



Submission to the Portfolio Committee on Justice and Correctional Services on the

**PREVENTION AND COMBATING OF
HATE CRIMES AND HATE SPEECH BILL [B9-2018]**

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Introduction

Triangle Project and the **Women's Legal Centre** ('WLC') welcomes the opportunity to make written submissions on the long-awaited Prevention and Combating of Hate Crimes and hate Speech Bill [B19-2018] (**the Bill**).

Triangle Project is a non-profit human rights organisation offering professional services to ensure the full realisation of constitutional and human rights for lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) persons, their partners, and families. The organisation is one of the oldest organisations of its kind in South Africa, with a community presence and service-delivery history dating back to 1981. Triangle Project was responsible for establishing the first gay and lesbian health project in a Black African township in Cape Town, and today we are one of the largest LGBTIQ organisations in South Africa, offering a wide range of services to a diverse and growing community.

Our organisation's three core services centre on Health and Support, Community Engagement and Empowerment, and Research and Advocacy. Our direct services to LGBTQI+ communities include health services related to general and sexual health, counselling, support groups, a helpline, public education and training services, advocacy, community outreach, and **court support to survivors of hate crimes**.

The WLC (<http://www.wlce.co.za/>) is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy, education and training. The Centre has a vision of women in South Africa who enjoy equal and substantive access to their rights, being free from violence, empowered to ensure their own sexual health and reproductive rights, free to own their own share of property and resources, having a safe place to stay, access to work in a safe and equal work environment.

The WLC was founded in 1998 and remains uniquely placed as the only dedicated women's rights legal centre of its kind in South Africa. Our programmatic work and focus areas are shaped by the women who seek assistance from us. These submissions are based on our expertise developed over the past 20 years in representing women before the Courts in our country and engaging in strategic advocacy on their behalf.

These brief written submissions are directly informed by targeted engagement with the Hate Crimes Working Group, Intersex South Africa and Restorative Justice as well as beneficiaries from our solidarity spaces. Their voices must be heard by the legislature, as new reports about hate crimes and hate speech against women and LGBTQI+ people reach us via the media at an alarming rate. Discrimination, violence, human rights violations, and criminalisation targeting lesbian, gay, bisexual, transgender, queer, intersex, plus (LGBTQI+) people in South Africa continue to have a severe and shameful impact. In its 16 April 2021 letter to the Speaker of Parliament, the Hate Crimes Working Group (of which Triangle Project is a member) pointed out that just since the revival of the Bill by the 6th Parliament in October 2019, there have been a shocking number of reports of brutally violent crimes against LGBTQI+ people living in South Africa. While these reports are disturbing enough on their own, they represent but the tip of the iceberg, and do not reflect the true prevalence and impact of hate crimes and hate speech against LGBTQI+ communities in South Africa, who are facing a crisis of fear despite the promise of our progressive Constitution and supporting legislation. The

Constitutional Court as recently as July 2021 stated that “It is a truth universally acknowledged that “[t]o be hated, despised, and alone is the ultimate fear of all human being.”¹

Herewith a list of known public cases since the lapse of the bill since 2019:

Dec-19	<ul style="list-style-type: none"> • Portia Simphiwe Mtshweni, a 25-year old LGBTQI+ individual who was murdered in an apparent hate crime. This took place in Tweespruit, Mpumalanga.²
01-Jan-20	<ul style="list-style-type: none"> • Nare Mphela, transgender activist who was murdered³
	<ul style="list-style-type: none"> • Bulelani Majeka, was attacked in a crime clearly motivated by hate directed at LGBTQI+ individuals.⁴
01-Feb-20	<ul style="list-style-type: none"> • Rape of a LGBTQI+ individual [name not disclosed], gang-raped allegedly because of her sexuality.⁵
	<ul style="list-style-type: none"> • Lindokuhle Cele, a well-known LGBTQI+ activist, stabbed multiple times in public in believed hate crime – the finalisation of this case only took place in April 2021.⁶
Mar-20	<ul style="list-style-type: none"> • Death of Adnaan Davids, murdered, attack may have been linked to his sexuality and that he was a drag queen.⁷ • Death of Liyabona Mabishi, stabbed 13 times, attack might be related to Mabishi’s sexuality.⁸
Apr-20	<ul style="list-style-type: none"> • Elma Robyn Montsumi, a trans woman and sex worker, found dead while in police custody⁹
19-Jun-20	<ul style="list-style-type: none"> • Death of Kirvan Fortuin, motive may have included hate based on the victim’s sexual orientation/gender identity or expression as a result of the victim being an LGBTQI+ individual.¹⁰

¹ Qwelane v The South African Human Rights Commission (<http://www.saflii.org/za/cases/ZACC/2021/22.html>)

² <https://www.mambaonline.com/2019/12/31/mpumalanga-lesbians-horror-murder-thought-to-be-hate-crime-graphic/>

³ <https://www.news24.com/news24/southafrica/news/transgender-activist-nare-mpihela-found-murdered-boyfriend-questioned-20200109>

⁴ <https://www.dailysun.co.za/News/he-called-me-moffie-and-hit-me-with-a-bottle-20200109>

⁵ <https://www.dailyvoice.co.za/news/boys-bust-for-raping-lesbian-43994634>

⁶ <https://www.iol.co.za/mercury/news/lgbtqi-activist-slain-in-durban-hate-crime-42460243>

⁷ <https://www.news24.com/news24/southafrica/news/two-in-court-for-murder-of-athlone-drag-queen-20200308>

⁸ <https://www.iol.co.za/news/south-africa/western-cape/five-held-after-gay-teen-murdered-in-alleged-hate-crime-in-khayelitsha-49336418>

⁹ <https://www.news24.com/news24/southafrica/news/police-watchdog-investigating-baffling-death-of-sex-worker-while-in-custody-20200603>

