

**PRIVATE AND CONFIDENTIAL**

**EX PARTE: CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA**

**LEGAL BRIEF ON HATE CRIMES IN SOUTH AFRICA**

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**27 May 2010**



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## 1. Introduction

- 1.1 We have been requested to draft a briefing document for the Hate Crimes Working Group ("**the Working Group**") on hate crimes in South Africa. More specifically, we have been requested to outline the international legal framework for hate crimes, examine existing South African legislation and case law and identify the gaps which exist in the South African law which may prevent the effective combating of hate crimes. We have been instructed that the Working Group will use this briefing document as the basis for lobbying with the Department of Justice and Constitutional Development ("**the Department**"), the South African Law Reform Commission ("**the Commission**") and any other relevant government party.
- 1.2 We have been requested to divide the briefing document into 3 parts:
- 1.2.1 a description of the international context (including an explanation of the conventions which address hate crimes and a description of the different models which have been used in foreign jurisdictions to address hate crimes);
- 1.2.2 an explanation of the legal framework in South Africa addressing hate crimes and any gaps which may exist in such legal framework; and
- 1.2.3 our thoughts on recommendations in relation to new legislation which may be introduced in South Africa (and any processes which may need to accompany such new legislation).
- 1.3 We turn to consider the issues which arise in each of these 3 parts below. We note at the outset that South Africa seems to be lagging far behind a number of foreign jurisdictions in developing policies and laws which assist in combating hate crimes. We further note that as a result of this shortcoming South Africa is failing to give effect to some of its international legal obligations.

## 2. The international law obligations

- 2.1 A hate crime usually involves behaviour or conduct which is both criminal and discriminatory or prejudicial. It therefore represents the confluence of criminal law and human rights law. Each of these branches of law come with their own requirements and limitations. Therefore when discussing the



obligations on states to address hate crimes it is necessary to be cognisant of these requirements and limitations. There are numerous examples in international law of obligations on states to eliminate various forms of discrimination. There are equally a number of examples of international law obligations on states to effectively prosecute perpetrators of violent crime. We turn to consider below the specific international law obligations which require combating criminal conduct which is motivated by prejudice or discrimination.

2.2 The most significant international convention which requires states to address hate crimes in domestic law is the International Convention on the Elimination of all forms of Racial Discrimination, adopted and opened for signature and ratified by General Assembly Resolution 2106 (xx), on 21 December 1965 ("**CERD**").

2.3 The term "*racial discrimination*", which is used throughout CERD, means any "*distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*" (Article 1(1), our emphasis). Therefore it seems that the term "*racial discrimination*" means any form of differentiation based on race, birth, national origin, ethnic origin or colour. It would naturally include forms of differentiation based on what a person looks like or where a person comes from or was born. It would include, for example, differentiation between South Africans and non-South Africans as well as differentiation between black and white South Africans.

2.4 Article 4 of CERD provides that:

*"State Parties condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:*

- (a) *shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to*



*racial discrimination, as well as all acts of violence or incitement to such act against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof...* " (our emphasis).

- 2.5 Article 4(a) of CERD therefore requires states to take positive measures to eradicate acts which promote racial hatred or are racially discriminatory in any form. This specifically includes the obligation on states to declare acts of violence, which are directed at persons of a particular race, group of another colour or ethnic origin, to be a criminal offence.
- 2.6 As part of the monitoring of the implementation of CERD, the office of the High Commissioner for Human Rights issued General Recommendation Number 1: States Parties' Obligations (Article 4) on 25 February 1972 indicating that the Committee on the Elimination of Racial Discrimination ("**the Committee**") found that the legislation of a number of state parties did not include provisions which were envisaged in Article 4(a) and (b) of CERD. The Committee noted that it was obligatory for all state parties which had signed and ratified CERD to implement Article 4. The Committee accordingly recommended that "*the state parties whose legislation was deficient in this respect should consider, in accordance with their national legislative procedures, the question of supplementing their legislation with provisions conforming to the requirements of Article 4(a) and (b)*".
- 2.7 Similarly, just over 10 years later, General Recommendation Number 7: Legislation to Eradicate Racial Discrimination (Article 4) included a recommendation that the "*states parties whose legislation does not satisfy the provisions of Article 4(a) and (b) of [CERD] take the necessary steps with a view to satisfying the mandatory requirements of that article*" (at paragraph 1).
- 2.8 We note that South Africa signed and ratified CERD on 3 October 1994 and 10 December 1998 respectively. South Africa is accordingly required to implement the obligations contained in Article 4(a) and (b). Not only has South Africa agreed to implement these obligations but it has also recorded that it recognises the competence of the Committee to receive and consider communications from individuals or groups of individuals within South Africa claiming to be victims of violations by South Africa of any of the rights set out in CERD (after such victims have exhausted their domestic remedies).



Further, South Africa has indicated that the South African Human Rights Commission is the body which will be competent to receive and consider petitions from individuals or groups of individuals within South Africa who claim to be victims of any of the rights set out in CERD (these declarations were made when South Africa ratified CERD on 10 December 1998).

2.9 In August 2006, the Committee considered a report submitted by South Africa under Article 9 of CERD, and recommended that South Africa "*ensure the full and adequate implementation of article 4 of the Convention, and that it adopt legislation and other effective measures in order to prevent, combat and punish hate crimes and speech*" (at paragraph 14).

2.10 In summary therefore, South Africa, by virtue of its signature and ratification of CERD, is required to take positive steps to eradicate acts which promote racial hatred or are racially discriminatory in any form. South Africa has an obligation, flowing from Article 4(a), to declare acts of violence, which are directed at persons of a particular race, group of another colour or ethnic origin, to be a criminal offence. Introducing hate crime legislation, depending on the manner in which it is crafted, may give effect to this obligation.

### 3. **Developments in hate crime law in foreign jurisdictions**

3.1 In this part we consider how foreign jurisdictions have approached hate crimes. It is useful to consider other approaches before considering the South African approach and its shortcomings. Many foreign jurisdictions have had hate crime laws in place for a number of years and have already learnt lessons in relation to the best manner to craft and implement such legislation.

