



‘Corrective rape’, hate crimes, and the law in South Africa

July 2013

1. Introduction

‘Corrective rape’ is the term given to the erroneous myth that heterosexual rape will have a ‘healing’ effect on a lesbian woman and will turn her ‘straight’ again.¹ Statements like “we will teach you a lesson”, or “show you how to be a real woman” accompany the crime indicating the perpetrator(s)’ belief in the myth that lesbianism is unnatural and wrong.² The perpetrator thus commits the crime with a bias or hatred towards the victim. But, classifying the rape only as a hate crime also ignores that it is particular women who are most vulnerable to the crime. The fact that it is black poor women living in informal settlements who are the most likely victims of this crime is often ignored by prevailing narratives on corrective rape. These incidents are certainly motivated by hate and or prejudice, but the victims are made more vulnerable by a state that does not adequately provide for their socio-economic needs.

In November 2010, the Minister of Justice announced that the Department of Justice and Constitutional Development (DOJ&CD) had already prepared a draft bill to address these crimes.³ In May 2011 the DOJ&CD announced that they would establish a National Task Team to address hate crimes and ‘corrective rape’ following mass public outcry. As of July 2013, no such draft bill has been presented to Parliament, and ‘corrective rape’ and violence against black lesbian women in particular has continued to escalate.

This paper seeks to provide a background to the issue of violence against lesbian women, to frame such violence within the context of hate crimes, and to assess the failure of the DOJ&CD to enact commitments made in media statements and responses to Parliamentary questions.

2. The context and scale of violence against lesbian women

Between April 2007 and March 2012, almost one million contact crimes were reported to the South African Police Services by South African women. The figures for each crime type are provided in Table 1 below.

¹ ActionAid. (2009) *Hate crimes: The rise of ‘corrective rape in South Africa*. Accessible via <http://rapeoutcry.co.za/home/wp-content/uploads/2012/09/correctiveraperep_final.pdf> Accessed 12 July 2013.

² Ibid.

³ Radebe, J (2010). Response to Internal Questions 3505. Accessible via <http://www.pmg.org.za/questions-and-replies/2010/09/03/justice-and-constitutional-development>



Table 1: Selected contact reported crime figures against women aged 18 and older⁴

	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012	Total per category
Murder	2 544	2 436	2 457	2 594	2 286	12 317
Attempted murder	3 016	2 966	3 008	2 842	2 416	14 248
All sexual offences	31 328	30 124	36 093	35 820	31 299	164 664
Common assault	94 286	91 390	94 176	89 956	87 191	456 999
Assault GBH	64 084	61 509	62 143	60 630	57 345	305 711
Total	195 258	188 425	197 877	191 842	180 537	953 939

Violence against lesbian women thus occurs in a context where violence against women is prevalent. Statistics on sexual offences are not published for public access in a form that allows the public to distinguish the motive for the crime. In addition, lesbian, gay, bisexual, transgender and intersex (LGBTI) rape survivors are not required to identify their sexual orientation when reporting a rape, and thus the system is unable to provide accurate statistics on the incidence of this crime.

However, non-governmental organisations and media reports make some suggestions about the scale of 'corrective rape'. Luleki Sizwe, a Non-Governmental Organisation (NGO) based in Khayelitsha, estimates that as many as ten lesbians are raped in townships every week because of their sexuality.⁵ The British Broadcasting Corporation reports that 31 lesbian women have died in the last ten years from attacks on them motivated by homophobia and hatred.⁶

The myth that lesbianism is wrong, or that violence is a legitimate means of indicating belief in this myth, has its roots in patriarchy and hetero-normativity. Patriarchy demarcates women's bodies and sexuality as male property, and hetero-normativity demarcates lesbianism as wrong. This myth may also have some grounds in the criminalisation of homosexuality under Apartheid. Lesbians in particular challenge hetero-normative male authority, and 'corrective rape' is a response to this challenge.⁷

⁴ The South African Police Services (2012a). *Crime Statistics Overview RSA 2011/2012*. Accessed via <http://www.saps.gov.za/statistics/reports/crimestats/2012/downloads/crime_statistics_presentation.pdf> Accessed 10 April 2013. Accessed 12 July 2013.

⁵ Luleki Sizwe (2013). *Homepage Facts*. Accessed via <<http://www.lulekisizwe.com/>> (Accessed 09 July 2013).

⁶ Fihlani, P (2011). "South African lesbians fear 'corrective rape'. BBC News Africa. Accessed via <<http://www.bbc.co.uk/news/world-africa-13908662>>. Accessed 12 July 2013.