¹⁰ <https://www.iol.co.za/news/south-africa/western-cape/teen-held-after-lgbtqi-activist-and-choreographer-kirvan-fortuin-stabbed-to-death-49336756>

23-Aug-20	<ul style="list-style-type: none"> • Shernice 'Fetu' Jonathan was murdered in a potential hate crime related to her sexuality. This took place in Schauderville, Eastern Cape.¹¹
Feb-21	<ul style="list-style-type: none"> • Bonang Gaelae, 29, whose throat was slashed in Sebokeng on 12 February.¹²
Mar-21	<ul style="list-style-type: none"> • Nonhlanhla Kunene, 37, whose body was found half naked in Edendale, Pietermaritzburg¹³ • Sphamandla Khoza, 34, who was beaten, stabbed and had his throat slit in Durban¹⁴
Apr-21	<ul style="list-style-type: none"> • Nathaniel 'Spokgoane' Mbele, who was stabbed in the chest in Tshirela, Vanderbijlpark¹⁵ • Khulekani Gomazi, 27, who was beaten to death on 3 April in Mpophomeni in KwaZulu-Natal after being accused of sexual assault.¹⁶ • Andile 'Lulu' Nthuthela, 41, whose mutilated and burned body was found on 10 April in KwaNobuhle, Kariega.¹⁷ • Lonwabo Jack, a young LGBTIQ+ individual who had just celebrated his 22nd birthday on 17 April. His lifeless body was found on a pavement the next day in Nyanga, Cape Town.¹⁸ • Lucky Kleinboy Motshabi, 30, whose body was found in a field in the town of Dennilton, Limpopo on 24 April. He was naked with stab wounds on his body.¹⁹
May-21	<ul style="list-style-type: none"> • Phelokazi Mqathana, 24, who was stabbed to death on the weekend of 1 May in Khayelitsha, Cape Town. It was reported that a man stabbed her after she rejected his advances.²⁰ • Lindokuhle Mapu, 23, who was stabbed to death in Mfuleni, outside of Cape Town, on 9 May.²¹ • Aubrey Boshoga, 48, whose body was dumped outside his house in Johannesburg on 29 May.²²

¹¹ https://www.heraldlive.co.za/news/2020-08-08-body-of-murdered-pe-woman-found-in-schauderville/?utm_medium=Social&utm_source=Facebook&fbclid=IwAR3lo-1xQ1VOnQjo6nguDgBFZSnBGMtt2KeMwz_gDJ2gldJbzzYYvoBhxrw#Echobox=1596909818

¹² <https://www.mambaonline.com/2021/02/25/justice-for-bonang-alleged-killer-appears-in-court/>

¹³ <https://www.mambaonline.com/2021/03/12/report-lesbian-woman-murdered-in-pietermaritzburg/>

¹⁴ <https://www.mambaonline.com/2021/04/06/sphamandla-khoza-laid-to-rest-as-queer-hate-festers-online/>

¹⁵ <https://www.mambaonline.com/2021/04/14/queer-hate-rocks-sa-gay-gauteng-man-stabbed-to-death/>

¹⁶ <https://www.mambaonline.com/2021/05/12/lindokuhle-and-khulekani-two-more-lgbtqi-lives-lost/>

¹⁷ <https://www.mambaonline.com/2021/04/13/queer-individual-andile-ntuthela-butchered-and-burned-in-uitenhage/>

¹⁸ <https://www.mambaonline.com/2021/04/19/sas-queer-massacre-gay-man-lonwabo-jack-murdered-on-his-birthday/>

¹⁹ <https://www.mambaonline.com/2021/04/30/hate-crime-crisis-lucky-motshabi-is-7th-lgbtqi-person-murdered/>

²⁰ <https://www.mambaonline.com/2021/05/04/hate-crime-crisis-phelokazi-mqathana-is-8th-lgbtqi-person-murdered/>

²¹ <https://www.mambaonline.com/2021/05/12/lindokuhle-and-khulekani-two-more-lgbtqi-lives-lost/>

²² <https://www.mambaonline.com/2021/05/31/gay-artist-aubrey-boshoga-stabbed-to-death-in-joburg/>

Jun-21	<ul style="list-style-type: none"> •Masixole Level, 28, whose body was found on a street in Kwazakhele, in the Eastern Cape, on 6 June.²³ •Anele Bhengu, 28, whose stabbed and mutilated body was discovered in KwaMakhutha, KZN, on 13 June.²⁴ •Lulama Mvandaba, who died days after being beaten outside a shebeen in Khayelitsha in the Western Cape in June.²⁵ •The body believed to be that of gay man Sam Mbatha was discovered in his burnt-out car in Klipgat in the North West province on 17 June.²⁶ •Motse Moeketsi, 36, whose body was discovered in Freedom Park in Gauteng after he was reported missing on 18 June.²⁷ •Sheila Lebelo, a 33-year-old lesbian-identifying woman, who was murdered in Atteridgeville, outside of Pretoria, in June.²⁸
Aug-21	In August, 23-year-old Thapelo Sehata died in hospital following an assault in the town of Senwabarwana in Limpopo. ²⁹

Triangle Project beneficiaries were interviewed regarding their experiences in relation to hate crimes and hate speech.

From a focus group held with 12 participants, the following conclusions were drawn in terms of:

Experiences with hate crimes:

- All participants agreed that they had experienced a hate crime due to their sexual orientation, gender or work as a sex worker
- 3 participants shared experiences of hate crimes perpetrated by family members or people they knew
- 1 participant shared their experience of being raped because of being a “butch” lesbian who is also a sex worker
- 2 participants said hate crime was so rife in their communities that they were constantly in fear of victimization and could thus not live openly as gay.
- Visible signs of distress we witnessed by three participants. They opted not to share their experiences. This was a definite indication of the continued trauma of their experiences.
- Hate crimes restricts freedom of movement for LGBTI people. All participants agree that they are areas they have to avoid in their own community to avoid being attacked by members of their community because they identify as LGBTI

Experiences with hate speech:

- All participants agreed that they had been on the receiving end of hate speech.