#### **Europe**

3.2 The *European Council Framework Decision 2008/913/JHA, of 28 November 2008, on combating certain forms and expression of racism and xenophobia by means of criminal law* ("**the EU Framework Decision**") creates a uniform framework for hate crime laws for countries which are members of the European Union. It recorded that:

*"Racism and xenophobia constitute a threat against groups of persons which are the target of such behaviour. It is necessary to define a*



*common criminal law approach in the European Union to this phenomenon in order to ensure that the same behaviour constitutes an offence in all Member States and that effective, proportionate and dissuasive penalties are provided for natural and legal persons having committed or being liable for such offences." (at (5) of the preamble)*

- 3.3 The EU Framework Decision specifically obliges Member States to take the necessary measures to ensure that certain listed intentional conduct is criminalised. Member States must make punishable the following acts:

*"(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;*

*(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material" (Article 1(a) and (b) of the EU Framework Decision)*

- 3.4 Further, Member States are required to take the necessary measures to ensure that aiding and abetting the above mentioned conduct is also punishable (Article 2(2) of the EU Framework Decision). The EU Framework Decision also explicitly addresses the type of punishment that should be legislated for the above mentioned conduct. Article 3(1) provides that Member States must take the necessary measure to ensure that the conduct *"is punishable by effective, proportionate and dissuasive criminal penalties"*.

- 3.5 In addition to requiring the above mentioned conduct to be criminalised by Member States, the EU Framework Decision also requires Member States to introduce measure to ensure the enhanced sentencing of crimes committed with a racist or xenophobic motivation. Article 4 provides that:

*"... Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or alternatively that such motivation may be taken into consideration by the courts in the determination of penalties." (our emphasis)*

- 3.6 Additionally, in a series of recent decisions by European Court of Human Rights, it held that Member States have positive obligations under the European Convention on Human Rights and Fundamental Freedoms ("the ECHR") to investigate crimes which may have been racially motivated. In *Nachova and Others v. Bulgaria*<sup>1</sup> the Court was called upon to consider if

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<sup>1</sup> (2005) 19 BHRC 1.



Bulgaria had given effect to its obligations under the ECHR in relation to the death of two Roma men at the hands of military police officials (the Roma in Europe are people of gypsy descent and are subject to serious forms of discrimination). In this case, the two Roma men had been shot in the back by military police officials while trying to escape arrest. Immediately after the shooting, one of the military police officials had pointed his gun at a young Roma boy, who had witnessed the shooting, and had insulted him saying "You damn Gypsies". Despite this verbal statement, which should have alerted the authorities to conduct an investigation into the racial motive of the crime, no such investigation was undertaken. The Court held that there was a duty to investigate possible racist motives behind acts of violence committed by state authorities, and that Bulgaria's failure to do so was a violation of the non-discrimination provision in Article 14 of the ECHR.

- 3.7 The Court applied these principles in *Šečić v Croatia*<sup>2</sup>, a case involving an attack by skinheads on a Roma man. The Croatian authorities had failed to properly investigate and prosecute the perpetrator of the attack, after a period of 7 years, despite constant reminders and requests from the victim to do so. The Court found that the failure by the Croatian state authorities to further the case or obtain tangible evidence to identify and arrest the attacker over a prolonged period of time indicated that the investigation did not meet the requirement of Article 3 of the ECHR. The Court explained as follows:

*"The Court reiterates that when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and is not absolute; the authorities must do what is reasonable in the circumstances of the case"* (at paragraph 66).

- 3.8 In addition to the finding that there was a breach of Article 3, the Court made the following finding in relation to the argument that the failure to properly investigate was also discriminatory:

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<sup>2</sup> (2007) 23 BHRC 36.



*"Treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention" (at paragraph 67).*

### **The United States of America**

- 3.9 Hate crime legislation in the USA exists at both the federal and state level. Prior to 1980, only five states within the USA had enacted hate crime legislation<sup>3</sup>. The Anti-Defamation League ("ADL") released a model hate crime statute in 1981 which has become the basis of hate crime legislation in most states in the USA.<sup>4</sup>
- 3.10 During the 1980s and 1990s, attacks motivated by prejudice based on race, national origin, religion and sexual orientation received considerable attention in the national media. In particular, the tragic deaths of Matthew Shepard and James Byrd, Jr. in the late 1990s received such attention. In October, 1998, Matthew Shepard, a 21 year old gay student of the University of Wyoming, was beaten savagely, tied to a fencepost in rural Wyoming and abandoned. He was found unconscious and spent five days in a coma before dying on October 12, 1998. In June 1998, James Byrd, Jr. a 49 year old black man, was killed when three white men chained him to the back of their vehicle and dragged him for approximately 6.5 kilometres on the open road.
- 3.11 Despite the fact that most states have modelled their hate crime legislation on the ADL's model statute, the approach followed by the different states in protecting various groups from hate crimes differs considerably. State hate crime legislation may vary in two ways; the most common being sentence enhancing statutes that increase the penalty for a crime in circumstances where the prosecution has established that the crime was committed out of hatred for a protected group of persons.<sup>5</sup> However, the enhanced penalty which may be imposed differs from state to state. For example, in Alabama,

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<sup>3</sup> Troy A. Scotting, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 Akron Law Review 853, 866 (2001).

<sup>4</sup> Scotting (*ibid*), 866.

<sup>5</sup> See for example NY Penal Law 44485.00-485.10; N.H. Rev. Stat. Ann § 651.



the minimum sentence may be enhanced by 15 years, while the legislation in Vermont prescribes that the maximum prison term may be doubled, and Florida legislation provides that the maximum prison term may be tripled.<sup>6</sup> The alternative approach adopted by some states is to create new crimes relating to specific acts of racial or ethnic intimidation.

3.12 There are a number of pieces of federal legislation addressing hate crimes:

3.12.1 The Federal Hate Crime Statistics Act, 28 U.S.C. § 534 (1994) ("**Federal Hate Crime Statistics Act**") prescribes that the Attorney General collect data on the incidence of hate or bias crimes from local law enforcement agencies, which must be included in the Federal Bureau of Investigation's ("FBI") Uniform Crime Reporting Program. The Federal Hate Crime Statistics Act is aimed at i) monitoring any fluctuations in the incidence of hate crimes, ii) assessing the effectiveness of current legislation, iii) increasing public awareness of hate crimes, and iv) assisting law enforcement officials to determine when and where racial tension is reaching critical levels that may require intervention.<sup>7</sup>

3.12.2 The Federal Hate Crimes Sentencing Act ("**FHCSA**") was passed in 1993 as part of the Violent Crime Control and Law Enforcement Act.<sup>8</sup> The FHCSA required that the United States Sentencing Guidelines ("**the Guidelines**") be amended to provide sentencing enhancements for at least three offence levels in circumstances where a crime was motivated by hate. The Guidelines were amended accordingly in 1995 to state that harsher sentences should be imposed on persons convicted of violent crimes where a victim is targeted because of their race, colour, religion, national origin, ethnicity, gender, disability or sexual orientation. We note that the FHCSA requires that the crime committed against the victim be a federal crime.