⁷ Nel, J (2005). "Hate Crime: A new crime category for a new South Africa" in Davis, L and Snyman, R (eds). (2005) *Victimology in South Africa*. Van Schaik.



3. Hate crimes and corrective rape

Seeing corrective rape as merely a criminal act ignores the prejudice that is involved in the perpetration of these crimes.⁸ These crimes are committed with a particular motive – prejudice or hatred towards lesbian women on the grounds of their sexual orientation. Statements like those mentioned in the introduction indicate that these crimes are committed on this basis.

Hate crimes are distinct from other crimes for a number of reasons.⁹ First, they are motivated, in part or in full, by prejudice about a victim, based on their alleged or actual membership to a group. In a corrective rape then, the rape is motivated in part or in full by the perpetrator's belief about homosexuality and the fact that he believes the victim is lesbian.

Second, hate crimes are seen as 'message crimes'. These crimes send, whether intended by the perpetrator or not, a message to the 'hated' group. As such, they affect not only the actual victim, but the other members of the group and community. They are divisive in that they cause stigma and suspicion of group members amongst others, and also because they create a sense of fear among group members. They thus affect community feelings of safety, security, and cohesion.¹⁰ When a black lesbian woman is raped in a setting such as a township, it sends a clear message to other lesbian women – if you are openly gay, you are at risk.¹¹

Third, hate crimes take place in an environment where discrimination against a particular group is socially accepted, and although hate crimes do not only target marginalised groups, it is these groups that are most vulnerable.¹² The prevalence of homophobia is evident even amongst very young South Africans, and corrective rape was noted as happening in schools in 2008.¹³ In 2011 a Twitter hashtag "#itsnotrapeif" circulated on the social media site, with one response being "#itsnotrapeif she is a lesbian and you are showing her what she is missing". Although the hashtag generated much public anger, the prevalence of the belief

⁸ Consortium for Refugees and Migrants in South Africa (CORMSA) (2011) *Hate Crimes in South Africa - A background paper for the Hate Crimes Working Group*. <http://www.cormsa.org.za/wp-content/uploads/2010/07/hate-crimes-working-group-background-paper.pdf> (Accessed 15 July 2011).

⁹ Ibid.

¹⁰ Harris, B (2004). "Arranging Prejudice: Exploring Hate Crime in post-apartheid South Africa". Centre for the Study of Violence and Reconciliation, *Race and Citizenship in Transition Series*. Accessible via <<http://www.csvr.org.za/docs/racism/arrangingprejudice.pdf>> Accessed 12 July 2013.

¹¹ Molosankwe, B (2013). "Mom tells of lesbian's horror death." Accessed via <<http://www.iol.co.za/news/crime-courts/mom-tells-of-lesbian-s-horror-death-1.1541081#.UdwS2zs3DI>> Accessed 12 July 2013.

¹² CORMSA (2011).

¹³ Action Aid. (2009) See also: Pillay, V (2008). "Rape Games played at School". *The Mail & Guardian*. December 10 2009. Accessed via <<http://mg.co.za/article/2008-03-12-rape-games-played-at-sa-schools>> Accessed 12 July 2013.



across social categories indicates that despite the Constitutional protection of the right to sexual orientation, a number of harmful stereotypes and stigma surrounding homosexuality still exists.¹⁴ If a rapist targets a lesbian on the grounds of her sexual orientation, ‘corrective rape’ qualifies as a hate crime based on the definition above.

4. Legislation and hate crimes in South Africa

South Africa currently does not have specific legislation that deals with hate crimes. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) aims to give effect to the Constitutional requirements to equality, and to facilitate compliance with international law obligations. However, whilst PEPUDA does target discrimination on a number of grounds, discrimination on the grounds of sexual orientation or on the grounds of nationality is not covered by the Act.

The Organisation for Security and Cooperation in Europe (OSCE) identified five questions that legislators should consider when drafting a hate crimes bill. These were:¹⁵

1. Should a new substantive offence be created or will a penalty enhancement for existing crimes be sufficient?
2. Which characteristics should be included in the law?
3. How should motive be defined?
4. How should association, affiliation and mistakes in perception be dealt with?
5. How much evidence is needed in order to prove the crime?

These questions will be considered below. Question 1 will be dealt with in 4.1. Questions 2 – 5 will be dealt with in 4.2.