²³ <https://www.mambaonline.com/2021/06/14/the-horror-continues-two-more-lgbtq-murders-reported/>

²⁴ <https://www.mambaonline.com/2021/06/14/the-horror-continues-two-more-lgbtq-murders-reported/>

²⁵ <https://www.mambaonline.com/2021/06/15/shock-as-queer-woman-lulama-mvandaba-murdered-in-khayelitsha/>

²⁶ <https://www.mambaonline.com/2021/06/24/sam-mbatha-remains-missing-as-two-arrested-over-burned-car-murder/>

²⁷ <https://www.mambaonline.com/2021/06/28/murdered-gay-man-motse-moeketsi-laid-to-rest/>

²⁸ <https://www.mambaonline.com/2021/07/07/lgbtq-murders-lesbian-woman-sheila-lebelo-slain-in-tshwane/>

²⁹ <https://www.mambaonline.com/2021/08/02/lgbtq-woman-thapelo-sehata-murdered-in-limpopo/>

- 2 participants shared that being on the receiving end of constant hate speech caused depression and suicidal thoughts.
- 1 participant shared that they were outed as being bisexual and was targeted in her community and the church. She eventually moved to a different community with her mother and child as she feared that the victimization would affect them too.

Possible solutions to change the attitudes of perpetrators:

- All participants agreed that a hate crime or hate speech was not only targeted at victim, but it is a message or threat against the entire LGBTI community. Therefore, there is an opportunity for restorative justice to play a role in restitution as part of sentencing of a perpetrator.
- Restorative Justice approaches suggested:
Some participants suggested a mandatory community service period in an LGBTIQ+ organization e.g. 6-months
1 participant suggested a public apology where a perpetrator is given an opportunity to share what they have learnt and why it is important to refrain from hate crimes and hate speech.

In 2016 report titled *Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) People in South Africa, 2016*³⁰ initiated by the Love Not Hate Campaign revealed that more than half (55%) of Lesbian, Gay, Bisexual and Transgender (LGBT) South Africans fear they will experience discrimination due to their sexual orientation or gender identity.

These fears are well founded: 44% of those surveyed said they had indeed experienced discrimination in their everyday life, due to their LGBT status.

Among the most troubling findings are that discrimination levels in schools are extremely high: 56% aged 24 years or younger indicated they had experienced discrimination based on their LGBT status in school.

Of those who experienced discrimination, 7% had been punched, hit, kicked or beaten; 7% experienced violence from a family member; and 6% had been raped or sexually abused.

For this reason, Triangle Project and the WLC at the outset wishes to impress the on the Portfolio Committee on Justice and Correctional Services (**the Committee**) the critical importance of this Bill to our communities, and to ensuring that the rights and values to equality and dignity is upheld as guaranteed in the Constitution. Traditionally, within legislation and policy our understanding of sexuality, sex and gender has been informed and developed within a discriminatory belief system based on heteropatriarchal, endosex³¹ and cishnormative³² assumptions, norms and prejudices. It is

³⁰ <https://out.org.za/wp-content/uploads/2020/10/Hate-Crimes-Against-LGBT-People-in-South-Africa-21-November-2016-Web.pdf>

³¹ “Endosex” refers to persons born with sex characteristics that fall within dominant social norms for typically “male” or “female” bodies. It is the opposite of “intersex”, which refers to persons born with sex characteristics that are more diverse than dominant social norms for typically “male” or “female” bodies.

³² “Cishnormative” refers to the discriminatory belief that every person is or should be cisgender, in other words, that every person has or should have a gender identity that is the same as the gender assigned to them at birth. Cishnormativity invisibilises and excludes transgender persons, whose

imperative that this Bill consciously rejects this old approach, to give LGBTQI+ people back their sense of belonging in South Africa, and trust that their human rights will be actively protected, respected, and promoted by the administration of the day.

The importance of S9 of the constitution cannot be overestimated the constitution itself clearly provides that South Africa is one sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism.

The achievement of equality is the bedrock of the Constitution. The Constitutional Court has said that the Constitution *“commands us to strive for a society build on the democratic values of human dignity, the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance”*³³.

The Constitution therefore does not only guarantee the right to equality, but also imposes a positive duty on all organs of state to protect and promote the achievement of equality. The concept of equality that emerges from our Constitution goes beyond mere formal equality and mere non-discrimination rather, our constitution recognises that decades of systemic discrimination cannot be eliminated without positive action being taken to achieve that result.

The Special Rapporteur on Violence Against Women its causes and consequence in her report on South Africa³⁴ found that:

“The violence inherited from apartheid still resonates profoundly in today’s society dominated by deeply entrenched patriarchal norms and attitudes towards the role of women and which make violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted phenomenon.”

The Special Rapporteur further highlighted the particular violence and discrimination faced by lesbian women and persons based on their sexual orientation and gender identity.

Our society is one where many transgender and gender diverse persons face pervasive discrimination and structural violence in all spheres of their lives. They often face rejection by their families and communities, are left homeless being subjected to violence and discrimination often by the very police and law enforcement that are meant to be enforcing and protecting them. Based on our experience for transwomen in particular the only way in which to provide for themselves financially are to enter into the sex work profession. An intersectional approach to addressing the issue of hate crimes and hate speech is therefore needed to take into account the intersecting forms of violence that are being experienced but also to ensure that effect is given to S9 of the constitution.

The contributing organisations recognise that it is within this lived reality, legislative framework as well as constitutional obligation on the State that the enactment of this Bill finds application.

gender identities differ from the gender assigned to them at birth; nonbinary persons, whose gender identities transcend the gender binary of woman/girl/female and man/boy/male; and gender diverse persons, whose gender and gender expressions are more diverse than dominant gender norms of femininity and masculinity.