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<sup>6</sup> Scotting (*ibid*), 866.

<sup>7</sup> Scotting (*ibid*), 874.

<sup>8</sup> Violent Crime Control and Law Enforcement Act of 1994, Publ. L. No. 103-322, 108 Stat. 1796, § 280003 (1994)(codified in part as 28 U.S.C. § 994 (1994)).



- 3.12.3 18 U.S.C. §245 ("**the Act**") applies in respect of crimes motivated by bias or hate based on race, colour, religion, and/or national origin.<sup>9</sup> The Act prohibits the use or threat of force to injure, intimidate, interfere, or attempt to injure, intimidate, or interfere with a person while the person is engaged in one of six enumerated activities namely, i) attending public school; ii) participating in any event administered by any state; iii) employment; iv) attending any court; v) travelling or using any facility in interstate commerce; and/or vi) enjoying any goods or services of any facility, based on that persons race, colour, religion or national origin. The Act however only applies if the victim was, at the time of the prohibited conduct, engaged in one of the six enumerated protected activities. Furthermore, the Act does not punish or protect victims of conduct motivated by hatred based on sex, gender, sexual orientation, disability or any of the other listed grounds in the Constitution of the Republic of South Africa, 1996 ("**the Constitution**").
- 3.12.4 The Church Arson Prevention Act, passed in 1997, is a law which was passed in reaction to a reported spike in the number of church burnings in the mid 1990s. Many of the affected churches were predominantly African American churches.<sup>10</sup> The law contains a number of provisions including facilitating federal prosecutions and increasing penalties for damaging places of worship.
- 3.12.5 A more recent enactment is the Matthew Shepard Hate Crimes Prevention Act ("**HCPA**").<sup>11</sup> It was originally proposed in 1998, and after more than a decade of advocacy, it was signed into law by President Barack Obama on October 28, 2009. The HCPA extends the Act so that it applies beyond the six enumerated protected activities in the Act. In addition to race, religion, and national origin, the HCPA amends the Act so that the Department of Justice is authorised to investigate and prosecute certain bias-motivated crimes based on the victim's actual or perceived sexual orientation, gender, gender identity, or disability. Furthermore, the HCPA provides limited jurisdiction for federal law enforcement officials to investigate and prosecute certain

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<sup>9</sup> Scotting (*ibid*), 875-76.

<sup>10</sup> Phyllis B Gerstenfeld, *Hate Crimes, Causes Controls and Controversies*, (2004), 29.

<sup>11</sup> S909 IS



bias-motivated crimes in states in which current law is inadequate. In addition, the HCPA authorises the Attorney General to award grants and provide technical, forensic, prosecutorial, or other assistance in the criminal investigation or prosecution of any hate crime. It also authorises the provision of grants for local programs to combat hate crimes committed by juveniles, including programs that train local law enforcement officers in identifying, investigating, prosecuting and preventing hate crimes. The HCPA facilitates certain federal investigations and prosecutions when local authorities are unwilling or unable to proceed. The HCPA also requires the Attorney General to track statistics on hate crimes based on gender and gender identity (as we have already explained statistics for other groups are already tracked by the Attorney General as a result of powers conferred by the Federal Hate Crimes Statistics Act).

- 3.13 The existing case law involving hate crimes in the USA has revolved around the legality of imposing enhanced sentences on perpetrators of hate crimes. In this regard, two cases are particularly instructive.
- 3.14 In *Wisconsin v Mitchell*, 508 US 476, Mitchell was convicted in the Circuit Court on a charge of aggravated battery and theft and received an enhanced sentence on the ground that he intentionally selected the victim because of the victim's race. Mitchell was one of the members of a group of young black men who (after watching a scene in *Mississippi Burning* of a white man beating up a young black boy who was praying) had attacked a young white boy and beat him unconscious so that he remained in a coma for 4 days. Mitchell appealed the sentence and judgement on the basis that the State's sentence enhancing legislation violated his First Amendment right to free speech by punishing what the legislature deems to be offensive thought and his *reason* for acting, as opposed to just punishing the act itself. The State Supreme Court upheld Mitchell's appeal and rejected the State's contention that the law punishes only the conduct of intentional victim selection and does not punish the perpetrator's individual beliefs. However, the United States Supreme Court reversed the decision, holding that "*physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment* [the protection of freedom of speech]" (at 484). In addition, the court held that traditionally, sentencing judges have considered a wide



variety of factors in addition to evidence bearing on guilt in determining what sentence to impose on a convicted perpetrator and that the perpetrator's motive is one such important factor. Thus, the court held that while the Constitution does protect bigoted and hateful thoughts, it does not safeguard persons who harbour such thoughts and then act upon them. The court stated further that "*the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment*" (at 486).

- 3.15 In *Apprendi v New Jersey*, 530 US 466 (2000), Apprendi was charged under New Jersey law with, *inter alia*, second-degree possession of a firearm for an unlawful purpose, a crime which carries a prison term of 5 to 10 years. He had shot randomly into an African-American family's home and had made a statement to the police (which he later retracted) saying that even though he did not know the occupants of the house personally "*because they are black in color he does not want them in the neighbourhood*" (at 2351). After Apprendi pleaded guilty to the charge, the prosecutor filed a motion to enhance the sentence in terms of the State's hate crime statute, which provides for an enhanced sentence if a trial judge finds, by a preponderance of the evidence, that the defendant committed the crime with a purpose to intimidate a person or group because of, *inter alia*, race. The court found that the shooting was racially motivated and sentenced Apprendi to a 12-year term on the firearms charge. Apprendi appealed his sentence on the basis that due process required that the finding of bias upon which his hate crime sentence was based be proved to a jury beyond a reasonable doubt. The United States Supreme Court upheld Apprendi's appeal stating that an enhanced sentence imposed by a judge must be based on a jury finding that the perpetrator had intentionally selected his victim because of the victim's, *inter alia*, race. In other words, the Court held that in order for the prosecutor to succeed in establishing there was a basis for an enhanced sentence, he or she would have to prove the fact that Apprendi was motivated to commit the crime as a result of bias beyond a reasonable doubt (at page 2363).

