

SOUTH AFRICA – A HOME FOR ALL?

The need for hate crime legislation

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The South African government is currently developing legislation on hate crimes. This follows repeated calls by civil society for an appropriate response to the apparent scourge of hate and bias-motivated crimes that tarnish the image of South Africa as a 'rainbow nation'. This article is aimed at informing related policy debates and provides discussion of violence targeted at foreign nationals and at those who are (or perceived to be) sexual minorities and/or gender non-conforming. This will give an indication of the trends and challenges that the proposed legislation and policy frameworks will need to address.

South Africa's Constitution outlines the vision of an equality-based society and in the preamble notes that 'South Africa belongs to all who live in it, united in our diversity'.¹ Despite these provisions, a range of civil society organisations (CSOs), human rights actors and academics have observed ongoing patterns of crimes specifically targeting people on the basis of their race, nationality, religion, sexual orientation or other such factors.² Such crimes, known internationally as hate crimes,³ undermine social cohesion⁴ and have been shown to have an especially traumatic impact on victims.⁵ South Africa has a number of laws that deal with discrimination, such as the

Equality Act, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) as well as section 9 of the Constitution, yet none of these is specifically tailored to address the issue of hate crime. An analysis by legal practitioners has demonstrated that the existing legal framework does not provide sufficient tools to address hate crime.⁶

The Department of Justice and Constitutional Development (DOJCD) is currently developing legislation on hate crimes as a means to strengthen the role of police and justice officials in holding perpetrators accountable and as a result send a clear message to society that such crimes will not be tolerated.⁷ This article provides some international context, two case studies of types of hate crime, and then discusses key policy issues related to the impending legislation.

HATE CRIMES AND THEIR IMPACT

A hate crime has been defined by the Organisation for Security and Cooperation in

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Europe (OSCE) as ‘a criminal act committed with a bias motive.’⁸ A ‘hate crime’ is thus an act which constitutes a criminal offence that is motivated in part or whole by bias or hate. There are two key components of ‘hate crimes’. The first is that the incident (even without the bias motive) comprises of a criminal offence under other existing laws (such as arson, assault, rape or murder). In this way, hate crimes differ from hate speech and discrimination where proving bias is central to determining whether or not an incident comprises a criminal offence. The second element of hate crimes is that some form of specific bias was involved in the selection of the victim. ‘Hate crimes’ can involve mixed motives, including criminal incentives, such as robbery, but incorporate a range of crimes where the victim’s actual or perceived identity such as race, nationality or sexual orientation was a factor.⁹

There are several reasons why hate crimes require specialised services and prioritisation, as well as legislative and policy responses. Hate crimes are treated differently in many countries, not because of their prevalence, but because the severe emotional and psychological impact of such crimes potentially extends beyond the individual victim to the group to which the individual belongs, or is perceived to belong.¹⁰ However, treating hate crimes as a separate category of crime is not universally agreed.¹¹

Whilst violent crime victimisation in general carries the risk of psychological distress, studies have indicated that victims of hate crimes have distinct needs and may suffer from consistently higher levels of psychological distress (e.g. intrusive thoughts, feelings of helplessness, depression, stress, anxiety, and anger) than victims of other comparable crimes.¹² Survivors of violent crimes, including hate crimes, are also at risk for developing a variety of mental health problems including post-traumatic stress disorder (PTSD).¹³

Prejudice renders victims of hate crime frequent targets of further victimisation when they turn to service providers for assistance after a hate-based incident – a phenomenon known as secondary

victimisation.¹⁴ Negative attitudes and prejudice on the part of criminal justice officials and health service providers play a role in secondary victimisation; that is, decision-makers de-prioritising hate victimisation, and service providers neglecting, and sometimes even overtly discriminating against, survivors of hate crimes within the criminal justice system and health care.¹⁵

Another example of such secondary victimisation is when community members display more support for the accused during a trial than for the victims of a hate crime and/or their families.¹⁶ The impact of these factors is compounded by self-stigmatisation and the hesitancy, as a result of fear, of survivors of hate victimisation to approach service providers for support or redress. Because victims of hate crimes are aware that there is a likelihood of secondary victimisation, they often delay or completely avoid approaching the criminal justice system or accessing health care.

In a 2003 community-based study (n=487) conducted by OUT LGBT Well-Being (OUT)¹⁷ in collaboration with the University of South Africa Centre for Applied Psychology (UCAP), it was found that 62% of the self-identified lesbian, gay and bisexual survivors of hate victimisation did not report their experience to the police and that approximately 33% of the respondents experienced the police as ‘not interested’ in assisting them when they had reported discrimination. A significant proportion of the respondents in this OUT/UCAP study also confirmed that the victimisation had embarrassed them, and they feared that reporting it would make their sexual orientation public knowledge.¹⁸ Such secondary victimisation has the effect of exacerbating, rather than addressing, the vulnerability of survivors of hate victimisation, and constitutes another reason why unique responses and prioritisation are required in the aftermath of a hate crime.