³³ Minister of Finance and Others v Van Heerden [2004] ZACC 3

³⁴ Report of the Special Rapporteur on violence against women, its causes and consequences on her mission to South Africa

Triangle Project and the WLC would also **welcome any opportunity to make oral submissions** to the Committee at the time of public hearing in connection with this Bill, or indeed at any time that the Committee may decide.

Preamble

We note that the preamble to the Bill refers to only two of South Africa's international human rights commitments:

- the Declaration adopted at the United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban (**the Durban Declaration**), and
- the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**).

While we welcome state action to make good on these historical commitments, we submit that there are many other international instruments that are applicable in the context of the State's obligation to advance and ensure equality and the elimination of discrimination. Hate crimes and hate speech against women and LGBTQI+ people are after all forms of discrimination, which often intersects with the other identities and lived realities of ordinary South Africans. We should submit that a holistic approach is needed that views the discrimination that vulnerable persons in our society experience through an intersectional lens recognising that they experience discrimination very differently based on where they are positioned in our society. By failing to recognise the long list of applicable international obligations as well as recognising the intersectional discrimination faced by women and LGBTQI+ persons the Bill inadvertently prioritises racial and xenophobic discrimination over others forms of hate and prejudice that are equally damaging to our society.

We therefore submit that the preamble of the Bill needs to include and set the foundational framework of the legislation contained within. It does therefore include a reflection on the **intersectional nature** of the discrimination and prejudice that fuel hate crime and hate speech against women and LGBTQI+ people. Women and LGBTQIA+ people in our society have diverse identities and are not homogenous groups in terms of race, culture, religion, language, geography, health status, socio-economic circumstances, occupation, dis/ability, and other positionalities.

We strongly believe that the preamble must recall and list all instruments that have a bearing on prejudice and discrimination, and not single out any one instrument.

We suggest the inclusion of:

- African Charter on Human and People's Rights including the Protocol on Women's Rights
- African Charter on the Rights and Welfare of the Child
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and its Optional Protocol
- Convention on the Rights of the Child
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights

- Resolution 275 of the African Commission on Human and People’s Rights, on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity.
- Universal Declaration of Human Rights
- Yogyakarta Principles Plus 10
- The Convention on the Elimination of All forms of Discrimination Against Women

Definitions and Language

Existing definitions and language

Triangle Project and the WLC wishes to point out that the language used overall in the Bill is binary and as a result not inclusive and representative of the people of South Africa. The use of the binary pronouns of “his or her” throughout the Bill is therefore problematic and we submit that it is critically important to ensure that the Bill is drafted in language that recognises the diverse identities of South Africans we therefore recommend the use of the pronoun “they/them/their” to replace “his or her” wherever this appears. Definitions are critically important in legislation as it provides us with legal certainty in respect of the language and wording found in the text. We make the following submissions in respect of the definitions section of the Bill.

Harm: Triangle Project has grave concern about the lack of clarity in the Bill about the true meaning of “harm”. The definition as it is currently worded is ambiguous and potentially problematic in light of the judgment handed down by the Constitutional Court in the case of Qwelane³⁵ where in respect of speech in particular the Court found that S10(1) of the Equality Act is inconsistent with S1(c) and S16 of the Constitution and thus unconstitutional and invalid to the extent that it includes the word “hurtful” in the prohibition against speech. Similarly, it may be argued that “... any emotional, psychological, physical, social or economic harm” as currently contained in the Bill is too broad. As pointed out by the Constitutional Court in Qwelane, the test for hate speech is an objective one to determine whether the intentions were to be harmful, or to incite harm and to promote or propagate hatred. It is according to the Court about assessing the identity of the speaker, the context in terms of which the speech occurred and its impact as well as the likelihood of the speech inflicting harm or propagating hatred. We would submit that herein lies a more meaningful expression of the “harm” that our Courts require in order to declare speech to be hate speech.

We are also concerned that the definition relies on the discretion of a judicial officer in interpreting whether “harm” in effect took place without any guidance in respect of the definition and meaning of “emotional, psychological, physical, social or economic harm” These will rely on a level of evidence that will need to be produced and which the state will need to bear the cost of in respect of expert evidence to be deduced. The implications in practice as well as the cost related to proofing elements of the offence will need to be taken into account and provision will need to be made for this.

“hate crime” and “hate speech” remains undefined in the definition section. We submit that it is important to include the definition section so as to guide ordinary South Africans on the concepts

³⁵ See para. 1(b) of the Order

and meanings of the term. It is most unhelpful for an individual to respond to a question of what is a hate crime for example by saying that it has the meaning ascribed to it in S3 91) of the Act. This renders the offence in the ordinary understanding and discourse to be meaningless. We therefore cannot stress enough how important it is to define both of these terms (and effective offences) in the definitions section.

When engaging community members around how hate crimes and hate speech have affected them, it was relayed that victims live with constant fear in their communities due to high levels of hate crime. They do not feel safe and don't think that even the police are invested in protecting them.

Mental health issues were relayed in the form of anxiety attacks because of consistent fear.

Beneficiaries have spoken about having experienced hate speech from childhood due to entrenched societal perspectives that use religion to affirm derogatory speech towards LGBTI people. This has affected their entrenched right to express their sexual orientation and gender identity which has affected their quality of life in their communities.

Intersex: Triangle Project notes the inclusion of a definition for “**intersex**” in the definitions sections of the Bill. However, we also note that there are no definitions of any of the other listed characteristics and grounds in section 3(1) and 4(1).