### **The United Kingdom**



- 3.16 Despite the fact that the Home Office has been monitoring hate crimes in the UK since the 1980s, prior to the tragic murder of Steven Lawrence, hate crimes were not a point of concern in the UK and did not appear on the national agenda for many years.<sup>12</sup> Lawrence was a black teenager who was ruthlessly beaten to death by a gang of white boys. The story, dubbed the "British Rodney King", was widely covered by the media, prompting public officials to address the issue of hate crimes in the UK. An official investigation into the matter was commissioned, resulting in the *Stephen Lawrence Inquiry* ("**the Inquiry**"), which presented recommendations to Parliament on the issue of hate crimes.
- 3.17 Prior to the publication of the Inquiry, the existing British laws did very little to protect victims of hate crimes. To illustrate this point, i) the Race Relations Acts of 1965 and 1976 criminalised the "*incitement of racial hatred*"; ii) the Public Order Act of 1986,<sup>13</sup> criminalised "*harassment through the use of abusive words or writing*" and the use of "*any visible writing or other visible representation with the intention of causing a person harassment, alarm or distress.*"<sup>14</sup> Furthermore, Section III of the Public Order Act of 1986 criminalised the incitement of racial hatred using various kinds of media<sup>15</sup>; iii) the Criminal Justice and Public Order Act of 1994, made it an arrestable offence to publish and distribute any material likely to "*stir up*" racial hatred; and iv) the Protection from Harassment Act of 1997 criminalised "*putting people in fear of violence*", which was defined as causing "*another to fear, on at least two occasions, that violence will be used against him.*"<sup>16</sup>
- 3.18 Accordingly, prior to the publication of the Inquiry, existing legislation in the UK did not criminalise acts motivated by hatred, directed at particular groups of people. The Inquiry prompted Parliament to enact the Crime and Disorder Act in 1998 ("**the Crime and Disorder Act**"), criminalising conduct motivated by racial hostility.<sup>17</sup>

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<sup>12</sup> Gail Mason, *Hate Crime and the Image of the Stranger*, 45 Brit. J. Criminology 837, 842 (2005).

<sup>13</sup> Public Order Act 1986 (Commencement No. 2) Order 1987, Chapter 64 s 4(1)(a)-(b); s 5.

<sup>14</sup> Public Order Act 1986 (Commencement No. 2) Order 1987, Chapter 64 s 4(1)(a)-(b); s 5.

<sup>15</sup> Public Order Act 1986 (Commencement No. 2) Order 1987, Chapter 64 ss 17-23.

<sup>16</sup> Protection from Harassment Act, 1997 Chapter 40, ss 1-4.

<sup>17</sup> Mason (*ibid*), 842.



- 3.19 The Crime and Disorder Act created four new racially aggravated offences namely, assault, criminal damage, public order offences, and harassment. If convicted of a racially aggravated offence under the Crime and Disorder Act, the accused may face a more severe sentence. In terms of the Crime and Disorder Act, an offence is racially motivated if "*at the time of committing the offence, or immediately before or after doing so, the offender demonstrates towards the victim of the offence hostility based on the victims membership (or presumed membership) of a racial group,*" or the offence is motivated, wholly or in part, by "*hostility towards members of a racial group.*"<sup>18</sup> In terms of section 28(3) of the Crime and Disorder Act, it is immaterial whether or not the offender's hostility is also based, to any extent, on the fact or presumption that any person or group of persons belongs to any religious group; or any other factor not mentioned in section 28. British courts have interpreted section 28(3) to mean that whether or not the racially aggravated offence was motivated by other factors is irrelevant if it can be outwardly demonstrated that the offence was racially aggravated.
- 3.20 Following the September 11 terrorist attacks on the World Trade Centre, several other pieces of legislation have been enacted to deal with hate crimes in the UK. The Anti-terrorism, Crime and Security Act, 2001, amended the Crime and Disorder Act to include, as criminal conduct, religiously aggravated offences<sup>19</sup> and increased the sentence imposed for hate crimes from two to seven years.<sup>20</sup>
- 3.21 In addition, the Criminal Justice Act, 2003 ("**the Criminal Justice Act**") mandates that the court consider certain aggravating factors in sentencing determinations, specifically where the offence in question was motivated by hostility towards a victim based on race, religion, sexual orientation or disability. The Criminal Justice Act provides that where the offender has "*demonstrated towards the victim hostility based on...sexual orientation or disability*" or where the offence was motivated by hostility towards one of the

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<sup>18</sup> Crime and Disorder Act 1998, 1998 Chapter 37, Part II, ss 28(1)(a)-(b).

<sup>19</sup> Anti-terrorism, Crime and Security Act, 2001 Chapter 24, Part 5, s 39.

<sup>20</sup> Anti-terrorism, Crime and Security Act, 2001 Chapter 24, Part 5, s 40-41.



two groups<sup>21</sup>, the sentence eventually imposed on the offender may be more severe.

#### 4. Models for hate crime laws: the hostility model and the discriminatory selection model

4.1 Before drafting hate crime legislation it is necessary to have a clear understanding of the types of conduct which constitute hate crimes. The popular conception of a hate crime posits that the offender acts out of *hatred or hostility* toward a particular trait of the victim, such as the victim's skin colour or ethnic or national origin or religion. In other words, the crime is perpetrated because the accused hates or has some prejudice against, for example, black people or gays and lesbians. This popular conception does not, however, capture all incidences where a hate crime may have occurred. It is easy to imagine a perpetrator of a hate crime committing such a crime not because he or she harbours some hatred or hostility towards a particular trait of a victim but rather because he or she is aware that because of the particular trait of the victim he or she would make an easy target. This may arise in instances where, for example, a black person is robbed because the perpetrator knows that the law enforcement officials in that area are unlikely to properly investigate crimes against black people. These two conceptualisations of hate crimes are referred to as the hostility model and the discriminatory selection model.

4.2 The hostility model requires the perpetrator to harbour hostile feelings or feelings of prejudice against the group to which the victim belongs. In practice therefore there would have to be some evidence led at the trial that the perpetrator harboured feelings of hostility of hatred. Studies have shown that people involved in all sectors of the criminal justice system wanted more guidance on the mental state required for an offence to be motivated by hostility.<sup>22</sup> In the UK, for example, section 28 of the Crime and Disorder Act requires that the offender either demonstrates or be motivated by hostility but the law provides no definition of hostility.<sup>23</sup> A statute that requires

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<sup>21</sup> Criminal Justice Act 2003, 2003 Chapter 44, Part 12, Chapter 1, ss 143, 145-46.

<sup>22</sup> *Hate Crimes Laws: A Practical Guide*, (2009, Organisation for Security and Cooperation in Europe ("OSCE") Office for Democratic Institutions and Human Rights), 47.

<sup>23</sup> See example article 63 of the Russian Federation's Criminal Code; article 62 of Tajikistan's Criminal Code; article 58(1)(f) of the Turkmenistan's Criminal Code; article 67 of Ukraine's Criminal Code; article 63



evidence of an offender's racist or hostile motive may conform to the popular idea of what a hate crime is, but it may also present obstacles to implementation. Whether a person actually feels hate is a highly subjective question and can be difficult to prove in a court of law. The difficulty is compounded by the fact that almost no other criminal offences require proof of motive as an element of the offence.