LEGAL MODELS

Internationally there are generally two models of hate crimes legislation.¹⁹ The ‘hostility model’

regards hate crimes as crimes motivated by hatred or hostility based on factors such as race, nationality, religion or sexual orientation (known as 'protected characteristics'). Convicting a person of a hate crime requires evidence of this hatred or hostility based on the victim's protected characteristic.²⁰

The second model is known as the 'discriminatory selection model' and provides a more expanded definition whereby a perpetrator's deliberate selection of a victim based on the victim's race, nationality or other protected characteristic would constitute a hate crime. This legal model therefore also allows for mixed motivation by perpetrators and so cases such as armed robbery that deliberately target the victims on the basis of their protected characteristic could constitute hate crimes.²¹

Deciding on the appropriate legal model requires a careful consideration of past, current and possible future trends of hate crime in South Africa. This article next presents an examination of the nature of violence against foreign nationals as well as violence targeting people on the basis of their sexual orientation as a means of illustrating the types of crimes that hate crime legislation would need to address.

VIOLENCE AGAINST FOREIGN NATIONALS

Violence against foreign nationals, popularly known as xenophobic violence, was noted as a major social challenge in South Africa as far back as 1998.²² Some recent trends of violence against foreign nationals are:

- Indiscriminate mob violence against all foreign nationals in a particular area
- Attacks, intimidation or specific looting campaigns targeting foreign-owned businesses
- Individual attacks on foreign nationals.

In the first category, local residents typically instigate the forceful removal of foreign nationals from the area, blaming them for a range of social ills. This was the case in many of the areas

affected by the country-wide May 2008 violence, De Doorns in November 2009 and Sasolburg in May 2010, where individuals with economic or political incentives mobilised other residents to attack or remove all foreign nationals from the area.²³

In the second category, local residents have protested publicly including about a lack of service delivery and some have taken the opportunity to attack and loot foreign-owned shops in the area. Whilst the protests have usually not been targeted at foreign nationals, the resulting looting has usually specifically targeted foreign-owned shops and left shops owned by South Africans untouched.²⁴ In 2011, local business owners started a campaign of intimidation against foreign-owned businesses with one group calling itself the Greater Gauteng Business Forum issuing threats with apparent impunity in areas including Freedom Park, Ramaphosa, Diepsloot and Tembisa.²⁵

Finally, there continues to be a number of seemingly isolated incidents where a foreign national, or small groups of foreign nationals, are attacked. Whilst high levels of crime in the country suggests that any person can be a victim, there have been a number of instances where it has been clear that people have been attacked deliberately because they are foreign.²⁶ These are some of the trends that new legislation on hate crimes needs to address.

Further challenges for foreign nationals include improving access to police protection and justice on an equal basis to citizens. In the past, police have been accused of intentionally protecting only South African-owned businesses during looting, ignoring requests for an urgent intervention following a threat of mob violence, being complicit in attacks on foreign nationals, and refusing to assist foreign nationals who wish to open a case at a police station.²⁷ Various national surveys have illustrated negative sentiments by the public towards foreign nationals and some police officers appear to share such sentiments.²⁸ Victims of xenophobic violence have often struggled to access justice. The low number of

arrests and lower number of successful convictions in the wake of the 2008 violence is one case in point.²⁹

There has been some progress in both policing and the justice response, including improved cooperation between national police, civil society and United Nations agencies with the appointment of a national coordinator for xenophobia in Visible Policing.³⁰ This has improved communication and has led to a number of instances where police have been able to respond quickly to outbreaks of violence. The National Prosecuting Authority (NPA) has also indicated that it has developed its own definition of xenophobia-related cases and has focal points in all the provinces responsible for collecting information on these.³¹

A final area of concern is access to compensation and restitution for foreign victims of hate crime.³² Obtaining a compensation order against the perpetrator is difficult, given the low number of arrests and successful convictions, but also within a context where there is often tacit support for crimes against foreign nationals.³³ Access to restitution where perpetrators return stolen goods or restore property is difficult for the same reasons.³⁴ These are some of the challenges that hate crimes legislation needs to address.