4.1. A new substantive offence or a penalty enhancement

In order to legislate against hate crimes, the DOJ&CD would need to choose between the creation of a new offence and the use of existing legislation to apply harsher penalties for hate crimes perpetrators.

¹⁴ Rape Crisis issued a statement, in which it called the hashtag topic: “devastating for the rights of survivors, and fuels myths that survivors of rape deserved what they got.” Rape Crisis Cape Town Trust. ‘Rape Crisis Cape Town Trust Statement on the #itsnotrapeif Twitter phenomenon’. Rape Crisis Cape Town Trust Website Homepage. April 8 2011. <http://victimempowermentsa.wordpress.com/2011/04/08/rape-crisis-cape-town-trust-statement-on-the-itsnotrapeif-twitter-phenomenon/>. Accessed 12 July 2013.

¹⁵ Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (ODIHR) (2009). *Hate Crime Laws - A Practical Guide*. Accessed via <www.osce.org/odihr/36426>, Accessed 12 July 2013.



If South Africa were to create a new substantive offence, it would rely on prosecutor familiarity with the legislation, and would rely on their discretion to bring hate crimes charges in addition to the crime (e.g. rape).¹⁶ Introducing a new hate crimes law would not provide a legal mechanism that compels prosecutors to prosecute the charge of hate crimes, which are more difficult to prove. To prove guilt beyond a reasonable defence, the prosecutor would have to prove the rape, that the perpetrator knew the victim's sexual orientation, and that that prejudice or hate motivated the perpetrator to commit the crime.

In cases of corrective rape, the base offence (rape) would still need to be proven before hate crimes charges could be tried. The conviction rate for rape is already low, and it is not clear how hate crimes legislation would improve this. Table 2, below, shows that very few sexual offences cases ever reach court, and those that do reach court do not necessarily result in a conviction.

Table 2: Comparison of sexual offences reported to the police and sexual offences prosecuted 2007 - 2012

	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012
Sexual offences reported to the SAPS ¹⁷	63 818	70 514	68 332	66 196	64 514
Criminal Prosecutions for sexual offences	4 365 ¹⁸	5 300 ¹⁹	- ²⁰	-	6 913 ²¹
Convictions	2 887 ²²	3 535	-	-	4 501 ²³

A penalty enhancement on the other hand would use existing law and would entail a stricter sentence for perpetrators of hate crimes. This could work under the South African legislation. Section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA) deprives judges of sentencing discretion with regards to rape in certain circumstances. Section 51 "takes into account the crime, the criminal history of the accused, and the victim to determine the

¹⁶ Criminal Procedure Amendment Act 51 of 1977, section 2 (1).

¹⁷ The South African Police Services (2012b). *Total Sexual Offences in RSA for April to March 2004/2005 to 2011/2012*.

¹⁸ The National Prosecuting Authority (2008). *Annual Report 2007/08*. Pretoria: The National Prosecuting Authority.

¹⁹ The National Prosecuting Authority (2009). *Annual Report 2008/09*. Pretoria: The National Prosecuting Authority.

²⁰ Following the decision to disband the sexual offences courts the NPA felt that reporting on these statistics would need a clearer process, and thus did not report on statistics for the years 2009/2010 and 2010/2011. A form was developed in that came into use in 2011, and thus they were able to begin reporting on the statistics again for the 2011/2012 annual report.

²¹ The National Prosecuting Authority (2012). *Annual Report 2011/12*. Pretoria: The National Prosecuting Authority.

²² The National Prosecuting Authority (2008).

²³ The National Prosecuting Authority (2012).



appropriate sentence.”²⁴ Those offences listed under Schedule 2 Part I of Section 51 have a minimum punishment of life imprisonment. A minimum of a life sentence must therefore be given in the following sexual offences:²⁵

- **Rape**

- a. When committed –

- (i) In circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
- (ii) By more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
- (iii) By a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions;
- (iv) By a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

- b. Where the victim –

- (i) Is a person under the age of 16 years;
- (ii) Is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
- (iii) Is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

- c. Involving the infliction of grievous bodily harm.

- **Compelled rape as contemplated in section 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 –**

- a. When committed-

- (i) In circumstances where the victim was raped more than once by one or more than one person;
- (ii) By a person who has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; or
- (iii) Under circumstances where the accused knows that the person committing the rape has the acquired immune deficiency syndrome or the human immunodeficiency virus;

- b. Where the victim-

- (i) Is a person under the age of 16 years;

²⁴ Kubista, N (2005). “Substantial and compelling circumstances: Sentencing of rapists under the mandatory minimum sentencing scheme.” *SACJ*.