- 4.3 The discriminatory selection model requires something different to the hostility model (and some may argue something less than). It must be shown that the perpetrator selected or chose his or her victim as a result of the victim's membership of a particular group. Similarly, in practice there would have to be some evidence led at the trial that the accused would not have selected the victim were it not for the fact that the victim belonged to the particular group. Under the discriminatory selection model it is irrelevant *why* an offender selected his victim on the bases of a protected characteristic it is merely sufficient that the offender did so.
- 4.4 The majority of hate crime statutes cannot be unambiguously placed in one model or the other.<sup>24</sup> The majority of statutes have employed neither phrases such as "*intentionally selects*" – which would indicate a discriminatory selection model nor words such as "*ill will, hatred, or bias*" which would indicate the hostility model. Instead the law requires that the offender acted "*because of*" or "*by reason of*" the victim's protected characteristic.<sup>25</sup> In other words, the law requires the causal link between the

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of Armenia's Criminal Code, article 61 of Azerbaijan's Criminal Code. See also New Hampshire, and Pennsylvania which follow the Group Animus Model, noting that the act must be motivated by "prejudice based on the race, colour, ancestry, ethnicity, religion, sexual orientation, national origin, mental or physical disability, or advanced age of the victim" (emphasis added); N.H. REV. STAT. ANN. 651:6(l)(f) (2008) (noting that the person must be "substantially motivated to commit the crime because of hostility towards the victim's religion, race, creed, sexual orientation . . . national origin, or sex" (emphasis added)); 18 PA. CONS. STAT. ANN 2710(a) (2008) (stating that "a person commits the offense of ethnic intimidation if, with malicious intention toward the actual or perceived race, color, religion, national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals" (emphasis added)). Title 18, section 2710(c) of the Pennsylvania Consolidated Statutes defines "malicious intention" as "the intention to commit any act . . . motivated by hatred toward the actual or perceived race, color, religion or national origin, ancestry, mental or physical disability, sexual orientation, gender or gender identity of another individual or group of individuals." New Jersey's bias crime law used to follow the Group Animus Model by enhancing the penalties for crimes that were motivated, at least in part, by "ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of race, color, religion, sexual orientation, or ethnicity." N.J. STAT. ANN. 2C:44-3(e).

<sup>24</sup> Frederick M. Lawrence, The Punishment of hate: toward a normative theory of bias-motivated crimes, 93 Michigan Law Review 320-381 (1994), 22.

<sup>25</sup> See ALASKA STAT. 12.55.155(22) (2008) (providing for a penalty enhancement when "the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex,



characteristic and offender's conduct but the exact emotion which motivated the offence is not specified. These statutes lack explicit reference either to the hostility or the discriminatory selection model. We note in passing that this is not necessarily a bad thing. The blind application of theoretical models does not necessarily translate into the best laws.

- 4.5 Wisconsin is apparently the only state within the United States with a bias crime law that unambiguously follows the discriminatory selection model.<sup>26</sup> It enhances the penalty for crimes where the offender "*intentionally selects . . . the victim in whole or in part because of the actor's belief or perception regarding the victim's race, religion, color, disability, sexual orientation, national origin or ancestry.*"<sup>27</sup>
- 4.6 Other states that have adopted the more ambiguous language of "*because of*" or "*by reason of*". Oregon's hate crime law, for example, prohibits crimes where offenders "*intentionally, knowingly or recklessly cause physical injury to another person because of the actors' perception of that person's race, color, religion, sexual orientation or national origin.*"<sup>28</sup> In *State v. Plowman*<sup>29</sup> the Oregon Supreme Court interpreted the statute as a discriminatory selection statute finding that "*one need not hate at all to commit this crime.*"<sup>30</sup>
- 4.7 Moreover, in *People v. Fox*<sup>31</sup>, where four straight men had lured a gay man, using an online dating website, to an isolated location and assaulted and

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colour, creed, physical or mental disability, ancestry, or national origin" (emphasis added)); COLO. REV. STAT. 18-9-121(2) (2008) ("A person commits a bias-motivated crime if, with the intent to intimidate or harass another person because of that person's actual or perceived race, colour, religion, ancestry, national origin, physical or mental disability, or sexual orientation." (emphasis added)); 720 ILL. COMP. STAT. ANN. 5/12-7.1 (West Supp. 2008) ("A person commits hate crime when, by reason of the actual or perceived race, colour, creed, religion, ancestry, gender, sexual orientation, physical or mental disability, or national origin of another individual or group of individuals, regardless of the existence of any other motivating factor or factors, he commits assault, battery, aggravated assault, misdemeanour theft, criminal trespass to residence, misdemeanour criminal damage to property, criminal trespass to vehicle, criminal trespass to real property, mob action or disorderly conduct. . . ." (emphasis added)); IOWA CODE ANN. 729A.2 (West 2008) ("Hate crime' means one of the following public offenses when committed against a person or a person's property because of the person's race, colour, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability, or the person's association with a person of a certain race, colour, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, or disability." (emphasis added)); KY. REV. STAT. ANN. 17.1523(1) (West 2008).

<sup>26</sup> Jordan Blair Woods, *Taking the "Hate" out of hate crimes: applying unfair advantage theory to justify the enhanced punishment of opportunistic bias crimes*, UCLA Law Review, December 2008, 497.

<sup>27</sup> WIS. STAT. ANN 939.645(2)(b).

<sup>28</sup> Woods (*ibid*), 499.

<sup>29</sup> 838 P.2d 558, 563 (Or. 1992).

<sup>30</sup> Woods (*ibid*), 499.

<sup>31</sup> 844 N.Y.S. 2D 627 NY.Sup.2007.



attempted to rob him, the applicable New York hate crime law was based on the discriminatory selection model. It provided that a "*person commits a hate crime when he or she commits a specified offence and ... intentionally selects the person against whom the offense is committed or intended to be committed in whole or in substantial part because of a belief or perception regarding the race, colour, national origin, ancestry, gender, religion, religious practice, age, disability, sexual orientation of a person, regardless of whether the belief or perception is correct*". The defendants were charged under such law but alleged that they harboured no hatred towards gay men and only targeted him because they thought that he would be easy to rob and therefore should not be prosecuted under the law. The defendants effectively argued that they should have had some form of hostility or hatred towards gay men in order to be prosecuted under the law. The court disagreed with the defendants and explained that the statute "*did not require proof of anything other than the intentional selection of a victim because of their 'race, colour, national origin, ancestry, gender, religion, religious practice, age, disability or sexual orientation*" (at para 3). The court thus interpreted the statute so that it fitted neatly into the discriminatory selection model (rather than the hostility model).