SEXUAL ORIENTATION AND GENDER-BASED VIOLENCE

Another type of hate crime is that which specifically targets lesbian, gay, bisexual, transgender and intersex (LGBTI) people. Like many South Africans, LGBTI people are targets of general violence and crime. However, because they are stigmatised for their perceived sexual and/or gender 'deviance', LGBTI people are also frequently discriminated against, through criminal acts, because of their sexual orientation, gender identity and/or biological variance.³⁵ Often, hate speech (such as harassment, slurring, name-calling and other forms of verbal abuse) creates the breeding ground for hate-based attacks.³⁶

Nel and Judge report that, internationally, the vast majority of openly LGB³⁷ persons have experienced some form of victimisation, such as verbal abuse, threats, being chased or followed, or being spat on. In comparison, research findings suggest that South Africans were less likely to experience verbal abuse and threats of violence than their American counterparts, but they were more prone to be physically assaulted and substantially more often sexually assaulted. The authors also suggest that homophobic hate crime increases as lesbian and gay communities become more visible.³⁸

Anecdotal evidence of sexual orientation-related hate crime, such as assault, malicious damage to property, rape and murder, abound.³⁹ The phenomenon of 'corrective rape'⁴⁰ has received considerable media attention. It will seem that black lesbians, particularly in townships, where they are seen to challenge patriarchal gender norms, are increasingly targeted for rape and/or murder. Although not a separate and distinct phenomenon from the high incidence of gender-based violence in the country, it has also been reported that highly visibly gay, lesbian or transgender people are more often the targets of homophobic violence. The fatal shooting of a gender non-conforming 'drag queen' in Yeoville, Johannesburg, in 2008 is a case in point.⁴¹ The connection between hate speech, hate crimes, gender-based violence and sexual orientation more generally seems to be too evident to ignore in considering appropriate responses to related victimisation within a South African context.

In 2010, the US-based site www.change.org started an online petition against 'corrective rape' directed at the government in partnership with Luleki Sizwe (a Cape Town township-based CSO), which received several thousand signatures. In response, in May 2011, the DOJCD declared that they would set up a multi-sectoral task team to address the issue. The proposal for this task team came after more than ten years of multi-sectoral advocacy aimed at raising awareness of gender-based violence against black lesbians in particular and LGBTI communities more broadly, and calling for a response from government and broader society.

A DOJCD spokesperson however, publicly stated that this was the first time they were hearing about the problem of violence against lesbians.⁴² The DOJCD-led national task team officially started meeting in July 2011.⁴³ Going forward, similarities and differences in respect of other prejudice-motivated crimes, such as xenophobic attacks and race-based incidents, will also be considered.⁴⁴

POLICY DEBATES

While not ignoring that there are some critics, internationally, of hate crime legislation,⁴⁵ there do seem to be many more voices calling for the South African criminal justice system to recognise such crimes. Hate crime legislation will, however, need to respond to the particular social context in South Africa and therefore some debate is required on which characteristics should be specifically protected. Characteristics generally protected by hate crimes legislation internationally are those that are fundamental or immutable – that is, those that a person cannot change and that tend to identify people as members of a social group. Internationally, race, national origin and ethnicity are frequently protected characteristics as are religion, gender, age, mental or physical disability, and sexual orientation.⁴⁶

Section 9(3) and the Equality Act referred to in Section 9(4) of South Africa's Constitution prohibit discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁴⁷ Subsequent jurisprudence also established nationality as a prohibited basis for discrimination. The Constitution could therefore be used as a starting point in determining which characteristics to protect, based on which of these characteristics have been or are reasonably likely to be a causal factor in crimes, as well as whether any additional characteristics, such as gender identity and gender expression, should be included. Given the types of crimes hate crimes legislation tries to protect against, there may also be merit in exploring how

best to protect people who are targeted for crime on the basis of their HIV status, as was the case for Gugu Dlamini in 1998.⁴⁸

Another important policy choice is determining the appropriate legal model for South Africa, as it is critical to avoid developing legislation that becomes difficult to implement. With the 'hostility model' proving subjective *hate* on the part of the perpetrator towards the victim, based on a protected characteristic, can be very challenging.

While some may argue that the discriminatory selection model with its lower threshold 'dilutes' the concept of a hate crime, this model requires police and prosecutors to simply show that the victim was selected *because* of a protected characteristic such as race, nationality, religion, sexual orientation or gender identity and/or expression. The discriminatory selection model also allows for mixed motives such as criminal incentives alongside bias. This broader applicability of the law can go beyond 'hate' to include stereotypes about particular social groups. This model of legislation thus aims to protect against prejudice as well as protect groups that may be targeted by criminals on the basis of perceived vulnerability. Countries with this model of legislation tend to require a causal link between a victim's protected characteristic and the crime.⁴⁹

Determining an appropriate punishment for hate crimes offenders is another matter that needs careful consideration. Internationally, hate crimes legislation usually either introduces hate crimes as substantive new offences (such as racially-aggravated assault) or introduces aggravating circumstances to argue for enhanced sentencing. Some have even introduced a combination of the two approaches as a means of providing prosecutors with a greater range of tools with which to address the offence.⁵⁰ Determining how best to aid prosecutors and equip them to ensure convictions of hate crimes perpetrators is an area where leadership by the NPA would be valuable.