In the circumstances, we submit that the definition of “intersex” should be removed from the definitions section of the Bill. The scientific, academic, and societal understanding of diverse sex characteristics is constantly evolving, and we are concerned that including a definition of intersex in the Bill, to the exclusion of other listed characteristics and grounds, will shackle the legal interpretation of the term to an understanding that may not age well over time.

However, if the Committee elects to retain a definition of “intersex”, we submit that **all** the listed characteristics and grounds in sections 3 and 4 should be properly defined. In this case, the most up-to-date definition as preferred by the intersex community of South Africa itself must be used instead. The existing definition must then be replaced with: **Omitted definitions and language:**

Associates: Triangle Project proposes the inclusion of a definition for the term “**associates**” in this section of the Bill. The term “associates” or variations of it appears several times in the Bill, alongside “family members.” We must point out that many women and LGBTIQ+ people living in South Africa are rejected by their family members and communities, with many made homeless and/or vulnerable to mental illness and emotional/psychological trauma as a result. This underscores the importance of the role of friends, partners, and people who may not be related to victims of hate crime and hate speech by consanguinity, in the lives of women and LGBTQI+ people. For this reason, we submit that the term “associates” should instead be used throughout the Bill, and be defined inclusively to include not only family members, but all persons who may have a close connection with a victim.

“**gender expression**” **although** referred to in the Bill is not defined and we submit that it should be as it is a term that those implementing the legislation will need to understand. Our experience is that it is often conflated with gender identity and so we suggest the following definition:

“gender expression” means the way in which a person expresses their gender identity, or how it is perceived by others. It may involve using dress, speech, mannerisms or other means, and if freely chosen, modification of bodily appearance or function by medical, surgical or other means”

“**gender identity**” **similarly** is referred to in the Bill and requires a definition. We suggest the following:

“gender identity means a person’s deeply felt internal and individual experience of gender, which may or may not correspond with the gender they were assigned at birth, including their personal sense of the body.”

“sex” is used in the Bill without any guidance on the meaning of the word. We suggest the following be included in terms of definition:

“sex” means female, male, intersex and all other forms of sex characteristics as well as the alteration of sex characteristics, whether this results from gender affirming surgery or other surgeries, medical treatment (e.g. hormonal), or through injury or disease.”

“sexual orientation” is referred to in the Bill and as indicated often conflated with gender identity. We therefore recommend the following definition:

“Sexual orientation means a person’s capacity for profound emotional, affectional, and sexual attraction to, and intimate and sexual relations with individuals of a different gender or the same gender or more than one gender.

Section 3(1) of the Bill: the offence of hate crime

Triangle Project and the WLC broadly supports the creation of the new offence of hate crime. However, the section requires some refining, as outlined below. Our proposed amendments to the section are in bold for ease of reference.

Existing section	Proposed changes	Motivation
<p>3. (1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person’s prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim’s association with, or support for, a group of persons who share the said characteristics:</p> <p>(a) age; (b) albinism; (c) birth; (d) colour; (e) culture; (f) disability; (g) ethnic or social origin; (h) gender or gender identity; (i) HIV status; (j) language;</p>	<p>3. (1) A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person’s prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or their associates or the victim’s association with, or support for, a group of persons who share the said characteristics:</p> <p>(a) age; (b) albinism; (c) birth; (d) colour; (e) culture; (f) disability; (g) ethnic or social origin; (h) gender, gender identity, or gender expression; (i) HIV status, or any other medical diagnosis;</p>	<p>Further, we submit that it is necessary to add “gender expression”, “asylum seeker”, and “sex characteristics” to the listed characteristics and grounds throughout the Bill, to properly complete the lists according to the objects of the Bill.</p>

(k) nationality, migrant or refugee status; (l) occupation or trade; (m) political affiliation or conviction; (n) race; (o) religion; (p) sex, which includes intersex; or (q) sexual orientation.	(j) language; (k) nationality, migrant, asylum seeker or refugee status; (l) occupation or trade; (m) political affiliation or conviction; (n) race; (o) religion; (p) sex, sex characteristics which includes intersex; or (q) sexual orientation. (r) marginalised socio-economic status, (s) vulnerable and criminalised professions such as sex work; (t) personal appearance; (u) current or past incarceration or detention in either a correctional facility or psychiatric facility (v) any other ground either perceived or real	
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Triangle Project and WLC also express concern about the lack of provision in the offence of hate crime motivated by intersecting forms of discrimination, on which people in South Africa may experience violent discrimination and which meets the criteria for a hate crime. In this regard, we are concerned about hate crimes against **unhoused (‘homeless’) people, people who use drugs, and those with health statuses that do not relate to HIV (e.g. TB and now also COVID 19)**. It is trite that these far too often marginalised persons are exceptionally vulnerable to prejudice, deprivation, and abuse – including by state actors. Many of our clients that we assist through our various programmes inform the position that more is required in respect of recognising the rights of persons who too often are rendered invisible in our society and who suffer stigma and prejudice as a result.

Discrimination against people who are unhoused, and those who use drugs, is well-documented internationally. In fact, “homelessness” has been included under the protection of hate crime legislation in several jurisdictions in the United States.³⁶ While there is a lack of clear reliable data available on hate crimes against homeless people in South Africa, research has argued that South Africa would benefit from following this example in the development of its own legislation.³⁷ We submit that this holds equally for people who use drugs, because people who use drugs are criminalised and stigmatised so “discriminatory language, drug shaming, and defamation are accepted and commonplace.”³⁸

³⁶ <https://www.nationalhomeless.org/publications/hatecrimes/levin.html>

³⁷ Popheim, JP. 2019. *Exploring the experiences of victimisation of the homeless*. Master’s of Social Science with Specialisation in Criminology in the Department of Criminology, Faculty of the Humanities at the University of the Free State, Bloemfontein. Available at: <https://scholar.ufs.ac.za/handle/11660/9830>

³⁸ International Network of People who Use Drugs. 2014. *Stigmatising People Who Use Drugs*. INPUD Secretariat, London. Pg 5. Available at

Section 4(1) of the Bill: the offence of hate speech

We support inclusion of the offence of hate speech in the Bill. This we submit is in line with our Courts interpretation of speech that is harmful. In the cases of Rustenburg Platinum Mine³⁹ the Court emphasised the need to examine the effect of what can be viewed as facially innocuous words within the structural position that is often occupied by white people in relation to black people in South Africa. This case dealt with hate speech in respect of racist speech, and reminds us that an obligation exists to address the legacy of our past under our Constitutional democracy.

