



**SUBMISSION ON THE PREVENTION AND COMBATING OF HATE CRIMES AND
HATE SPEECH BILL (B9-2018).**

Submitted by

Consortium for Refugees and Migrants in South Africa (CoRMSA)

To

Portfolio Committee on Justice and Correctional Services

Attention: Mr V Ramaano at vramaano@parliament.gov.za.

15 February 2019.

A. Introduction:

The Consortium for Refugees and Migrants in South Africa (CoRMSA) is pleased to make this submission on the published **SUBMISSION ON THE PREVENTION AND COMBATING OF HATE CRIME AND HATE SPEECH BILL (B9-2018)** to the Portfolio Committee on Justice and Correctional Services, attention to: Mr V. Ramaano. The Consortium for Refugees and Migrants in South Africa (CoRMSA) is a national network of organisations working with asylum seekers, refugees and other international migrants. CoRMSA currently has 25 member organisations across the country. It was established in 1996 as a loose network of organisations working with refugees as the National Consortium for Refugee Affairs (NCRA) and was later registered as an NPO. In 2007 NCRA's mandate was extended to include the protection of international migrants. Our members are made up of direct legal and social service providers; research institutions and refugee and migrant community groups. The CoRMSA model is such that through our members and partners, collectively we cover work at local, provincial, national, sub-regional, regional and global levels to ensure that the daily challenges faced by non-nationals are addressed through policy and practices. CoRMSA has over fifteen years of experience working on migration engaging in advocacy and lobbying; coordination and network building; capacity building; rights awareness and information sharing. CoRMSA's overall objective is the protection and promotion of asylum seekers, refugees and migrant's rights in South Africa, regionally and internationally.

CoRMSA welcomes this opportunity and below make the following recommendations on specific sections of the Prevention and Combatting of Hate Crimes and Hate Speech Bill (B 9-2018). CoRMSA is available to make an oral presentation regarding this submission should such an opportunity arise.

CoRMSA makes the following submission to the Bill 9-2018.

CoRMSA takes note that the Bill aims to give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations; to provide for the offence of hate crime and the offence of hate speech and the prosecution of persons who commit those offences; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech; to provide for the reporting on the implementation, application and administration of this Act; to effect consequential amendments to certain Acts of Parliament; and to provide for matters connected therewith.

However, CoRMSA is concerned that the Bill focuses more on criminalisation of offences, and is silent in outlining processes and procedures to the address of the root causes of the hate crimes and hate speech and the promotion of social cohesion in communities to give effect to the co-existence of everyone within the republic. If the Bill is adopted the into law without outlining the rehabilitation processes of those concerned, the Bill will present a problem to police and National Prosecuting Authority (NPA) as they would have to decide

which case took precedent. Before passing the Bill into law, the government should outline and put place mechanisms that will address the causes of hate crimes and hate speech and rehabilitation processes of those concerned. There is a need for legal regulation to guide behaviour change rather only focusing on criminalisation. The Bill should not stop at criminalising hate crimes and hate speech. But, it should take the important step of tasking the State (ostensibly government at all levels, as well as chapter 9 institutions such the the Public Protector; the South African Human Rights Commission (SAHRC); the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission) and the Commission for Gender Equality (CGE) including the South African Police Service with promoting and raising awareness of, and combating, both hate crimes and hate speech.

CoRMSA welcomes the continuing commitment of the South African Government to recognise the South African Constitution as the principal and supreme law of the republic. CoRMSA believes that with this recognition of the Constitution, the rights set out under chapter 2 of the Constitution will be respected and upheld as the cornerstone of democracy in South Africa. The Bill (Constitution) enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom with no prejudice based on nationalities, race or gender, sexual orientation, language. In supporting the above, Deputy Minister of Justice and Constitutional Development Hon John Jeffrey during the multi-stakeholder dialogue (29 January 2019) on the Prevention and Eradication of Hate Crimes and Hate Speech Bill convened by the Southern Africa Liaison Office's (SALO) indicate that "targeted violence directed at persons on the basis of their sexual orientation, race and other constitutionally-protected grounds motivated for the criminalization of hate speech and crimes. This would serve to supplement existing civil remedies provided by such legislation as the Promotion of Equality and Prevention of Unfair Discrimination Act. "Hate crimes is something government has been lobbied about for some time." Said Deputy Minister John Jeffrey.