- 4.8 Although the court in *Fox* interpreted the statute in accordance with the plain language, the court's lengthy judgment illustrates that its interpretation was not obvious. The fact that the court engaged in a proper analysis suggests that it could have reached the conclusion that the statute required the state to show a form of hatred or hostility.<sup>32</sup> Thus, the *Fox* case illustrates the importance of the legislature using language which makes it clear what is required to secure a conviction for a hate crime.

## 5. The most appropriate model for South Africa

- 5.1 The discriminatory selection model is arguably broader because it reaches those offenders who harboured no hostility but selected their victims based on prejudices or stereotyped information about the victim's vulnerability. A discriminatory selection model law is both easier to apply in practice and may do a better job of addressing the kind of harm that hate crime laws are intended to prevent. First, a discriminatory selection law does not require

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<sup>32</sup> Woods (*ibid*), 499.



that hate be proven as an element of the offence. When a hate crime law requires hatred or hostility, it requires law enforcement to make an assessment of an offender's mental state, an exercise that may be difficult. Secondly, the impact of hate crimes on the victim and members of the victim's community is usually the same, regardless of whether the offender acted out of hate or hostility.<sup>33</sup> A victim who is targeted because the offender assumes that a trait of the victim makes him or her especially vulnerable to crime is likely to experience the same trauma as a victim who is targeted because the offender actually harbours hatred or hostility towards the victim. From the victim's perspective, what matters is that he or she has been chosen because of an immutable or fundamental aspect of his or her identity.<sup>34</sup>

- 5.2 The hostility model is arguably narrower than the discriminatory selection model. Hate crimes are often committed without any clear evidence that they were motivated by hatred or hostility (for example, it is unusual rather than the norm for a hate crime to be accompanied by hate speech which evidences the hatred or hostility). Additionally, an accused person is always entitled to take the stand and explain that he or she harbours no prejudicial feelings towards a particular group. Rebutting this type of evidence would be difficult. Hate crime laws which are modelled on the hostility model may therefore do little to combat the perpetration of hate crimes as they may be seen as ineffective due to the difficulties of proving hatred or hostility. Additionally, where hate crime laws require the prosecutor to prove hate or hostility it will be necessary to provide guidance and training to both investigating officers and prosecutors about the evidence which is necessary to prove hostility or hatred. Currently, investigating officers and prosecutors are not sensitised to these issues.
- 5.3 There is some debate amongst academics as to whether the hostility model or the discriminatory selection model is better. Lawrence argues that the hostility model more appropriately defines those crimes which should be recognised as a bias crime.<sup>35</sup> He, however, points out that many cases of discriminatory victim selection are also cases of racial hostility. This, he

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<sup>33</sup> OSCE (*ibid*), 49.

<sup>34</sup> OSCE (*ibid*), 49.

<sup>35</sup> Lawrence, (*ibid*), 80.



argues, demonstrates the continued significant role of discriminatory selection.<sup>36</sup> He goes on to state that discriminatory selection may often act as a persuasive surrogate for hostility that may not be proven by any other means and that if discriminatory selection of the group may be shown, hostility may often be inferred. However, he explains that where "*we know that discriminatory selection exists without animus, then the selection ought not be used as a surrogate for racial animus, and should not be punished. In the punishment of bias crimes it is vital to understand precisely what we are punishing: purposeful conscious criminal conduct that is grounded in the racial animus [or hostility] of the perpetrator.*"<sup>37</sup>

- 5.4 Woods, on the other hand, urges legislatures to follow the discriminatory selection model and explicitly state their intentions to do so.<sup>38</sup> Woods offers a defence for the enhanced punishment of opportunistic bias crimes (which would only be captured if a legislature adopts the discriminatory selection model). Woods applies what he refers to as the unfair advantage theory in order to argue that enhanced punishment is indeed properly based on the perpetrators' motivations and the crimes' harmful effects. He argues that his unfair advantage theory justifies punishment based on the unfair advantage that criminals gain over law-abiding members of society by violating the law. He contends that the enhanced punishment of opportunistic bias crimes is justified because the advantages that perpetrators obtain by committing them are greater than the advantages obtained from parallel crimes. He further argues that opportunistic bias crimes warrant additional punishment because perpetrators deliberately exploit perceived disadvantages stemming from their victims' group membership. In terms of harmful effects, Woods contends that opportunistic bias crimes warrant additional punishment because such crimes perpetuate the belief that certain victims are easier crime targets as a result of disadvantages stemming from their group membership. Perpetuating this belief enables potential offenders to continue to unfairly profit from exploiting the perceived disadvantages tied to group membership by committing opportunistic bias crimes in the future.

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<sup>36</sup> Lawrence (*ibid*), 81.

<sup>37</sup> Lawrence (*ibid*), 81.

<sup>38</sup> Woods (*ibid*), 489-541.



- 5.5 In our view, at the early stages of beginning to lobby government to introduce hate crime laws it is not necessary to decide which model is better. As we have already mentioned most laws in foreign jurisdictions make use of a combination of both models. It may well be that laws which embody a combination of both models more accurately capture the type of crimes that should be punished as hate crimes.

## 6. Hate crime law in South Africa

- 6.1 The Constitutional protection of the right to equality provides that "[e]quality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." (our emphasis, section 9(2)) In order to achieve equality it is well within the legislature's competency to take legislative and other measures to protect persons who have been disadvantaged by unfair discrimination. Hate crime laws are generally considered laws which are aimed at protecting people who have been disadvantaged by unfair discrimination and accordingly the legislature may make such law and is, in fact, encouraged by the Constitution to pass such laws in order to promote the achievement of equality.
- 6.2 Criminal offences are defined in both the common law and statutory law. In South Africa, neither the common law nor statutory law defines what constitutes a hate crime, nor does the common law or statutory law create the offence of a hate crime.
- 6.3 Criminal trials in South Africa involve two stages: the trial phase where the guilt of the accused is determined; and the sentencing phase where the appropriate punishment is determined should the accused be found guilty. In *Legoa v S* [2002] 4 All SA 373 (SCA) Cameron JA explained that "[i]t is an established principle of our law that a criminal trial has two stages – verdict and sentence. The first stage concerns the guilt or innocence of the accused on the offence charged. The second concerns the question of sentence. Findings of fact may be relevant to both stages. However, those in the first stage relate to the element of the offence (or the specific form of the offence) with which the accused is charged. Those in the second mitigate or aggravate the sentence appropriate to the form of offence of which the



*accused has been convicted.*" (at paragraph 15). Therefore if a criminal court is hearing a matter which involves facts which may amount to a hate crime, the point at which the hate aspect of the crime becomes relevant is once a conviction has been secured and the court considers the appropriate sentence. It is in the sentencing phase that the prosecution can introduce evidence relating to the circumstances surrounding the crime. A court exercises its discretion when imposing a sentence and in doing so it must consider the position of the perpetrator, the circumstances of the crime, and the interests of society (*S v Zinn* 1969 (2) SA 537 (A) at 540G).