In South Africa, there is some debate as to whether mandatory minimum sentences are

effective in deterring would-be offenders from the commission of a particular type of crime. Mandatory minimum sentencing, which prescribed severe prison terms, was introduced in 1998 and is currently in place for crimes such as gang rape and premeditated murder. It has been argued that minimum sentencing has not had the effect of deterring crime (as many offenders do not expect to be caught), and has instead had a negative impact by contributing to overcrowding in correctional facilities.⁵¹ Determining appropriate punishments for hate crimes offences is an area where further input from criminal justice experts would be welcome, to ensure that the provisions of hate crimes legislation respond to the specific challenges in South Africa. There may also be scope to explore the use of alternative dispute resolution mechanisms in non-violent hate crimes cases.⁵²

Once hate crimes legislation is developed there is an opportunity for police and the NPA to develop guidelines for the police and prosecutors on how to utilise the legal provisions. A number of countries with hate crimes legislation have developed guidelines for prosecutors and investigators to assist them in collecting and demonstrating evidence of prejudice or deliberate selection of the victim on the basis of their identity.⁵³

In addition, the police in several countries have developed guidance manuals on policing hate crimes. For example, the Association of Chiefs of Police in Scotland 2010 manual provides information on the legislation, key definitions, recording and reporting of hate crimes offences, supporting witnesses and victims (and avoiding secondary victimisation), as well as other related considerations.⁵⁴ The existence and availability of such manuals represents a valuable opportunity for South Africa to ensure its police are well trained and have the knowledge to effectively address and collect evidence of hate crimes.

The perception of the victims or the victims' community is often used to determine whether to investigate a crime as a possible hate crime. This is specifically important to demonstrate that

police and prosecutors are sensitive to community perceptions of the nature of the case. Whilst in some cases there may be immediate suggestions pointing towards an incident being a hate crime, further investigation by police may reveal otherwise. If police are transparent and share this information with concerned communities, this can allay fears that 'people like us' are 'under attack'. In South Africa, media reports on a number of crimes indicate that victims or other concerned groups have reported their perceptions that a crime constituted a hate crime.⁵⁵

Because of the traumatic impact of hate crimes on their victims and because these crimes can seriously disrupt social cohesion, one possible approach is to fast track hate crimes cases through the criminal justice system in order to demonstrate that such crimes are taken seriously. Whilst the attempts at fast tracking xenophobia-related cases following the 2008 violence met many challenges, the FIFA World Cup 2010 special courts demonstrated that it can be possible to try cases rapidly, provided that there is political will, effective cooperation between police and prosecutors, and sufficient budget to support these courts.

To support the implementation of the law, training will be required for police, prosecutors, magistrates and judges, as well as service providers, such as health care providers, as a means to ensure that law enforcement and justice officials are able to make use of the legislative provisions effectively and that service providers are able to assist victims without secondary victimisation. Of course, as recognised by the National Victim Empowerment Programme, such service provider guidelines have a crucial contribution to make, even in the absence of hate crime legislation.⁵⁶ At least one international organisation has expressed an interest in supporting South Africa by providing experts for related training.⁵⁷

Regardless of whether hate crime legislation is adopted in South Africa or not, a further important intervention is the need to collect

accurate data on hate crimes across the country. Enhanced recording practices will translate into data that can be used to determine trends of hate crimes and where they are most likely to occur, as well as track the progress in holding perpetrators accountable by observing the number of cases lodged with police and assessing how many of these were successfully prosecuted. Such analysis will guide interventions to address any barriers that may emerge, either by police not producing sufficient evidence, or by obstacles occurring in the prosecution process.

Civil society is currently in the process of developing its own monitoring system to record cases of hate crimes and assess the quality of support offered by service providers and police, the traumatic impact on the victim and whether the victim intends to report the matter. In addition to providing information on the levels of service provision and the psychological impact, this monitoring will also provide one mechanism to examine levels of under-reporting of hate crimes. The monitoring system is being developed by the UCAP in collaboration with members of the Hate Crimes Working Group.⁵⁸

Finally, legislation on hate crimes is only likely to be effective if there is sufficient political and public support to implement it. This requires senior leaders to speak out on a regular basis against all types of hate crimes. A number of leaders have spoken out on racism and xenophobia, but this needs to be consistent and extend to other forms of hate crimes.⁵⁹ At the core, related experiences of discrimination and victimisation are more similar than different, and a 'prejudice hierarchy', where some experiences are valued over others, ought to be avoided.⁶⁰

CONCLUSION

Hate crimes occur more often in South Africa than the government may wish to acknowledge. Whilst this article primarily highlights those crimes that specifically target people on the basis of their nationality, sexual orientation and/or gender expression, sufficient anecdotal evidence and early research findings suggest that the

problem is more widespread than these occurrences. Hate crimes are not reconcilable with the democratic principles of equality and human rights for all and do not serve the international image of this 'rainbow nation' well. Current legislation and policy frameworks are insufficient to appropriately respond to related incidences or to effectively minimise and/or prevent hate crimes from happening. To address the social causes underlying hate crimes, multi-level responses are required, including interventions aimed at increased diversity awareness in communities, and education and training programmes for service providers. However, the 'symbolism' of law reform is of the utmost importance, as is the platform provided by the legal system from which to condemn violating behaviours. It is therefore, in our view, in the South African government's interest to fast track the development of hate crime legislation and related service provider guidelines, in which hate crimes are acknowledged as priority crimes. Introducing hate crime legislation will send a clear message that hate will not be tolerated. As indicated, various international examples exist to assist in this important process. The time is now to clearly signal that South Africa belongs to all who live in it.



