

A RESPONSE TO THE PREVENTION AND COMBATING OF HATE CRIMES AND HATE SPEECH BILL FROM A RESTORATIVE JUSTICE PERSPECTIVE

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Introduction

The draft Prevention and Combating of Hate Crimes and Hate Speech Bill was published for public comment on 24 October 2016. The Bill seeks to give effect to the State's obligations in terms of the Constitution and international conventions to make racial superiority or hatred punishable by law. In his public comments about the Bill Justice Minister Michael Masutha stated that 'developing specific legislation on hate crimes will have a number of advantages. It will provide additional tools to investigators and prosecutors to hold the perpetrators of hate crimes accountable and provide a means to monitor efforts and trends in addressing hate crimes.'¹

The Bill makes provision for the prosecution of both hate crimes and hate speech. It goes far beyond racism, defining victims of bias or intolerance based on: race, gender, sex (which includes intersex), ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism, occupation or trade.

In introducing this Bill, South Africa is joining an international trend in which multiple jurisdictions are criminalizing both hate crime and hate speech to protect a range of different victim groups. Central to the vast majority of these laws is the provision for increased punishment 'for any offender who "demonstrates" or who is (partly) motivated by, hostility towards a victim based on the victim's actual or presumed identity traits'². The rationale for this increased punishment arises from the retributive principle of proportionality on the view that a hate offender's intention/purpose carries a higher degree of moral blameworthiness, while simultaneously recognizing the enhanced level of harm that such crimes cause to victims, communities and society more broadly.³

The Bill provides limited guidelines for sentencing, referring to relevant aspects of the Criminal Procedure Act and where those provisions are not relevant hate crimes should be regarded as aggravating circumstances. The Bill recommends hate speech, in the case of a first offence, lead to a fine or imprisonment for a period not exceeding three years, or to both a fine and prison. Apart from this, the Bill thus does not provide any new mechanisms for responding to hate crime or speech.

While there are good reasons for hate crimes legislation (some of which will be referred to below), 'there are two fundamental criticisms of this approach that should be noted:

1. The enhancement of punishment and additional criminalization of hate-motivated perpetrators does little *to repair the harms* caused by incidents of hate(emphasis in original)
2. Enhancing the penalties of offenders is unlikely to effectively challenge the underlying causes of prejudice, at least at an individual level.⁴

The Bill does not appear to have taken these criticisms into account at all. This paper argues that it essential to do so. It will present reasons for this based on a restorative justice (RJ) view and recent international research and make recommendations regarding the Bill arising from this view.

¹ Nicolson, G. *Analysis: What's in the Hate Bill?* Available on <https://www.dailymaverick.co.za/article/2016-10-24-analysis-whats-in-the-hate-bill>

²Walters, M.A. 2014 *Hate Crime and restorative justice: exploring causes, repairing harms*. Oxford, Oxford University Press, p ix

³ Walters, p xx

⁴ Walters, p xxii

RJ concepts and its current status

Since at least the early 1970s there has been growing dissatisfaction in many countries with the criminal justice system, both in the way it is conceptualised and in the way it functions. The various streams within this comprehensive movement have included the restitution movement, the victims' rights and support movement, the prison abolition movement,⁵ and more recently the therapeutic jurisprudence movement.⁶ Specific concerns that have been expressed include:

- the fact that criminal proceedings tend to exclude victims, despite the fact that they are the very people most affected by the crime incident;
- the inadequacies in the conceptual foundations or practices of criminal justice;
- the recognition that imprisonment causes suffering and debilitation;
- the inadequacies of retribution alone as a governing theory; and
- the appropriateness of making offenders accountable to their victims.