²⁵ Criminal Law Amendment Act 105 of 1997 Schedule 2 Part I. As amended by virtue of Section 68 (2) of the Sexual Offences Act to include the crime of compelled rape.



- (ii) Is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or
- (iii) Is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; or

c. Involving the infliction of grievous bodily harm.

- **Rape in all other circumstances**

Rape in all other circumstances is listed as an offence in Schedule 2 Part III.²⁶ In these instances, punishment depends on the characteristics of the offender.²⁷ The Act states that the court should sentence as follows:

- (i) A first offender, to imprisonment for a period of not less than 10 years;
- (ii) A second offender of any such offence, to imprisonment for a period of not less than 15 years; and
- (iii) A third or subsequent offender of any such offence, to imprisonment for a period of not less than 20 years.

Thus, with regards to 'corrective rape', the law could be amended to include penalties relating to rape as a hate crime. In all of the above cases a lesser sentence may be imposed if and only if 'substantial and compelling circumstances' exist. If a court finds that such circumstances exist, such circumstances should be entered into the court record.²⁸ No guidance is provided about what sorts of circumstances these are, although Section 51(3)(Aa) provides clarity on what circumstances *do not* constitute such evidence.

Section 51(3)(Aa) of the Criminal Law (Sentencing) Amendment Act 38 2007 makes clear conditions that do not constitute substantial and compelling evidence, and thus do not justify the imposition of a lesser sentence. These include:

- (i) The complainant's previous sexual history;
- (ii) An apparent lack of physical injury to the complainant;
- (iii) An accused person's cultural or religious beliefs about rape; or
- (iv) Any relationship between the accused person and the complainant prior to the offence being committed.

Thus, the perpetrator's prejudicial beliefs about homosexuality would not be grounds to divert from these sentences if 'corrective rape' were included in the Criminal Law (Sentencing) Amendment Act.

²⁶ Schedule 2 Part III. Criminal Law Amendment Act 105 of 1997.

²⁷ Ibid.

²⁸ Section 51 (3).



4.2. Definitions

The definition of what constitutes a hate crime in either a new law or a penalty enhancement in the CLAA will be incredibly important. For example, including the characteristic ‘sexual orientation’ may be insufficient as it would not cover crimes committed because of prejudice or bias against intersex or transsexual people. This is discrimination based on gender. Thus, definitions should be expansive to ensure that the law does not reinforce existing vulnerabilities or exclusions.²⁹

In addition, clarity on how motive would be defined would also be important. Would the perpetrator need to feel hatred, or would a bias or prejudice be sufficient? Hatred would be difficult to prove during prosecution, and it is not clear whether knowing that the perpetrator acted based on hatred would change the circumstances or feelings of the victim or his/her family.³⁰ Research into the needs and opinions of corrective rape survivors will be crucial before new legislation is formulated. Legislation would also need to consider whether it would cover only the members of the defined groups, or those associated or affiliated with the group.³¹

It seems obvious that if the penalty enhancement were to be based on knowledge of the victim’s actual or supposed membership of a group, the perpetrator would deny such knowledge to avoid harsher sanction. The French legal system thus adopted a penalty enhancement that can be applied in cases of the victim’s “actual or supposed membership or non-membership” of a particular group.³² This could then be considered by the magistrate during sentencing.

4.3. Policy and procedural options

Creating legislation is a useful first step in indicating that the State rejects such instances of violence, and prioritisation of the crime will ensure that perpetrators are aware of the law.

²⁹ Nel, J (2005).

³⁰ ODIHR (2009).

³¹ ODIHR (2009) and Harris, B (2004) Harris gives an example of racially motivated hate crimes by association against South African women who were associated with Zimbabwean men.

³² ODIHR (2009). *Mistake of fact* negates the *mens rea* of the perpetrator: he cannot be culpable of a crime if he was not aware of a particular fact necessary to meet the requirements of the elements of definition of that crime.