- 6.4 In the sentencing phase of a criminal trial both the accused and the prosecutor are given an opportunity to present evidence relating to the circumstances of the accused, the nature of the crime and the interests that society may have in punishing the accused. Such facts, which may be introduced by the accused or the prosecutor, must be established or proved on a balance of probabilities (*Legoa v S* (*supra*), at paragraph 16; and *S v Sparks* 1972 (3) SA 396 (A), at 404).
- 6.5 We are aware of four decisions where race or racial hatred has been considered as a factor in sentencing (*S v Salzwedel and others* 2000 (1) SA 786 (SCA), *S v Van Wyk* 1992 (1) SACR 147 (NmS), *S v De Kock* 1997 (2) SACR 171 (T) and *S v Matela* 1994 (1) SACR 236 (A)). We are unaware of any decisions where other factors such as hatred or prejudice based on gender, disability, sexual orientation or national origin have been introduced in order to argue that the accused should receive a harsher sentence.
- 6.6 In *Salzwedel* the accused were white men, associated with the AWB, who had brutally attacked a group of black men whose car had broken down in the Eastern Cape. One of the black men was murdered, the other assaulted and the car was destroyed. Mohamed CJ found that the racist motivation behind the crimes was an aggravating factor which ought to be taken into account when sentencing. He rejected the argument that it ought to be a mitigating factor that the accused were brought up in a racist environment. He explained as follows:

*"The commission of serious offences perpetrated under the influence of racism subverts the fundamental premises of an ethos of human rights which must now 'permeate the process of judicial interpretation and judicial discretion' including sentencing policy in the punishment of criminal offences."* (at 792)



- 6.7 Similarly, the decision in *S v Van Wyk* illustrates that judges are able to take the racist motivation of a crime into account when sentencing. Acting Justice Ackermann (as he then was) held that certain provisions of the Namibian Constitution required him to take into account the racial motivation in a murder as an aggravating factor in sentencing the accused (at 169 – 170). Ackermann AJA rejected the argument made by the accused that racist proclivities are less reprehensible when socialised (at 170c-d).
- 6.8 We note that for the most part sentencing is entirely within the discretion of the judge. However, the Criminal Law Amendment Act 105 of 1997 ("**Amendment Act**") provides for minimum sentences to be imposed for certain serious criminal offences. Minimum sentencing laws may be used effectively to combat hate crimes should the legislature decide that minimum sentences are necessary or appropriate for hate crimes.
- 6.9 Finally, for the sake of completeness, we have considered the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("**PEPUDA**") as well as the provisions of the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. The latter piece of legislation has no bearing on hate crimes, however, the former piece of legislation provides that:

*"If it is proved in the prosecution of any offence that unfair discrimination on the grounds of race, gender or disability played a part in the commission of the offence, this must be regarded as an aggravating circumstance for purposes of sentence."* (section 28(1))

- 6.10 It seems to us that the subsection does little more than repeat what is already possible by making use of the common law. In other words, it confirms that a judge may decide that where unfair discrimination played a role in the commission of an offence then this should be treated as an aggravating circumstance which may give rise to a harsher sentence. We are unaware of a reported decision which has made use of this particular subsection. The main benefit of this subsection is that it makes use of the mandatory word "*must*" which indicates that a judge cannot ignore unfair discrimination which played a role in the commission of an offence and must weigh it up as part of his or her considerations in imposing a sentence. Finally, a significant shortcoming of this subsection is that it only makes reference to unfair discrimination on the grounds of race, gender or disability. It fails to make reference to unfair discrimination on other grounds such as nationality, sex,



pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age disability, religion, conscience, belief, culture, language or birth (all of these grounds are given Constitutional protection).

## **7. Gaps within the South Africa legal framework**

- 7.1 It is evident from the above that the only current mechanism to address hate crimes is through arguing at the sentencing phase that an accused should receive a harsher punishment because the crime was motivated by a form of prejudice or hatred. A judge is entitled to consider the circumstances surrounding the crime and may chose to impose a harsher sentence should he or she be of the view that it is justified (bearing in mind the other factors which he or she must take into account, such as the position of the accused). It is simultaneously possible to compel a judge to consider that unfair discrimination, based on race, gender or disability, played a role in the commission of the crime and should be considered an aggravating factor in sentencing (using section 28(1) of PEPUDA).
- 7.2 There are 3 serious shortcomings with the current position:
- 7.2.1 First, investigating officers and prosecutors are not trained to investigate and build a case against an accused where there has been a form of discrimination or prejudice which motivated the crime. Therefore evidence which may be used to show the crime was motivated by prejudice is often not collected or led;
- 7.2.2 Secondly, a judge who is not particularly attuned to the pernicious affects of prejudice or discrimination motivating a criminal offence may not give it the correct weight when determining sentencing.
- 7.2.3 Thirdly, the failure of the legislature to comprehensively consider how hate crimes should be combated sends the message that hate crimes are not taken seriously by South African society. Individual judgments which highlight the pernicious affects of hate crimes have a smaller impact than a legislative decision to combat hate crimes in a comprehensive manner.
- 7.3 There are a number of gaps in the South African response to hate crimes. For example:



- 7.3.1 Comprehensive hate crime legislation does not exist. There is a need for the legislature to consider how best to combat hate crimes. This may be through creating a new hate crime offence which comes with particular prescribed punishment. It may also be through ensuring that enhanced sentencing is imposed where there is any form of hate crime (in other words where a crime is motivated by prejudice on any of the listed grounds in the Constitution).
- 7.3.2 Judges have not been given an opportunity to consider if accused persons who are convicted of crimes which are motivated by prejudice, other than racial prejudice, should also receive harsher punishment. This primarily is as a result of investigating officers not investigating such crimes and prosecutors not arguing such cases in a way which highlights the prejudice which motivated the crime.
- 7.3.3 South African law does not include a mechanism to record the incidences of hate crimes. In other words, there is no law which makes it mandatory for hate crime statistics to be collected, processed and analysed. This collection and use of information is essential to develop a thoughtful and nuanced response to hate crimes.
- 7.3.4 Investigating officers, prosecutors, magistrates and judges are not sensitised or trained in relation to the key issues surrounding the perpetration of hate crimes. Investigating officers, for example, will not consider evidence of the motive of a crime as being relevant to securing a conviction. Prosecutors similarly will not necessarily think of leading evidence on the motivation of a crime in the sentencing phase as it is not an issue which will be guaranteed to be treated as a harsher sentence. Judges and magistrates will not necessarily be aware that the effect of hate crimes goes far beyond the victims and serve to traumatise whole communities and damage South African society. Without the decision makers in the criminal justice system being attuned to these issues it will not be possible to properly combat hate crimes.
- 7.3.5 There has been little consideration of the types of punishment which may be most appropriate for perpetrators of crime based on hatred or prejudice. It may well be that bigger fines or longer prison sentences



are not the most effective way to address a combination of violence and prejudice of accused persons.