CoRMSA is satisfied that the Bill recognises section 9(1) of the South African Constitution that of everyone is equal before the law and has the right to equal protection and benefit of the law; and section 9(3) and (4) of the Constitution provides that neither the State nor any person may, directly or indirectly, discriminate unfairly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, and that national legislation must be enacted to prevent or prohibit unfair discrimination. The insertion of this sections on the Bill explains and gives effect to the general public and public servants that no one is above the law and no one can be segregated based on the above grounds. The word "**everyone**" in the Constitution includes, covers and provides for the protection the Local Citizens, Asylum Seekers, Refugees and Migrants residing within the republic of South Africa.

Section 1. Definitions:

CoRMSA proposes the inclusion of the “Asylum Seeker”, “Xenophobia”, Racial Discrimination “Racism” and a “Refugee” definitions as defined by the United Nation High Commission for Refugee.

Asylum Seeker- is someone whose request for sanctuary has yet to be processed by the host country. (<https://www.unhcr.org/asylum-seekers.html>)

Refugees - are people who have fled war, violence, conflict or persecution and have crossed an international border to find safety in another country (<https://www.unhcr.org/what-is-a-refugee.html>). And as defined by the Refugee Act of 1998 that Refugee “Anyone who has a well-founded fear of persecution on the basis of race, religion, nationality, social group, tribe or political opinion and who’s government is unable or unwilling to protect you”.

Insertion of Asylum Seeker and Refugee definitions it is supported by the study done by the Institute for Social Development at the University of the Western Cape, in partnership with the Scalabrini Institute for Human Mobility in Africa (SIHMA) and funded by the United Nations High Commissioner for Refugees (UNHCR) published in April 2018. This study report indicates that last few years, the world has witnessed the greatest rate of increase in the records of refugees and asylum seekers who have been forced to move from their countries due to war, persecution and political violence. This study further indicates that the difficulties facing refugees and asylum seekers and the lack of support and apathy on the side of the Department of Home Affairs (DHA), Department of Social Development (DSD) and the South African Police Services (SAPS). Amongst the challenges included the lack of recognition of refugee documents as valid identification documents for the purposes of obtaining social assistance grants, the inability of DSD social workers to provide assistance to unaccompanied foreign minors and violence and abuse at the hands of police officials. Other sources support the claim of inhumane treatment of refugees in South Africa. (<http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Download-File-4.pdf>).

Xenophobia- is the fear or hatred of foreigners or strangers; it is embodied in discriminatory attitudes and behaviour, and often culminates in violence, abuses of all types, and exhibitions of hatred. (https://www.sahistory.org.za/sites/default/files/file%20uploads%20/sapss_22_solomon_kos_aka_0.pdf).

Racial Discrimination - means that someone treats you unfairly or unfavourably, or harasses you, because of your, race, colour, descent, ethnic and national origin and nationality. (http://www.hrc.act.gov.au/res/AHRC_2039_Race_ATSI.pdf).

Racism - is where someone thinks you’re inferior because of your colour, ethnicity, nationality or race. (<https://www.childline.org.uk/info-advice/bullying-abuse-safety/crime-law/racism-racial-bullying/>).

CoRMSA further proposes the inclusion of the definition for 'association' as stated in Section 3 (1) to provide clarity on the term. This definition of this term should include: Family members, friends, colleagues and other people in close connection to the victim.

Section 2. Objects of Act:

CoRMSA proposes the insertion of (h) "provide for the promotion and addressing the roots causes and rehabilitation process".

