1), and report thereon to a committee or committees of Parliament, sitting jointly or separately, as determined by Parliament.

Regulations

11. (1) The Cabinet member responsible for the administration of justice may or must, 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.

(2) Any regulations made under this section –

- (a) must be submitted to Parliament for approval 60 days prior to the publication thereof in the *Gazette*;
- (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 Minister of Finance.

(3) Regulations made in terms of this section may, in respect of any contravention or failure to comply therewith, prescribe as a penalty a fine or imprisonment for a period not exceeding 12 months.

Laws amended

12. 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

13. This Act is called the Prevention and Combating of Hate Crimes Act, 2015.

SCHEDULE
(Section 12)

Number and year of law	Short title	Extent of amendment
Act No. 51 of 1977	Criminal Procedure Act, 1977	<p>1. The amendment of Schedule 6 by the substitution for paragraph (b) of the item "Murder" of the following paragraph: "(b) the victim was –</p> <ul style="list-style-type: none"> (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; [or] (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1; <u>or</u> (iii) <u>a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes Act, 2016;</u>. <p>2. The amendment of Schedule 6 by the substitution for paragraph (b) of the item "Rape or compelled rape" of the following paragraph: "(b) where the victim –</p> <ul style="list-style-type: none"> (i) is a person under the age of 16 years; (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; [or] (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or (iv) <u>is a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes Act, 2016; or</u>".
Act No. 105 of 1997	Criminal Law Amendment Act, 1997	<p>1. The amendment of Part I of Schedule 2 by the substitution for paragraph (b) of the item "Murder" of the following paragraph: "(b) the victim was –</p> <ul style="list-style-type: none"> (i) a law enforcement officer performing his or her functions as such, whether on duty or not; [or]

Number and year of law	Short title	Extent of amendment
		<p>(ii) a person who has given or is 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></p> <p>(iii) <u>a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes Act, 2016;</u> .</p> <p>2. The amendment of Part I of Schedule 2 by the substitution for paragraph (b) of the item "Rape" of the following paragraph: "(b) where the victim –</p> <p>(i) is a person under the age of 16 years;</p> <p>(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; [or]</p> <p>(iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</p> <p>(iv) <u>is a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes Act, 2016; or</u> .</p> <p>3. The amendment of Part I of Schedule 2 by the substitution for paragraph (b) of the item "Compelled rape" of the following paragraph: "(b) where the victim –</p> <p>(i) is a person under the age of 16 years;</p> <p>(ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; [or]</p> <p>(iii) is a person who is mentally disabled as contemplated in section of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or</p> <p>(iv) <u>is a victim of a hate crime as defined in section 1 of the Prevention and Combating of Hate Crimes Act, 2016; or</u> .</p>