- 7.4 We note in passing that the National Prosecuting Authority ("the NPA") has already established specialised units that facilitate the direct involvement of specially trained prosecutors at the inception of the investigation in the case of sexual offences, commercial crimes and priority crimes (referring to war crimes or other internationally recognised categories of crime). In 1999 the NPA established the Sexual Offences and Community Affairs Unit ("SOCA") which was designed to establish a reporting and prosecuting mechanism that was sensitive to the victims of sexual offences, prevented secondary victimisation and could guide the investigative process to increase the probability of eventual successful prosecution. This is the clearest example in our legal system of a victim sensitive partnership between the NPA and those responsible for the actual investigation of the crime. The SOCA units are often located in hospitals themselves where victims are able to make the report to the unit directly. The units are also based on the collaboration between social workers, investigating officers, healthcare professionals, specialised prosecutors and non-governmental organisations. This model may be a good template for any possible future 'hate crimes' or 'biased crimes' unit.
- 7.5 We further note that in terms of Section 179(5)(a) of the Constitution the "*National Director of Public Prosecutions must determine, with the concurrence of the Cabinet member responsible for the administration of justice, and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process*" (emphasis added). Clause 4(c) of the *Prosecution Policy* (Revision Date: 1 December 2005) ("**the Prosecution Policy**") refers to the principles that a prosecutor needs to take into account when there is a potential prosecution in the public interest. The clause requires that when "*considering whether or not it will be in the public interest to prosecute*" a prosecutor "*should consider all relevant factors, including*":
- 7.5.1 the "*nature and seriousness*" of the offence, and
- 7.5.2 the "*interests of the victim and the broader community*".



- 7.6 When considering the nature and seriousness of the offence the prosecutor in the case is required to consider the "*effect of the crime on the victim*", the "*manner in which it was committed*", "*the motivation for the act*", the nature of the offence including its "*prevalence and recurrence*", its effects on "*public order and morale*" and "*its effect on the peace of mind and sense of security of the public*". The interests of the victim and the broader community are described as the "*attitude of the victim... towards a prosecution*" bearing in mind that "*public interest may demand that certain crimes should be prosecuted – regardless of a complainant's wish not to proceed*".
- 7.7 The Prosecuting Policy therefore includes some useful guidance to prosecutors which may be used when prosecuting hate crimes. However, it is still necessary for prosecutors to be trained regarding the particular types of hate crimes that may be perpetrated as well as the effects such hate crimes may have on victims, their families and the broader community.

## 8. Recommendations

- 8.1 Having considered South Africa's international law obligations, hate crime laws in foreign jurisdictions and the South African approach to hate crimes (which has been found to be lacking) it seems that the Department could be encouraged to adopt the following strategies to combat hate crimes:
- 8.1.1 Comprehensive hate crime legislation could be developed. This would require drafting a hate crime law which created a new category of crime called a hate or a bias crime. The statute could specify that an accused person found guilty of committing a hate or bias crime should receive an enhanced sentence. The statute could further require that hate crimes have their own minimum sentences. It is worth being aware that legislation introducing a new category of crime called a hate or a bias crime would require prosecutors to prove such crime beyond a reasonable doubt. In other words, the burden of proof for the hate or the discriminatory selection element of the offence is high as it must be proved beyond a reasonable doubt.
- 8.1.2 Comprehensive sentencing legislation could be developed. In this regard, section 28(1) of PEPUDA could be amended to ensure that all categories of hate crimes (or crimes which are commissioned as a result of unfair discrimination on all grounds in the Constitution) receive




harsher sentences. We note that if sentencing legislation were to be developed it would seem that the evidence of prejudice led at the sentencing phase would only need to be established on a balance of probabilities. It thus seems prudent to develop both comprehensive hate crime legislation and comprehensive sentencing legislation (as in the event that it cannot be proved that a hate crime occurred beyond a reasonable doubt it may still be possible to argue for a harsher sentence as there may be proof on a balance of probabilities that the crime was motivated by a form of prejudice).

- 8.1.3 Training programmes on the nature and effects of hate crimes could be introduced for investigating officers, prosecutors, magistrates and judges. Such training programmes would need to be tailored to the needs of each of these role players. For example, it would be necessary to train investigating officers to recognise a hate or bias crime and know what evidence should be collected to prove such crime. Prosecutors on the other hand may need to be trained on how to introduce the aforementioned evidence and on the effects of hate crimes on victims, their families, their communities and society at large. Judges and magistrates may need to be trained on the effects of hate crimes as well as the types of sentences which are most appropriate to punish or reform hate crime offenders.
- 8.1.4 Information on the incidences and nature of hate crimes needs to be systematically collected in order to ensure that the legislative response to hate crimes is appropriate. In this regard, it is also necessary to develop comprehensive legislation which enables the collection of hate crime data.
- 8.1.5 The Department and the NPA could be encouraged to establish a separate business unit of the NPA which is mandated to specifically prosecute hate crimes. As we have explained there is already a model for this type of business unit within the NPA. The benefit of this is that it may result in resources being allocated to such unit in the short term (where development of legislation may take longer).
- 8.2 There is no doubt that the above mentioned recommendations will take time, resources and personnel with the requisite skills to develop. We are most



willing to give input on any proposed laws which the Working Group may wish to put forward. Further, should the Department or the Commission or any other relevant party require assistance we would be happy to offer our assistance.

- 8.3 Finally, if the Working Group would like to meet with us to discuss this briefing note or the proposals we have made we would be happy to do so. We are familiar with the international, foreign and South African approaches to hate crimes and would be willing to take members of the Working Group through the treaties, legislation or judgments if required.



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**Webber Wentzel**

**27 May 2010**

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<sup>39</sup> With the assistance of Tshego Phala and Benjamin Cronin.