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NOTES

1. Constitution of the Republic of South Africa (Act 136 of 1996), Pretoria: Government Gazette.
2. Some of those who have spoken out on the need to address hate crimes in South Africa include the United Nations Committee on the Elimination of Racial Discrimination, South African Human Rights Commission (SAHRC), a number of lesbian, gay, bisexual, transgender and intersex (LGBTI) CSOs, the Consortium for Refugees and Migrants in South Africa, the Special Rapporteur on the Human Rights of Migrants, and most recently, participants in an Institute for Security Studies and Human Sciences Research Council Seminar, *South Africa: The Country We Want To Live In: Policy, Practice, Legislation With Respect To Hate Crime* (See <http://www.issafrica.org/eventitem.php?EID=739>).
3. The term 'hate crimes' tends to be misleading as the crimes popularly referred to as such may not be fuelled by actual *hatred*. Such crimes are also referred to as bias crimes or bias-related crimes. For the sake of

clarity, we will use the popular term *hate crimes* in this article.

4. See for example Laws of New York, 2000, *Chapter 107, Hate Crimes Act of 2000*, http://criminaljustice.state.ny.us/legalservices/ch107_hate_crimes_2000.htm (accessed 14 October 2011) in which the nature and impact of hate crimes that extend beyond the individual are articulated. Also see P Iganski, *Hate Crimes Hurt More*, *American Behavioral Scientist*, 45(4) (2001), 626-638.
5. Iganski, *Hate Crimes Hurt More* and also J McDevitt, J Balbonic, L Garcia and J Gui, *Consequences for Victims, A Comparison of Bias and Non-Bias Motivated Assaults*, *American Behavioral Scientist*, 45(4) (2001), 697-711.
6. For a more extensive discussion around the gaps in the existing legal framework in South Africa, see K Williams, *Legal brief on hate crimes in South Africa*, 2010. <http://www.cormsa.org.za/wp-content/uploads/2010/07/cormsa-hate-crimes-legal-brief.pdf> (accessed 7 November 2011).
7. The DOJCD is also overseeing the development of a National Action Plan against Racism, Racial Discrimination, Xenophobia and Related Intolerances.
8. Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*, Warsaw: Organisation for Security and Cooperation in Europe, 2009, 16.
9. Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
10. See for example Laws of New York, 2000; B Harris, *Arranging prejudice: Exploring hate crime in post-apartheid South Africa*, *Race and citizenship in transition series*, 2004, <http://www.csvr.org.za/wits/papers/paprctpl.htm> (accessed 14 October 2011); Juan A Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*, unpublished doctoral thesis, Unisa, Pretoria, 2007; Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
11. Among others, see JB Jacobs and KA Potter, *Hate Crimes: Criminal Law & Identity Politics*, New York: Oxford University Press, 1998.
12. In McDevitt et al., *Consequences for Victims, A Comparison of Bias and Non-Bias Motivated Assaults*, 'comparable crimes' refer to the location of the incident (for example, victimisation in the area of the home, at work, etc), relationship between victim and perpetrator, and nature of the assault (i.e. whether medical treatment was required). Also see GM Herek, JR Gillis and JC Cogan, *Psychological sequelae of hate-crime victimization among lesbian, gay and bisexual adults*, *Journal of Consulting and Clinical Psychology*, 67(6) (1999), 945-951.
13. American Psychological Association, *The Psychology of Hate Crimes*, 2009. www.apa.org/about/gr/issues/violence/hate-crimes-faq.pdf (accessed 14 October 2011).
14. This is acknowledged in the South African national policy guidelines for victim empowerment. See Department of Social Development, *National Policy Guidelines for Victim Empowerment*, Pretoria: Department of Social Development, 2009.
15. Ministerial Advisory Committee on Gay and Lesbian Health, *Health and sexual diversity: A health and wellbeing action plan for gay, lesbian, bisexual, transgender and intersex (GLBTI) Victorians*, 2003, http://www.glhv.org.au/files/health_action_plan.pdf (accessed on 14 October 2011); Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*.
16. N Mkhize, J Bennett, V Reddy and R Moletsane, *The country we want to live in: Hate crimes and homophobia in the lives of black lesbian South Africans*, Cape Town: HSRC Press, 2010.
17. OUT is a CSO working towards the well-being and rights of LGBT persons in Pretoria, Gauteng and South Africa.
18. JA Nel and M Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*. *Acta Criminologica*, 21(3), (2008); L Polders and H Wells, *Overall research findings on levels of empowerment among LGBT people in Gauteng, South Africa*, Unpublished report, Pretoria: OUT LGBT Well-being, 2004.
19. Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
20. This legal model appears consistent with what many people popularly understand a 'hate' crime to consist of.
21. An example of this model can be seen in section 422.55 of the California Penal Code, which states that "Hate crime" means a criminal act committed, in whole or in part, because of one or more of the following actual or perceived characteristics of the victim: The characteristics specifically protected in California are then listed as disability, gender, nationality, race or ethnicity, religion, sexual orientation, and association with a person or group with one or more of these actual or perceived characteristics. California Penal Code (amended 1987).
22. In 1998 the SAHRC, the United Nations High Commissioner for Refugees and the National Consortium for Refugee Affairs jointly launched the 'Roll Back Xenophobia' campaign. Despite efforts from a range of stakeholders, including hearings on xenophobia in 2004 held jointly by the SAHRC and the Portfolio Committee on Foreign Affairs, as well as concerns cited by the African Peer Review Mechanism 2007 report, there was little concerted effort by government departments to address violence against foreign nationals. This reluctance of government culminated in the widespread violence of 2008 which left at least 62 dead and an estimated 100 000 displaced. Since 2008, there has been increased awareness of the problem and this, as well as new partnerships between government, civil society and international agencies, has gone some way to preventing a repeat of the 2008 violence. Yet, small scale attacks deliberately targeting foreign nationals continue to occur. Threats of violence around the FIFA World Cup saw Cabinet reactivate an Inter-Ministerial Committee to coordinate government's response, which included pre-emptive and responsive deployment of