Restorative justice is a very specific stream within this comprehensive movement, and has developed in such a way that it is not limited to criminal justice matters.⁷

RJ has been described as an 'appraisive' concept (the term implies a number of values and standards); it is also an internally complex and open concept that continues to develop with experience.⁸ A useful articulation is the following three conceptions of RJ:⁹

The encounter conception

This is probably the most common way of using the term, as it captures one of the central ideas of the movement: 'that victims, offenders, and other "stakeholders" in a criminal case should be allowed to encounter one another outside highly formal, professional-dominated settings such as the courtroom'.¹⁰

The reparative conception

Proponents of this conception agree with the typical retributive view that when a crime has been committed, an injustice exists that needs to be put right. However, they reject that simply imposing pain upon offenders is either necessary or sufficient to achieve this. They hold that while the imposition of pain and suffering on offenders may provide some short-lived sense of justice for victims, it typically does not have much tangible meaning for victims, nor is it very effective in changing either the behaviour of the offender in question or of deterring similar behaviour by other would-be

⁵ Daniel Van Ness, 'An Overview of Restorative Justice Around the World', Paper presented at Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18–25 April 2005.

⁶ Annette Van der Merwe, 'Therapeutic jurisprudence: judicial officers and the victim's welfare' – *S v M* 2007 (2) SACR 60 (W) p98 - 106. At http://137.215.9.22/bitstream/handle/2263/15710/VanDerMerwe_Therapeutic%282010%29.pdf?sequence=1

⁷ Gerry Johnstone and Daniel Van Ness (eds), *Handbook of Restorative Justice*, US and Canada: Willan Publishing, 2007, p 15.

⁸ Johnstone and Van Ness, *Handbook ...*, p 8.

⁹ *Ibid*, 9–20.

¹⁰ *Ibid*, 9.

future offenders. Instead, the essence of justice is found in 'repairing the harm' or 'putting right the wrongs'. 'Putting right' can be understood to mean the need to:

- address harms (primarily those of victims, but also those of communities); and
- address causes at all levels (personal, interpersonal, environmental and societal).¹¹

Where the reparative conception differs from the encounter conception, is that even where an encounter cannot take place, other steps can be taken to address the harm resulting from a crime. This opens up the possibility of partially restorative solutions to crime being generated outside encounter processes, and reparative sanctions being ordered and administered by professionals within the criminal justice system.

The transformative conception

This conception differs significantly from the first two. Essentially it views the issues that arise from dealing with individual matters as pointers in contributing to the goal of a just society. It is grounded in a holistic perspective of people in relation to each other and the physical environment, and has implications for the way we use language, the way we treat other people and the environment, the way we allocate resources, and the way we respond to all harmful conduct.

This perspective understands that while certain conflicts can be resolved and managed, they are often based on underlying issues, often situations of serious injustice. Simply managing and resolving conflict can suggest that we ignore these issues and the need for change. The concept of 'conflict transformation' has been suggested as recognising the immediate situation as well as the underlying patterns and context. It has been defined as:

... to envision and respond to the ebb and flow of social conflict as life-giving opportunities for creating constructive change processes that reduce violence, increase justice in direct interaction and social structures and respond to real-life problems in human relationships.¹²

This conception is thus concerned with linking micro and macro perspectives, seeing individual incidents as symptoms of a broader context of structural injustice.

These three conceptions need to be regarded as different perspectives of RJ, not mutually exclusive of each other, but as part of a greater whole.

South Africa has embraced RJ in a number of significant ways. The Truth and Reconciliation Commission is regarded as a pioneering example of applying the concept at a macro political level. The concept has been defined in at least two pieces of legislation¹³; a National Policy Framework has been drafted and several superior court judgements have established a significant jurisprudence¹⁴.

¹¹ Adapted from Howard Zehr, *The Little Book of Restorative Justice*, Intercourse, Illinois: Good Books, 2002, p 2002.

¹² John Paul Lederach, *The Little Book of Conflict Transformation*, Intercourse, PA: Good Books, 2003, p 14.

¹³ The Probation Services Act, 1991 and the Child Justice Act, 2008

¹⁴ The matters in which superior courts have ruled on restorative justice are:
North Gauteng:

- S v Shilubane 2008 (1) SACR 295 (T), [2005] JOL 15671(T)
- S v Maluleke 2008 (1) SACR 49 (T)

Furthermore, the Child Justice Act, 2008, in addition to defining the concept, lists as one of its aims, 'to expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law'. It has then gone on to develop a well-articulated system for diverting a range of cases, from minor to serious, seeking to make this a central feature. Detailed provision is made for therapeutic and didactic programmes as well as victim offender mediation at both a pre-trial and pre-sentence level.

