



Prevention and Combating of Hate Crimes
and Hate Speech Bill, 2018:

**Qwelane v South African Human Rights
Commission and Another Case CCT
13/20**

18 August 2021

PORTFOLIO COMMITTEE ON JUSTICE
AND CORRECTIONAL SERVICES



the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

ONE CONSTITUTION, ONE NATION

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Part I: The Bill

- **Purpose of Bill:**
 - The Bill seeks to address the increasing number of incidents motivated by prejudices, in the form of hate crimes and hate speech, and to assist persons who are victims thereof; and
 - creates the offences of hate crimes and hate speech and puts in place measures to prevent and combat these offences.
- **Clause 1** contains self-explanatory definitions. “Court” excludes district courts from the application of the Bill. Only the High Court and regional courts, where there are more experienced officers, may deal with the adjudication of these offences.
- **Clause 2** sets out the objects of the Bill, which are self explanatory.

Part I: Continued

- **Clause 3: Hate crimes**

- If a person commits any recognised offence under any law, commonly referred to as the “base crime or 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 group of persons who share the said characteristics.
- A prosecution in respect of a hate crime may only be instituted on the authorisation of the Director of Public Prosecutions having jurisdiction (Clause 4(3)).

Part I: Continued

- **Clause 4(1): Hate speech**

- **4(1)(a):** Any person who intentionally publishes, propagates or advocates anything or communicates 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** or to **promote** or **propagate hatred** based on age, albinism, birth, colour, culture, disability, ethnic or social origin, gender or gender identity, HIV status, language, nationality or migrant or refugee status, race, religion, sex, which includes intersex or sexual orientation, is **guilty of the offence of hate speech**.
- **4(1)(b):** creates an offence when **hate speech material** is intentionally distributed or made available **in cyber space**.
- **4(1)(c):** any person who intentionally **displays any material** or makes available any material **which constitutes hate speech**, which is accessible by or directed at a specific person who can be considered to be a victim of hate speech, is guilty of an offence.



Part I: Continued

- **Clause 4(2): Exemptions to criminal liability**
 - **4(2)(a) to (c):** Confirm the right of freedom of expression as enshrined in section 16(1) of the Constitution, which includes, 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. These provisions exclude from 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.
 - **4(2)(d):** excludes from hate speech any bona fide interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings. Artistic creativity or performance or espousal of religious doctrine will not qualify for exemption from hate speech if it advocates hatred that constitutes incitement to cause harm based on any protected grounds.



Part I: Continued

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



Part I: Continued

- **Clause 6: Penalties and orders**
 - 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, subject to the penal jurisdiction of that court, (whether it be the High Court or the regional court); and
 - alternatives to fines and imprisonment: Restorative Justice Approach: presiding officers can, in terms of existing legislation, among others, section 297 of the Criminal Procedure Act, 1977, impose creative sentences which keep convicted persons out of prison, for instance suspended sentences and the postponement of sentences, with appropriate conditions.

Part I: Continued

- **Clauses 7 and 8: Directives and reporting**
 - **Clause 7:** the NDPP, after consultation with DG: Justice and Constitutional Development and the National Commissioner of SAPS, to issue directives on relevant matters and these directives must be complied with by prosecutors in the execution of their functions under the Bill.
 - **Clause 8:** requires the Minister, after consultation with the Minister responsible for SAPS and the NDPP, to make regulations on the information to be collected and collated by the SAPS and the NPA, respectively. The information obtained must be made available to Parliament and to the Chairpersons of 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.

Part I: Continued

- **Clauses 9 and 10: Prevention of hate crimes and hate speech and regulations**
 - **Clause 9:** deals with the prevention of hate crimes and hate speech and requires the State to promote awareness of the prohibition against these offences, aimed at the prevention and combating thereof. Training programmes, including social context training programmes, must be developed by the State and the South African Judicial Education Institute on the prohibition, prevention and combating of hate crimes and hate speech.
 - **Clause 10:** empowers the Minister to make certain regulations in order to achieve the objects of the Bill.

Part I: Continued

- **Clauses 11: read with the Schedule to the Bill**
 - sets out the consequential amendments of 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. The amendments in the Schedule to the Bill only relate to hate crimes and not to hate speech.
 - The hate crimes to be included in Schedules 5 and 6 to the Criminal Procedure Act, relating to bail, in Parts I and II to the Criminal Law Amendment Act, 1997, relating to compulsory minimum sentences and in Schedule 3 to the Child Justice Act, 2008, relating to the most serious offences committed by children, constitute the most serious offences known in our law.
 - They are all characterised by the most violent infringements of the right to the security of the person or serious damage to property.