- police and the military in suspected hotspots. For examples of such attacks, see Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*, 2010, <http://www.cormsa.org.za/wp-content/uploads/2009/05/cormsa-database-of-violence-against-foreign-nationals.pdf> (accessed 16 October 2011).
23. See J-P Misago, T Monson, T Polzer and L Landau, *May 2008 violence against foreign nationals in South Africa: Understanding causes and evaluating responses*, Johannesburg: CoRMSA, 2010. There have also been numerous cases where residents have correctly or incorrectly suspected a foreign national of a particular crime and then formed vigilante groups to evict all foreign nationals from the area. This was the case in Imizamo Yethu in November 2009, Riviersonderend in January 2010 and Masiphumelele in October 2008. See Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*.
 24. This has been the case in a number of incidents reported in Mpumalanga such as Siyathemba in July 2009 and February 2010, Sakhile in July 2009, Mhluzi in March 2010 and Ermelo in February 2011. See Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*.
 25. Lawyers for Human Rights, *LHR calls on the police to protect foreign nationals and foreign-owned businesses in the pre-election intimidation and attacks in Gauteng*, press release issued 13 May 2011, <http://www.lhr.org.za/news/2011/lhr-calls-police-protect-foreign-nationals-and-foreign-owned-businesses-pre-elections-inti> (accessed 16 October 2011).
 26. Some examples include a Burundian national being attacked on a train near Claremont station in Cape Town in August 2010, allegedly by a group of people singing 'get out, foreigner', a Congolese woman being raped in Samora Machel by attackers who told her they will do the same to all other foreigners in the area, and a Zimbabwean national being thrown off a train allegedly after being threatened due to being foreign. See Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*.
 27. See Consortium for Refugees and Migrants in South Africa, *CoRMSA Brief for the Independent Complaints Directorate: Police Harassment and Abuse of Foreign Nationals*, 2010, <http://www.cormsa.org.za/wp-content/uploads/2009/05/submission-to-the-independent-complaints-directorate-on-police-abuse-of-foreign-nationals.pdf> (accessed 16 October 2011).
 28. See the survey results described in Southern African Migration Project, *The Perfect Storm; The Realities of Xenophobia in Contemporary South Africa*. Cape Town: IDASA, 2008. For a discussion of police attitudes towards foreign nationals, see D Bruce, G Newham and T Masuku, *In Service of the People's Democracy: An assessment of the South African Police Service*, Johannesburg: Centre for the Study of Violence and Reconciliation, 2007.
 29. In response to an enquiry from the SAHRC regarding progress on cases related to the 2008 xenophobic violence, the DOJCD responded: "Of 597 cases, only 159 had been finalised with a verdict (98 guilty; 61 not guilty), while 218 had been withdrawn by October 2009". The SAHRC observed that this amounted to a withdrawal rate of almost four times that of typical violent crime. South African Human Rights Commission, *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals*, Johannesburg: South African Human Rights Commission, 2010: 68.
 30. T Polzer and K Takabwirwa, 'Just Crime'? Violence, Xenophobia and Crime: Discourse and Practice, SACQ 33, September 2010.
 31. National Prosecuting Authority, personal communication, 21 April 2011.
 32. The Victim Empowerment Programme (VEP) integrated policy guidelines prescribe that victims of hate victimisation should be one of the ten priority groups. Assistance listed in the guidelines includes access to compensation and restitution. See Department of Social Development, *National policy guidelines for victim empowerment*.
 33. There have been a number of instances where, following displacement due to xenophobic violence, foreign nationals have been intimidated or encouraged to drop the criminal charges against residents. One example of this was in Siyathemba in July 2009 where a group of residents approached displaced foreign nationals and forced them into dropping charges. This and other cases are listed in Consortium for Refugees and Migrants in South Africa, *Incidents of Violence against Foreign Nationals*. In this social and political context it is very difficult for foreign nationals to seek and enforce a compensation order, especially if they intend returning to the area.
 34. Following the May 2008 violence, victims spoke about the difficulties of returning to an area where perpetrators who had stolen goods were known but the victim was unable to do anything about it. Group of displaced foreign nationals, Rand Airport shelter, personal communication, September 2008.
 35. Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*.
 36. For example, homophobic speech is often shaped by so-called religious and cultural narratives: "Homosexuality is un-African" taken to its logical conclusion, may be used to 'justify' a hate crime and "homosexuality is a sin", may also be used in the same manner (Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*, 22). Hate crimes can therefore be understood as representing the extreme side of a continuum that starts with it being socially acceptable to name call and demean specific social groups.
 37. Where T and I are not in references to research findings, transgender and intersex persons were not included in the research.
 38. Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*.
 39. Vernon Gibbs and Tony Halls, the first same-sex couple to be married under the Civil Union Act, had previously made news headlines as targets of a hate crime. In 2005, this white male couple had pressed criminal charges after their guest lodge in Riversdal, Eastern Cape, was vandalised five times by local Dutch Reformed Church members who objected to their