Insights from international research

Research and policy development literature available on the internet points to a rich resource in this field that has evolved since the 1990s¹⁵. Key elements from this literature include:

- an understanding of the drivers of hate crime and hate speech: a context of poverty and unmet needs, the power of stereotypes that are driven by public discourse, and that these crimes are committed by individuals rather than groups
- responses need to go beyond law enforcement to community efforts to promote racial and cultural tolerance and cohesion (including skilled community structures to address intergroup community disputes) and to model this behaviour.

These elements are also reflected in South Africa's Draft National Action Plan to combat racism, racial discrimination, xenophobia and related intolerance 2016-2021.¹⁶

Walters highlights some of the arguments in support of the usefulness of the law to address hate crime:

- The state's expression of denunciation of an offender's actions provides a public declaration of the moral wrongfulness of particular conduct and identity-based prejudices as well as the promise of future eradication of hate-motivated offences. Even though the laws that make trials leading to such outcomes possible are likely to have little individual deterrent effect they will ultimately play an important role in shaping society's attitudes towards these issues

• **S v Thabethe** 2009 (2) SACR 62 (T)

Eastern Cape:

- *S v Saayman* 2008 (1) SACR 393 (E)

Supreme Court of Appeal

- **S v Thabethe** 619/10

Constitutional Court:

- *Dikoko v Mokhatla* 2006 (6) SA 235 (CC)
- *S v M (Centre for Child Law Amicus Curiae)* 2007 (12) BCLR 1312 (CC);[2009(2) SACR 477 (CC)]
- *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC)
- *Le Roux vs Dey* CCT 45/10 [2011] ZACC 4

¹⁵ see for example Strategy – Counselling of offenders involved in hate groups (US National Crime Prevention Council) [www.ncpc.org, http://www.ncpc.org/topics/hate-crime/strategies/strategy-counseling-for-offenders-involved-in-hate-groups](http://www.ncpc.org/topics/hate-crime/strategies/strategy-counseling-for-offenders-involved-in-hate-groups); Promising Practices against Hate Crimes (US Department of Justice, May 2000) <https://www.ncjrs.gov/pdffiles1/bja/181425.pdf>; A Policy Makers Guide to Hate Crimes (US Department of Justice, March 1997) <https://www.ncjrs.gov/pdffiles1/bja/162304.pdf>; Preventing and responding to hate crimes. A resource guide for NGOs in the OSCE Region (Organisations for Security and Co-operation in Europe - OSCE's Office for Democratic Institutions & Human Rights (ODIHR) Poland, www.osce.org)

¹⁶ See particularly p46 -48

- Linked to this ‘denunciatory process of censuring hate offenders’ is a further message of support to groups that have suffered victimization, an implicit promise of active protection from targeted victimization.¹⁷

The research by Walters offers particularly helpful insights. It sought specifically to examine whether RJ helps to repair the harms caused by hate crime victimisation in the United Kingdom. It focused on a community mediation project as well as a police project and drew on observations at eighteen mediations and sixty interviews. The findings are startling:

- At the community mediation project, the majority of complainant victims interviewed (17/23) reported that the mediation process *directly improved their emotional well-being* - levels of anger, anxiety and fear were reduced directly after the mediation process. The four most common reasons were:
 - Participants felt they could **play an active part** in their own conflict resolution
 - Participants were able to **explain to the perpetrator and others** the harms they had experienced
 - Participants felt supported by mediators who **listened** to their version of events
 - The **perpetrator signed an agreement promising to desist** from further hate incidents.
- Regarding prevention of re-offending
 - **11 out of 19** separate cases of **ongoing** hate crime incidents researched in the community mediation project area ceased directly after the mediation process had taken place.
 - A further **6 cases** stopped after the community mediator included other agencies in the mediation process. These included schools, social services, community police officers and housing officers.

The findings of the police mediation project were less positive:

- Fewer than half the victims were satisfied with the outcomes, felt they’d had an opportunity to explain how the incident had affected them or that the outcome had helped repair the harm. Reasons that were given included:
 - Feeling pressured by the police to agree to the intervention.
 - Most felt that the apology was disingenuous;
 - Only one victim was given an opportunity to talk directly with the offender about the offence and how the offender could repair the harms he had caused
 - Officers had received a three hour training session on the virtues of RJ.