The Consortium for Refugees and Migrants in South Africa (CORMSA) also suggests that interventions on three levels are necessary.³³

- First, policing of hate crimes needs to be improved so that police are better able to record motive for an attack, are sensitive to the needs of the victims of hate crimes, and also to ensure that policing structures represent the diversity of the communities that they serve.³⁴
- Second, judicial reforms should address delays in the criminal justice system, and the National Prosecuting Authority should identify hate crimes as a priority, including the speedy prosecution of these crimes.³⁵
- Finally, the State should monitor and report on these crimes by including hate crimes as a crime category for statistical purposes. CORMSA also recommends that civil society collect data on the incidence of these crimes for comparative purposes.³⁶

5. Previous DOJ&CD commitments with regards to corrective rape and hate crimes

The DOJ&CD has not ignored the issue of hate crimes against LGBTI people and has made a number of commitments to address this issue. However, these verbal commitments have not resulted in legislative or policy amendments to date.

5.1. 2010

- November 2010: the Minister of Justice responded to an internal question regarding hate crimes and announced that the DOJ&CD had already prepared a draft bill to address hate crimes.³⁷ However, he noted that this bill would only cover racism, racial discrimination, xenophobia and related intolerance.³⁸

5.2. 2011

³³ CORMSA (2011).

³⁴ CORMSA (2011).

³⁵ Ibid.

³⁶ Ibid.

³⁷ Radebe, J (2010). Response to Internal Questions 3505. Accessible via <http://www.pmg.org.za/questions-and-replies/2010/09/03/justice-and-constitutional-development>

³⁸ Ibid.



- 22 March 2011: South Africa committed to ending violence and human rights violations based on sexual orientation and gender identity.³⁹
- 4 May 2011: the DOJ&CD announced that they would establish a National Task Team (NTT) to address hate crimes and ‘corrective rape’ following mass public outcry.⁴⁰ The NTT would be comprised of the DOJ&CD, the South African Police Services, the Department of Social Development, the National Prosecuting Authority, Legal Aid South Africa, representatives from the Judiciary, six Non-Governmental organisations, the Human Rights Commission and the South African Law Reform Commission. The statement suggested that the short term focus would be public awareness and sensitization and that part of the brief of the NTT would be a legislative audit.
- In its five-year strategic framework 2011 – 2016, the DOJ&CD committed that it would “criminalise hate speech and related intolerance” and set a target date of December 2011 for tabling a draft bill in Parliament.⁴¹ This deadline was not met.

5.3. 2012

- 6 December 2012: the Deputy Minister of Justice “reiterated government’s commitment to fight all forms of hate crimes and gender based violence, including violence against Lesbian, Gay, Bi-sexual, Transgender and Inter-sex (LGBTI) people.” The statement noted that the Government was “committed to fighting all forms of violence and discrimination on the basis of sexual orientation. We condemn hate crimes, including so-called ‘corrective rape’ in the strongest terms.”⁴² The Deputy Minister made reference to a baseline research report produced by the NTT on hate crimes that said that most South Africans condemn violence against LGBTI people.

5.4. 2013

- In the 2013/2014 Annual Performance Plan (APP), the DOJ&CD set a target of developing a legislative framework to criminalise hate speech and related intolerance. September 2013 was noted as the target date for a ‘Hate Speech Bill’ to be submitted

³⁹ Chamberlain Donahoe, E (2011). “Over 80 Nations Support Statement at Human Rights Council on LGTB Rights”(Mar 22 2011). The United States Mission to the United Nations and Other International Organisations in Geneva. Accessed via <<http://geneva.usmission.gov/2011/03/22/lgbtrights/>> Accessed 12 July 2013.

⁴⁰ The Department of Justice and Constitutional Development (2011). *Media Statement: Task Team is Set Up to Attend to LGBTI Issues and Corrective Rape*. 4 May 2011. Accessed via <http://www.justice.gov.za/m_statements/2011/20110504_lgbti-taskteam.html>. Accessed 10 July 2013.

⁴¹ The Department of Justice and Constitutional Development. Strategic Plan for the period 2011 – 2016. Annual review 2011/12. Accessible via <http://www.info.gov.za/view/DownloadFileAction?id=148854> Page 54.

⁴² The Department of Justice and Constitutional Development (2012). *Media Statement: Deputy Minister of Justice condemns hate crimes against lesbian, gay, bisexual, transgender and intersex people*. 6 December 2012. Accessible via <http://www.justice.gov.za/m_statements/2012/20121206_dm-lgbti.html> Accessed 10 July 2013.



to the Minister for purposes of obtaining Cabinet approval to table in Parliament. It is not clear whether the bill will address *actions* motivated by hate, or only speech. It is also not clear whether it will address broader discrimination than the categories noted in the Minister's 2010 response to the Parliamentary question. If not, it will not address corrective rape.