In the case of South African Revenue Service⁴⁰, the Constitutional Court was called upon to consider the use of the repulsive term “kaffir” in the workplace and an insinuation that that African people are inherently foolish and incapable of providing any leadership worthy of submitting to:

“South Africa’s special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism.”

It is exactly this lack of transformation that necessitates and requires that positive action should be taken to address the discrimination that continues to prevail against women and LGBTQI+ persons in South Africa.

The Constitutional Court in Qwelane⁴¹ stated that the facts of that case “*vividly demonstrates the continuing structural subordination and vulnerability relating to sexual orientation and gender identity.*” The Court went on to say that “*The purpose of hate speech regulation in South Africa is inextricably linked to our constitutional object of healing the injustices of the past and establishing a more egalitarian society. This is done by curtailing speech which is part and parcel of the system of subordination of vulnerable and marginalised groups in South Africa.*” We strongly support the position as articulated by the Constitutional Court in its position, not only in relation to LGBTQI+ people living in South Africa, but in relation to all the listed characteristics and grounds already included in the Bill. Triangle Project also wishes to **re-iterate our above submission on the importance of providing for analogous grounds** in the Bill. We believe this should also extend to hate speech, to ensure that the protection of the Bill reaches all marginalised persons in society, and in recognition of the multiple identities and intersecting forms of discrimination that individuals often experience.

Existing section	Proposed changes	Motivation
4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to	4. (1) (a) Any person who intentionally publishes, propagates or advocates anything or communicates to	Triangle Project strongly submits that “ occupation and trade ” and “ political affiliation or conviction ”

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewiRsqHdqYjzAhU1QkEAHegxAHEQFnoECAIQAAQ&url=https%3A%2F%2Fdrugpolicy.org%2Fissues%2Fdiscrimination-against-drug-users&usg=AOvVaw140fwgtLsMaMVun71q6_5B

³⁹ Rustenburg Platinum Mine v SAEWA obo. Bester [2018] ZACC 13

⁴⁰ South African Revenue Service v Commission for Conciliation, Mediation and Arbitration [2016] ZACC 38

⁴¹ See para. 86 of the Judgment

<p>one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—</p> <p>(i) be harmful or to incite harm; or</p> <p>(ii) promote or propagate hatred,</p> <p>based on one or more of the following grounds:</p> <p>(aa) age;</p> <p>(bb) albinism;</p> <p>(cc) birth;</p> <p>(dd) colour;</p> <p>(ee) culture;</p> <p>(ff) disability;</p> <p>(gg) ethnic or social origin;</p> <p>(hh) gender, gender identity, or gender expression;</p> <p>(ii) HIV status;</p> <p>(jj) language;</p> <p>(kk) nationality, migrant, asylum-seeker, or refugee status;</p> <p>(ll) race;</p> <p>(mm) religion;</p> <p>(nn) sex, sex characteristics which includes intersex; or</p> <p>(oo) sexual orientation, is guilty of an offence of hate speech.</p>	<p>one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—</p> <p>(i) be harmful or to incite harm; and</p> <p>(ii) promote or propagate hatred,</p> <p>based on one or more of the following grounds:</p> <p>(aa) age;</p> <p>(bb) albinism;</p> <p>(cc) birth;</p> <p>(dd) colour;</p> <p>(ee) culture;</p> <p>(ff) disability;</p> <p>(gg) ethnic or social origin;</p> <p>(hh) gender, gender identity, or gender expression;</p> <p>(ii) HIV status;</p> <p>(jj) language;</p> <p>(kk) nationality, migrant, asylum-seeker, or refugee status;</p> <p>(ll) occupation or trade</p> <p>(mm) political affiliation or conviction</p> <p>(oo) race;</p> <p>(pp) religion;</p> <p>(qq) sex, sex characteristics which includes intersex; or</p> <p>(rr) sexual orientation, is guilty of an offence of hate speech.</p>	<p>should be included as grounds on which speech can constitute hate speech, as they appear in the hate crime provision. We strongly believe that this is necessary to truly achieve the objects of the Bill, not least given the long history of political violence and intolerance in South Africa, and which continues to characterise much our political engagement as a people to date.</p> <p>We do not believe this would pose a threat to the right to freedom of speech, given the high threshold introduced by the wording of the offence in the Bill.</p> <p>The section must also be brought in line with the <i>Qwelane</i> judgment, which demands a conjunctive reading of (i) and (ii).</p>
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Section 4(2) of the Bill: exceptions to hate speech

Triangle Project appreciates the importance of the right to freedom of speech and the right to freedom of religion as protected by the South African Constitution, and the delicate balance this section attempts to strike.

However, our country’s value system does not allow for prejudice and bigotry to hide behind a mask of religious freedom. We remain concerned by the many who spread prejudice and hate against the LGBTQI+ communities with impunity in conservative and patriarchal enclaves in South Africa, under the guise of “*bona fide*” interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings.”

Our law, in its codified and case law forms, has firmly entrenched the principle that individuals deserve dignity and equal treatment by the State irrespective of their sexual orientation. This again **underscores the importance of providing a substantive, practical, plain language definition of “harm”** in the Bill, so there will be clear understanding of when religious speech crosses the line into advocating for hatred that constitutes incitement to cause harm as per section 4(2)(d).