¹⁷ Walters xxii

Walters proposes that his research provides empirical evidence to strengthen the view from a number of case studies that suggest that inclusive dialogue may be better suited to reducing the harms caused by hate than the mere imposition of punishment, while simultaneously challenging the underlying causes which give rise to hate-motivated behaviour¹⁸

Discussion

This brief review suggests that the concept of hate crime legislation is appropriate for South Africa: given the country's history of centuries of discrimination and the ideals framed in the Constitution, the functions of denouncing the wrongfulness of behaviour, affirming societal values and providing support and protection to victims take on particular meaning.

However, as in the response of using minimum sentences, the Bill is based on the belief that punishment as a primary response to crime is effective. This is despite the prevailing criminological view that 'while punishment does have a deterrent effect, it is the certainty of punishment rather than the severity of the sentence that is likely to have the greatest deterrent impact. There is certainly no evidence, empirical or even anecdotal, to suggest that increasing sentences from, say, six to 11 years for rape or robbery deters rapists or robbers generally, or even discourages them individually from committing a crime that otherwise they would not have risked.'¹⁹ As the Bill provides no alternatives in this regard – it simply proposes more of the same, despite ample evidence of its failure - this must be regarded as a fundamental flaw.

A restorative approach to hate crime and hate speech, based on the three conceptions outlined above, provides a sounder and more appropriate basis for the proposed legislation.

Two specific concerns are often raised about RJ in response to this, both of which are directly addressed by Walters²⁰. The first is that it is a 'soft option', and that perpetrators will simply say sorry to avoid punitive sanctions. This concern can be partly dismissed by the evidence that punitive measures are generally ineffective, so in one sense there is nothing to be lost in trying alternatives. The more persuasive argument, though, lies in the evidence of Walters' research, of the extraordinarily high satisfaction levels experienced by victims as well as the high rates reported of hate crime behaviour ceasing. In this author's view, this evidence overrides the related concern that a restorative approach may be appropriate for children, but is not for adults. This is particularly so in the case of the proposed legislation attempting to ensure that a hate offender's intentions should be regarded as aggravating factors. The second concern is that victims will experience a meeting with offender(s) as being re-victimised. Walters accepts that this is a valid concern, but points out that in his entire study this was raised only in one case and then the objection was that the police facilitator (not the young offender) had treated the victim unfairly. His argument is that

¹⁸ Walters p xxv

¹⁹Van Zyl Smit, D. 2004. Swimming against the tide: controlling the size of the prison population in SA in Dixon, B. & van der Spuy, E (eds) *Justice gained? Crime and Crime Control in South Africa's transition*. Cape Town: UCT Press, p 248. See also Tonry, M. 2006. Keynote address delivered at the Open Society Foundation for SA conference *Sentencing in South Africa*, 25-26 October 2006, p 7 and Terblanche, S. 2008. *Research on the sentencing framework bill*. Cape Town, Open Society Foundation of South Africa p 16;

²⁰ <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms>

If RJ is to be used more widely for hate crime, police services and other justice agencies must use experienced and fully trained restorative practitioners who understand, not only the key values underpinning RJ, but also the sensitive dynamics of hate crime victimisation. In order to further support the reparative qualities of restorative practice, organisations should work together using a multi-agency approach to addressing hate crime.²¹

This perspective is echoed by the US National Crime Prevention Center's recommendations for counselling to be available in addition to face to face encounters.²²

Conclusions and recommendations

At this time of considering hate crime legislation, it is essential that South Africa take careful note of the well-documented shortcomings of the retributive approach, contrasted by the promising evidence of a restorative approach.

It is recommended that:

- Specific discussions are held to consider integrating a restorative approach to the proposed legislation, based on the above understanding and information
- Specific attention be given to making encounter and counselling available at both a pre-trial and pre-sentence stage, using the framework of the Child Justice Act, 2008 regarding diversion and diversion options as the fundamental point of reference
- Community structures, supported by the State be used to make these options available.

²¹ <http://www.internationalhatestudies.com/hate-crime-restorative-justice-exploring-causes-repairing-harms>

²² See <http://www.ncpc.org/topics/hate-crime/strategies/strategy-counseling-for-offenders-involved-in-hate-groups>