Section 3 (1). Offence of Hate Crimes:

On (k) CoRMSA proposes the insertion of "asylum seekers" as group of people that exist and live in the republic. Leaving them out as group or people will subject them to further hate crimes as they are not recognised by the Bill.

Section 4 (1). Offence of Hate Speech:

On (kk) CoRMSA proposes the insertion of "asylum seekers" as group of people that exist and live in the republic. Leaving them out as group or people will subject them to further hate speeches as they are not recognised by the Bill.

Section 4 (1) (b). CoRMSA proposes the insertion of the word "**unintentionally**" in this section to read Any person who "unintentionally "or intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is—

To attest to the above, in the recent years we have witnessed both the traditional and political leaders making and voicing discriminatory and prejudiced rhetoric that can be considered hate speech and later if called to order, they hide behind the word "unintentionally" to recuse their hate statements. A critical example is that of a Deputy Minister of Police who stated in his speech that "How can a city in South Africa be 80% foreign national? That is dangerous. South Africans have surrendered their own city to the foreigners." The South African Human Rights Commission (SAHRC) intervened on this matter through the complaint lodged by the Civil Society Organisations to say that ""Leaders are expected to constructively shape public debate and social cohesion through evidence-based statements. Repeating stereotypes does not advance the goals of upholding the fundamental rights of all in society," <https://www.timeslive.co.za/politics/2017-07-17-you-are-fuelling-xenophobia-sahrc-warns-deputy-police-minister/>

This Law (Bill) should also address such unintentional hate speech statements in whatsoever communication strategies from the leadership to community level.

Section 4 (1) (c). CoRMSA proposes the insertion of the word "**unintentionally**" on this section to read "Any person who "**unintentionally**" or intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which that person knows constitutes hate speech as contemplated in paragraph (a), which is accessible by, or directed at, a specific person who can be considered to be a victim of hate speech, is guilty of an offence.

Section 5 (1) Victim impact statement:

CoRMSA makes a submission of the word “**testimony**” to be included on the sentence to read “For purposes of this section, a victim impact statement means a sworn statement or affirmation or “**testimony**” 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. This word can also be added on subsection (3).

This will afford an opportunity for the victims an opportunity to also stand, express and give their truthful verbal testimonies about the incidents that affects them not just only through the sworn statement or affirmation.

Section 6. Penalties and orders:

On this section, CoRMSA is concerned about the lack of clarification on which Law this Bill is trying to support or amend. For example, two laws are spelled out as Criminal Procedure’s Act and only one section (276) is quoted and section 51 of the Criminal Law Amendment Act of 1997. There is further confusion that the Bill on section 6 (a) indicate that “the court sentencing the person considers appropriate and which is within that court’s penal jurisdiction”. This statement still leaves it open for sentencing court to decide on which Law to use in sentencing the perpetrator. This section needs to be revised to clearly indicate which Law the Bill is supporting or amending. We submit that Further clarification is needed on this section.

On subsection 6 (3). CoRMSA does not support this section as it is, because it reads and propose the new impartial crime in a form of “Hate Crime”. It is necessary for the Government if it goes ahead with this section to provide further segregated explanation of hate crimes and its minimum sentencing including the sentencing procedure. This section suggest that hate crimes are different from other crimes and worthy of extra attention for several reasons therefore, an explanation table on various hate crimes and the sentencing thereof should be made available to this Bill.

Section 7. Directives:

CoRMSA welcomes this proposed section and proposes that the duration of expecting the Directives should be between 8 to 12 weeks (60 to 90 days) reasonable so.

Section 8. Reporting on implementation of Act.

CoRMSA in in agreement with this section. However, we propose that the South African Police Service play the leading role in the implementation of this Bill supported by the Department of Justice and Correctional Service and National Prosecuting Authority. In most cases, police are the first respondent to any crime committed for their intervention by either protecting, combating or preventing. The Bill should also indicate on who will be responsible for the collection and analysis of information as indicated on section 7 (b).