opening the lodge to gay tourists. During the 2005 Lesbian and Gay Pride march in Braamfontein, Johannesburg, the float of the CSO, Forum for the Empowerment of Women, or FEW, was targeted by spectators throwing bottles, seriously injuring a lesbian volunteer. In light of the general hostility to same-sex marriage, it is precisely for fear of victimisation that the two Johannesburg-based black men who were the first couple to legally marry in a religious ceremony chose to remain anonymous. In 2006, a 19 year-old black lesbian, Zoliswa Nkonyana, was murdered by a mob in Khayelitsha, Cape Town, because of her sexual orientation. On 7 July 2007, two black lesbian women, Salome Masooa and Sizakele Sigasa, were brutally raped and murdered in Soweto and in response, Campaign 07-07-07 was initiated, among others, calling for hate crime legislation. Only 15 days later, a black lesbian woman, Thokozaane Qwabe (23), was found murdered in Ladysmith, KwaZulu-Natal. For full references, see Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*. In addition, also see Mkhize et. al., *The country we want to live in: hate crimes and homo-phobia in the lives of black lesbian South Africans*.

40. 'Corrective rape' is the prejudiced notion that a lesbian woman can be raped to 'make her straight': i.e., to 'correct' her lesbian sexuality. 'Corrective rape' seeks to justify the rape of those people who are perceived to not conform - or to disrupt - expected gender roles, behaviour and/or presentation. Misogyny and homophobia underpin the prejudice associated with 'corrective rape' (OUT, 2008, cited in Nel and Judge, *Exploring homophobic victimisation in Gauteng, South Africa: Issues, impacts and responses*, 24). Also see www.actionaid.org.uk/doc_lib/correctiverape_rep_final.pdf.
41. Lesbian and Gay Equality Project, *South Africa: LGBTI People in Yeoville Mourn the Killing of Daisy Dube, an Open Drag Queen*. Press release on 12 June 2008, <http://www.anarkismo.net/article/9125> (accessed 15 August 2008). Also see Mkhize et. al., *The country we want to live in: hate crimes and homo-phobia in the lives of black lesbian South Africans*.
42. FEW initiated the 'Rose has Thorns' campaign as far back as 2003, and the earlier mentioned 'Campaign 07-07-07' was launched in 2007. Other initiatives include submissions made to government, such as UCAP and OUT, *Hate crime in South Africa: Issues, challenges and strategies for action*, submission to the National Prosecuting Authority, June 2008, Pretoria: UCAP & OUT; and *Hate Crimes Working Group. Memo for the Department of Justice and Constitutional Development on Hate Crimes in South Africa*, June 2010, Johannesburg: Hate Crimes Working Group in which among others, reference is made to South Africa's VEP integrated policy guidelines and 10th anniversary conference resolution that recognise those subjected to hate victimisation as priority target groups for assistance, as well as the need to develop comprehensive legislative and policy frameworks for hate crimes, including xenophobia and for LGBTI people.
43. Following concerns raised by civil society representatives about both such narrow focus and the language

that is being used to frame violence against lesbians, a suggestion was provisionally accepted to stop using the term 'corrective rape' altogether and instead refer to gender-based violence targeted at LGBTI persons in order to capture both homophobic and gender discrimination, and to cover the various forms of violence against LGBTI people (e.g. harassment, assault, rape, murder).