Section 5(1) and (2) of the Bill: Victim Impact Statements

In Triangle Project’s experience, victim impact statements (VIS) are critical in criminal court proceedings. It is a way for the victim’s voice to be heard in proceedings that are primarily between the state and the accused, and for the court to fully understand and appreciate the destruction and long-term consequences that hate crime or hate speech wreak on a victim’s life. This goes to the heart of the objects of the Bill.

Triangle Project submits, however, that too often in South Africa hate crime results in the death of the victim. In this case, there is no victim to provide a VIS or to authorise someone else to provide a VIS on their behalf. This cannot be the end of the matter.

Existing section	Proposed changes	Motivation
<p>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 a such statement on behalf of the victim, which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and his or her family member or associate.</p> <p>(2) The prosecutor must, 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).</p>	<p>5(1) For purposes of this section, a victim impact statement means a sworn statement or affirmation by one or more of the following persons:</p> <p>(i) the victim;</p> <p>(ii) someone authorised by the victim to make a such statement on behalf of the victim</p> <p>(ii) in the event of the victim’s death, the victim’s associate(s);</p> <p>(iii) an organisation or institution with expert knowledge or experience of the group to which the victim belongs, or is perceived to belong;</p> <p>which contains the physical, psychological, social, economic or any other consequences of the offence for the victim and their associate(s).</p> <p>(2) The prosecutor must, when adducing evidence or</p>	<p>We strongly submit that prosecutors in hate crime and hate speech cases should have a legal obligation to look beyond the victim and their associates alone, and deliberately seek out expert input, evidence, and opinions that can assist the court to understand the full impact of hate crime and hate speech on the broader LGBTQI+ communities, as outlined by Prof Nel in the Qwelane matter. Triangle Project has acted in this capacity in hate crime matters, but not at the invitation of the state and only after. In the criminal trial against the men who murdered 19 year old lesbian woman, Zoliswa Nkonyana we consistently put pressure on the judicial system and took to the stand to provide evidence for sentencing.</p>

	<p>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 furnish the court with a victim impact statement provided for in subsection (1).</p> <p>(2A) Where is not possible to obtain a victim impact statement provided for in subsection (1), the prosecutor must provide the court with written reasons for the absence of such a statement by either the victim, their associate(s), or an organisation or institution with expert knowledge or experience of the group to which the victim belongs or is perceived to belong.</p>	<p>We also submit that the wording of section 5(2) appears to prevaricate on the mandatory nature of the VIS, by stating that prosecutors “must” consider the impact on victims, but may only provide VISs where it is “practicable”. This is unacceptable, due to the importance of the VIS in sentencing. We believe it is non-negotiable that a VIS must be obtained on all hate crime and hate speech cases.</p> <p>We suggest that this be remedied by adding a new sub-section that directs prosecutors, in cases where it was truly impossible to obtain such a statement, to provide the court with written reasons to explain why it was impossible to obtain a VIS, and outlining all their efforts to do so.</p>
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Section 6: Penalties and Orders

We are disappointed to note that the Bill makes no provision for restorative justice nor a commitment to the creation of an enabling environment for the lodgement of complaints. We submit that reporting offences based on hate or motivated by hate will depend on the ability of the victims of such crimes to come forward and report them. Overall, this will require that mechanisms be built into the reporting process that strengthens the faith and trust that vulnerable persons must have in the criminal justice system.

Here in particular we note that in respect of S9(3) of the Bill the South African Judicial Education Institute is mandated to develop training materials for judicial officers on the implementation of the legislation. Starkly no such provision is made for members of the South African Police to receive similar training as well as members of the National Prosecuting Authority. We submit that this is a major shortfall in the Bill, which will lead to underreporting of these offences at the first port of reporting.

While we support the rationale for more severe punishments for hate crime and hate speech in terms of this Bill in recognition of the scale of harm that such crimes cause, we submit that South Africa also prizes reconciliation and transformation. We support the views expressed by the Restorative Justice Centre in its 2018 submission on the Bill, that:

- The heightened severity of punishment, and additional criminalisation of hate-motivated perpetrators, do not on their own **repair** the harms caused hate crime and hate speech;
- Elevating the penalties for hate crime and hate speech will not challenge the **underlying causes** of prejudice.

For this reason, we strongly submit that restorative justice must have a place in this Bill, **alongside** the enhanced sentences it now prescribes, which can be employed in cases where it is in line with the wants and needs of the victim or their associates. Elements of restorative justice which promotes the values of our constitution should therefore be infused into the Bill. Restorative justice options that promote reconciliation between parties, restitution and responsibility through involvement in programmes and community-based education and training should be invested in by the state for this purpose. There should be a process and provision for reconciliation and healing where appropriate and opted for by victims.

Diversion is already part of the South African law relating to accused persons who are children, as outlined in the Child Justice Act of 2008 and the Probation Services Act of 1991. We share the view of the Restorative Justice Centre that the system is well-enough developed, and capable of delivering a range of therapeutic and didactic programmes, and victim offender mediation at both a pre-trial and pre-sentence level. We submit that the same mechanisms should be provision should be available in hate crimes and hate speech matters, **strictly with the free and informed consent of victims or their associates, and only in cases where no minimum sentence is applicable.**

Section 7 of the Bill: Directives

We strongly support this section of the Bill. It is critical to provide all prosecutors with clear directions on how to conduct prosecutions, particularly how to lead evidence, and how to charge hate crimes and charge speech.

However, we submit that this section should include the same obligations on the South African Police Service (**SAPS**), in the form of National Instruction(s) and Standing Orders, and training, especially because there is no express mention of the SAPS under the general implementation provisions in section 8.