- 18 January 2013: A media statement noted that the "DOJ&CD is finalising a policy framework on hate crimes that will lay the basis for legislation criminalising hate speech and hate crimes."⁴³
- 17 May 2013: A media statement noted that "Several pieces of legislation such as the PEPUDA 2000 have been developed and enacted to deal with discriminatory elements. This law protects all the people living in South Africa against unfair discrimination and forbids hate speech and harassment." It further continued: "The Department has reorganised its functions pertaining to the prioritisation of human rights matters and has transferred the function of coordination of the protection and promotion of the rights of LGBTI persons to the newly established Branch called Constitutional Development to be led by a Deputy Director-General. A National Task Team meeting comprising civil society organisations, government departments and chapter 9 institutions will be called very shortly to urgently and decisively continue the important work given to them by the Minister."⁴⁴
- 28 June 2013: A media statement announced a new programme of action for the NTT to strengthen interventions aimed at promoting and enhancing the rights of LGBTI communities.⁴⁵ "The action plan includes the development of a long-term strategy to address violence against LGBTI people as well as the monitoring of pending and unresolved criminal cases involving LGBTI victims." The statement also noted that training for service providers and a communication strategy would take place. The statement did not mention new legislation or policy, but encouraged "the public to use the Equality Courts should they experience discrimination especially on the basis of sexual orientation."

⁴³ The Department of Justice and Constitutional Development (2013). *Media Statement: Department of Justice and Constitutional Development requests the SA Human Rights Commission to investigate reports of unfair discrimination by the Creare Training Institute in Bloemfontein*. 18 January 2013. Accessible via <http://www.justice.gov.za/m_statements/2013/20130118_creare-training-centre.html> Accessed 10 July 2013.

⁴⁴ The Department of Justice and Constitutional Development (2013). *Media Statement: Justice supports the International Day against Homophobia*. Accessible via <http://www.justice.gov.za/m_statements/2013/20130517-IDAHOBIT.html> Accessed 10 July 2013.

⁴⁵ The Department of Justice and Constitutional Development (2013). *Media Statement: New Programme of Action for the National Task Team on LGBTI*. 28 June 2013. Accessed via <http://www.justice.gov.za/m_statements/2013/20130701_new-programme-action-LGBTI.pdf> Accessed 10 July 2013.



6. Discussion and Conclusion

The various conflicting statements from the DOJ&CD do not provide a picture of a cohesive or clear strategy to address corrective rape or hate crimes. Between 2010 and July 2013, new legislation and policy relating to hate crimes have been mentioned, and yet in the Department's most recent statement there seems to be a move away from introducing new mechanisms, and towards using existing mechanisms such as PEPUDA and the Equality Courts.

The DOJ&CD has also not been transparent in its communications around the NTT, leading several civil society organisations to publicly request clarity from the Department in May 2013 on the activities of the NTT, and what decisions had been made regarding hate crimes against LGBTI people.⁴⁶ Moreover, the baseline report that the Deputy Minister mentioned in 2012 is not publicly available, and nor are the details of the membership of the NTT.

Neither a draft bill on hate crimes, nor a policy framework on dealing with hate crimes, has ever been made publicly available. As of July 2013, no such bill had been tabled in Parliament. Whilst new legislation is an option, it is also a costly option that would require extensive training of police, prosecutors, and magistrates. Consideration of the questions provided by the OSCE would be a useful starting point, given that the current legislative framework already prohibits discrimination on a number of grounds. As a result of a lack of clarity in the Department of Justice's communication, it is not clear which option they are currently considering.

These conflicting statements give the impression that the Department has not adequately planned or decided how to address these crimes, and that what is needed is a clear strategy and implementation plan to ensure that hate crimes (not only hate speech) are addressed in South Africa.

7. Recommendations

- The DOJ&CD provide timeframes for the tabling of a hate crimes bill.
- The DOJ&CD clarify what strategies are in place to assess the need for new substantive legislation versus harsher sentencing.
- The DOJ&CD consult with vulnerable groups on the scope of such a bill, or the scope of crimes that should be considered for penalty enhancements.

⁴⁶ OUT (2013). "OUT Concerned about lack of communication on LGBT violence task team." Accessed via <http://www.out.org.za/index.php/what-s-hot/news/267-out-concerned-about-lack-of-communication-on-lgbt-violence-task-team>>. Accessed 12 July.



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Organisation for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights (ODIHR) (2009). *Hate Crime Laws - A Practical Guide*. Accessed via <www.osce.org/odihr/36426>, Accessed 12 July 2013.

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