Furthermore, CoRMSA proposes the inclusion of the Minister of Social Development as (e) on section 8 (2) as some of the information and data can be retrieved from this department through victims contact with Social Workers and counselors.

Section 9. Prevention of hate crimes and hate speech.

It is difficult for CoRMSA to accept this section and its subsections on a number of issues of concerns contained on this section.

Subsection (1).

This section generalises the “State” as responsible and therefore fails to indicate specifically on which level of the “State” will intervene. This leaves it open and subject afford the State an opportunity not to act upon its mandate as it is not clear on who within the “State” should intervene. CoRMSA propose that the Bill be specific on who will act within the State fraternity.

Out of the eight Chapter 9 Institutions only 2 are singled out as the key role players on the Bill. CoRMSA proposes that the other Chapter 9 institutions role be clarified. For example, the we have the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. The CRL Rights Commission is mandated "to promote respect for and further the protection of the rights of cultural, religious and linguistic communities; promote and develop peace, friendship, humanity, tolerance, national unity among and within cultural, religious and linguistic communities on the basis of equality, non-discrimination and free association; to promote the right of communities to develop their historically diminished heritage and to recognise community councils". As CoRMSA we believe that the CRL have a critical role to play on this Bill as its mandate says a lot about prevention and combating hate crime and hate speech. We propose that other Chapter 9 institutions be included in the Bill for they will play their roles in the Bill.

Sub-section (2) (1) further suggests that “one or more Cabinet members, designated by the President, must cause programmes to be developed in order to— “. CoRMSA believes that this sub-section will create confusion within the “State” as all organs of the “State” will rely on the President’s designation, meaning that it limits them to act before they are designated. This sub-section further limits the other organs of the “State” ‘s capabilities to develop or cause relevant programmes relating to prevention and combating of hate crimes and hate speech. CoRMSA proposes that powers to develop programmes should be vested with the organs of the State not for the President to designate first.

On section 9 (3) which proposes that “*judicial officers for purposes of presiding in court proceedings*”. CoRMSA is against the view that the training should be for “*Judicial Officers*” only for the purposes of this Act. CoRMSA proposes that this training should be escalated to the Chapter 9 Institutions Decision Makers Officers and Public Prosecutors.

Still on section 9 (3) CoRMSA request the meaning of “*social context training*” be clarified on Bill for the purposes of this Bill and its interpretation during implementation.

In promoting awareness of the prohibition against hate crimes and hate speech, aimed at the prevention and combating of these offences, CoRMSA would like to draw your attention to the National Development Plan 2030 which clearly elaborate that Citizens have the right to expect government to deliver certain basic services, and to hold leaders accountable for their actions. They also have responsibilities to other citizens, including mutual respect, tolerance and abiding by the laws of the land. Leaders throughout society have to balance the power they hold with responsibility, including listening to and tolerating different and diverse views, promoting social cohesion and working together to resolve problems. https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf . Therefore, it is important for this Bill be more inclusive as it can in creating an enabling environment of raising awareness and campaigning.

CoRMSA also proposes the inclusion and listing of these critical role players:

- National House of Traditional Leaders
- Department of Arts, Culture, Science and Technology
- Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.
- Department of Basic and Higher Education
- Department of Social Development
- The Public Protector.
-

Section 10. Regulations:

CoRMSA proposes the removal of “**may**” to stick on “**must**” for the section to read: The Cabinet members responsible for the administration of justice **must**, where applicable, make regulations regarding any matter which is required or permitted by this Act to be prescribed by regulation or any other matter which is necessary or expedient to prescribe in order to achieve the objectives of this Act.

The removal of “**may**” will obligate the cabinet to draft regulations for the administration of this Bill.

We thank you.



Contact Details:

Thifulufheli Sinthumule (MR) – Executive Director

Email: thifulufheli@cornsa.org.za Telephone: 011 403 7560/1. Fax 011 403 7559. Mobile: 076 429 1608.