Part II: Background information

- **Facts of case:** Mr Qwelane **published an article** in a Sunday newspaper on 20 July 2008 which was found to be **offensive towards** members of the **LGBT+ community**;
- Matter eventually came before the CC at the instance of the **SAHRC** which **received complaints** from, among others, members of the LGBT+ community;
- Essence of case before the CC:
 - Sections 10 and 12 of PEPUDA, read with sections 9 and 16 of the Constitution;
 - Balancing the rights of **freedom of expression, equality and dignity**;

Part III: Placing the Qwelane judgment in perspective

- Judgment primarily deals with provisions of PEPUDA, read with sections 9 and 16 of the Constitution;
- PEPUDA: prohibited grounds stipulated in section 10, read with definition of “prohibited grounds” in section 1 of PEPUDA;



Part IV: Judgment: PEPUDA read with Constitution

- **PEPUDA:**
 - Section 1: “**prohibited grounds**” are—
 - (a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status; or
 - (b) any other ground where discrimination based on that other ground—
 - (i) causes or perpetuates systemic disadvantage;
 - (ii) undermines human dignity; or
 - (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).

Part IV: Continued

- **PEPUDA:**
 - Prohibition of hate speech: **S 10(1):**
 - Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—
 - (a) be **hurtful**;
 - (b) be harmful or to incite harm;
 - (c) promote or propagate hatred.

Part IV: Continued

- **PEPUDA:**
 - Prohibition of dissemination and publication of information that unfairly discriminates: **S 12:**
 - No person may—
 - (a) disseminate or broadcast any information;
 - (b) publish or display any advertisement or notice,that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.



Part IV: Continued

- **Questions before CC (in Qwelani matter):**
 - whether s10 entails a subjective or objective test;
 - whether s10(1)(a) to (c) should be read disjunctively or conjunctively;
 - is the provision impermissibly vague; and
 - whether the provision leads to an unjustifiable limitation of section 16 of the Constitution.

Part IV: Continued

- **Does s10 entails a subjective or objective test?**
 - With reference to the phrase “that could reasonably could be construed to demonstrate a clear intention” the Court found that it is plainly an objective standard that requires a reasonable person test.
- **Whether s10(1)(a) to (c) should be read disjunctively or conjunctively?**
 - The CC found that on a disjunctive reading, section 10 would prohibit mere private communication which could reasonably be construed to demonstrate a clear intention to be hurtful – the CC found that this would be an overly extensive and impermissible infringement of freedom of expression — the provision should be read conjunctively.

Part IV: Continued

- **Is the provision (“hurtful”) impermissibly vague?**
 - “Hurtful” on a conjunctive reading of the provision is redundant and contributes to the lack of clarity of the provision. The term “hurtful” is vague and breaches the rule of law.
- **Whether the provision leads to an unjustifiable limitation of section 16 of the Constitution?**
 - The limitation of “hurtful” speech goes beyond the justified limitation of hate speech and is therefore unconstitutional.



Part V: Conclusion

- **The Bill does not use the term “hurtful” when it comes to hate speech, but the CC found that the expansion of the listed grounds to include analogous grounds, does not render the definition of prohibited grounds unconstitutional. The extended prohibited grounds are narrowly crafted to fulfil the purpose of the hate speech prohibition. Accordingly, the CC concluded that the limitation is proportionate in an open and democratic society. The challenge based on a limitation of section 16 of the Constitution did not succeed.**
- Clause 4(1)(a)(i) and (ii), in the Bill as introduced is disjunctive. Careful consideration must be given to the provisions of this clause to ensure its constitutional compliance as per the Qwelane judgment. The judgment expressed (at para 104) that “ Furthermore, and critically, a disjunctive reading would render the impugned provision unconstitutional, since merely hurtful speech, with no element of hatred or incitement, could for example constitute hate speech. This would be an impermissible infringement on the freedom of expression as it would bar speech that disturbs, offends and shocks.



Part V: Conclusion

- Clause 4(1)(a)(aa) to (oo) of the introduced Bill lists the specified grounds upon which hate speech may be premised. The Qwelane judgment dealt only with hate speech against the LGBT+ community. The judgment specifically noted the “broadness of the prohibited grounds, but undertook no further analysis.” The judgment states, at para 128, that this analysis is best left with Parliament to deal with. Parliament must therefore delve deeper into this clause of the introduced Bill.
- The Department published amendments to PEPUDA, and comments are currently being evaluated. The Qwelane judgment, while providing a reading-in to address the constitutionally invalid clause, gave Parliament 24 months to cure the defect. In reviewing the PEPUDA amendments, an amendment to address the order of the CC, will be drafted.

End: Thank you

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