Existing section	Proposed changes	Motivation
7. 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	7. (1) 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 within 90 days of the commencement of this Act regarding all matters which are reasonably necessary or expedient to be	The role SAPS will play in the implementation of this Bill is of paramount importance. They will be first responders, as they are to most crimes, and there is ample evidence to show that SAPS officers do not always treat LGBTIQ+ persons with respect and due regard for their rights to equality and dignity.

<p>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:</p> <p>(a) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including—</p> <p>(i) the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped; and</p> <p>(ii) 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</p> <p>(b) the collection and analysis of information contemplated in section 8.</p>	<p>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:</p> <p>(a) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including—</p> <p>(i) the circumstances in which a charge in respect of such an offence may be withdrawn or a prosecution stopped; and</p> <p>(ii) 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</p> <p>(b) the collection and analysis of information contemplated in section 8.</p> <p>(2) The National Commissioner of the South African Police Service must, after consultation with the National Director of Public Prosecutions and the Director-General: Justice and Constitutional Development, issue National Instructions and Standing Orders within 90 days of the commencement of this Act 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 the opening of dockets and investigation of cases relating to hate crimes and hate speech, in order to</p>	<p>Many victims have reposted secondary victimisation by SAPS and further discrimination because the police has not been adequately trained in terms of the diversity of sexual orientation, gender identity and sex characteristics.</p> <p>Triangle has embarked on training SAPS so that they are able to identify the markers of hate crimes and to be sensitive victims by not further discriminating against them or asking intrusive or offensive questions because of their identities.</p> <p>When engaging communities, it was conclusive that there is a need for:</p> <p>Mandatory private rooms for reporting hate crimes in all police stations.</p>
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	<p>achieve the objects of this Act, including the following:</p> <p>(a) The manner in which cases relating to hate crimes and hate speech are to be dealt with, including—</p> <p>(i) the circumstances in which a charge in respect of such an offence may be withdrawn or a docket closed; and</p> <p>(ii) the collection 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</p> <p>(b) the collection and analysis of information contemplated in section 8.</p>	
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Section 9 of the Bill: Prevention of hate crimes and hate speech

Triangle Project is disappointed with this section of the Bill and cannot support it in its current form. We are particularly discouraged by its brevity, lack of specificity, and lack of detailed commitment. The section appears to “play for time” by shifting the responsibility onto the President alone to designate responsible departments at some later, unspecified time. This creates the unfortunate impression of a lack of state buy-in and intention around this Bill, which cannot be the case. While we do not object to the President choosing such departments per his discretion, we submit that this should be done now, and the designated departments listed in this Bill.

First, section 9(1) appears to place a general duty on the “the State” and only two Chapter 9 institutions to make the public aware of the prohibition against hate crimes and hate speech.

- This general duty on unspecified state institutions is vague and does not create enough accountability for specific state institutions.
- It is not clear why two Chapter 9 institutions have been listed in this section, to the exclusion of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, which we submit will equally have a role to play.
- Merely creating awareness of the Bill and what it criminalises **will not prevent hate crime**. Prevention is complex work, which requires real political commitment and resources to achieve.

Secondly, section 9(2) places a duty on the President to designate certain executive departments, for the development of certain programmes at some unspecified future time.

- We re-iterate that while we do not object to the President choosing the responsible departments, we strongly submit that this should be done now, and that specific state departments should be expressly listed in the principal legislation to create improved legal certainty and accountability for implementation.

- We submit that this Bill should create justiciable obligations in relation to executive departments that are expressly listed, together with specific responsibilities that speak to each of their departmental/institutional mandates. At the minimum, these departments and institutions must include:
 - Chapter 9 institutions
 - the Department of Basic Education
 - the Department of Cooperative Governance and Traditional Affairs
 - the Department of Government and Communication System
 - the Department of Higher Education and Training
 - the Department of Social Development
 - the Department of Sport, Arts, and Culture
 - the Department of Women, Youth and Persons with Disabilities
 - the National House of Traditional Leaders

This section of the Bill requires far greater detail, and must expressly commit strategically selected state departments and institutions to specific roles and responsibilities in preventing and combating hate crimes and hate speech.

Financial Implications

We find ourselves compelled to reject the assertion in the explanatory memorandum to the Bill that “(e)xisting budgets will be used... No additional funding is being sought to implement the Bill.”⁴² In a climate of austerity, and departmental budget cuts, we fail to see how this law can be properly implemented within existing executive budgets. We also fail to see how this assertion can be made so glibly when the Bill is not accompanied by a costing, for the public and the legislature to see if it can indeed be accommodated by existing budgets.

In the circumstances, and in the absence of a costing, the assertion that this Bill will not cost the state any additional funds, signals to us and our constituents that the state is not committed to the full and impactful implementation of the provisions of this Bill, and that it is in danger of lying on the statute books as yet another paper tiger that makes no real impact in the lives of LGBTQI+ people living in South Africa.

South Africa is notorious for failing to implement what appear to be progressive laws and policies. We believe that is in part due to a failure to **accurately calculate and acknowledge the real and full financial, human, and other resource implications when creating new laws and policies.**

We therefore remain gravely concerned that this Bill has not been costed, which means there has been no true consideration of the cost of additional training and education programmes, and the new systems and ways of working that will be required. It also means that **the full facts about the cost of implementation are not before the legislature, nor the public.**

⁴² At par 4

Conclusion

Triangle Project and the Women's Legal Centre have been advocating for the passage of hate crimes legislation since at least 2009, while the South African government has been committed to passing hate crimes legislation for nearly 20 years – following its commitment at the World Conference Against Racism in 2001. We are encouraged that the Bill has reached this important stage and are now anxious that it is passed and implemented as speedily as possible. We also strongly urge the Portfolio Committee to not allow this opportunity to pass it by and to ensure that this legislation includes meaningful timeframes and reporting structures that deliver on its long-awaited promise. We would formally request and would welcome the opportunity to give an oral submission to the Portfolio Committee.