44. Civil society update on task team to address gender-based violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) people, September 2011.
45. See Jacobs and Potter, *Hate Crimes. Criminal Law & Identity Politics*. In Nel, *Towards the 'Good Society': Healthcare provision for victims of hate crime from periphery to centre stage*, some of the controversies related to hate crime laws is also outlined.
46. Department of Social Development, *National policy guidelines for victim empowerment*, Pretoria: Department of Social Development, 2009.
47. Constitution of the Republic of South Africa, 1996.
48. See for example, Partnership against AIDS, *Press Release issued by the Department of Health on the Killing of Ms Gugu Dlamini (AIDS Campaign Worker)*, 1998, <http://www.info.gov.za/speeches/1998/990428438p1006.htm> (accessed 16 October 2011).
49. An example of this is a case from New York where robbers targeted a gay man because they thought he would be less likely to resist and to report the crime. In court the defendants argued that they could not be found guilty of a hate crime as they had no anti-gay hostility towards the victim. The court disagreed on the basis that they had deliberately selected the victim on the basis of a protected characteristic. See Organisation for Security and Cooperation in Europe, *Hate Crime Laws: A Practical Guide*.
50. In the United Kingdom, for example, the Crime and Disorder Act of 1998 created new 'racially-aggravated' and 'religiously-aggravated' offences. In addition, the Powers of Criminal Courts (Sentencing) Act of 2000 prescribes that if an offence was racially aggravated, this shall be treated as an aggravating circumstance during sentencing and it shall be noted on the court record that the offence was such.
51. M O'Donovan and J Redpath, *The Impact of Minimum Sentencing in South Africa*, Cape Town: Open Society Foundation for South Africa, 2006.
52. For example, the Jewish Board of Deputies has facilitated visits to the Holocaust Museum by children who have been accused of using anti-Semitic speech. Feedback from this suggests that such types of interventions may be most appropriate in less serious cases. Jewish Board of Deputies, Johannesburg, personal communication, 23 April 2011.
53. The United Kingdom's Crown Prosecution Service has developed a policy on prosecuting racist and religious crime as well as hate crimes based on disability. This covers matters such as the legislative background, ensuring full recognition of evidence of bias in a crime, support for victims and witnesses, as well as guidance for the sentencing phase. See Crown Prosecution Service, *Racist and religious crime – CPS prosecution policy*, <http://www.cps.gov.uk/publications/prosecution/rpbcbrbook.html> (accessed 16.10.2011)

- and Crown Prosecution Service, *Policy for Prosecuting Cases of Disability Hate Crime*, http://www.cps.gov.uk/publications/docs/disability_hate_crime_policy.pdf (accessed 16 October 2011).
54. Association of Chiefs Police Officers in Scotland, *Hate Crime Guidance Manual*, 2010, http://www.acpos.police.uk/Documents/Policies/ED_ACPOS_HateCrimeManual_Sept2010.pdf (accessed 16 October 2011).
 55. See, for example, N Joseph, *We think it was Xenophobic*, 2009, <http://www.iol.co.za/news/south-africa/we-think-it-was-xenophobic-1.444551?ot=inmsa.ArticlePrintPageLayout.ot> (accessed 16 October 2011). Cases of attacks on black lesbians have often been immediately suggested to be hate crimes - see for example A Kelly, *Raped and Killed for being a Lesbian: South Africa ignores 'corrective attacks'*, *Guardian.co.uk*, 12 March 2009, <http://www.guardian.co.uk/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> (accessed 16 October 2011).
 56. Department of Social Development. *National policy guidelines for victim empowerment*.
 57. Personal communication with a representation of the Organisation for Security and Cooperation in Europe, 1 July 2010.
 58. The Hate Crimes Working Group comprises of a multi-sectoral group of CSOs working to address crimes motivated by different forms of prejudice. The Working Group can be contacted via CoRMSA.
 59. For example, President Zuma included comments on racism and xenophobia in his Reconciliation Day address in 2009. President Jacob Zuma, *Address by His Excellency, President JG Zuma on National Reconciliation Day; Amphitheatre, Freedom Park, Salvokop, Tshwane*, 16 December 2009, <http://www.info.gov.za/speeches/2009/09121708351001.htm> (accessed 16 October 2011).
 60. Harris, *Arranging prejudice: Exploring hate crime in post-apartheid South Africa*.