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Hate crime based on disability in South Africa

Lessons for law reform

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When contemplating whether to introduce disability hate crime as a new substantive offence or as a penalty enhancement of existing crimes, legislators should consider the peculiarities of reporting, investigating and prosecuting hate crimes perpetrated against disabled people. This article argues that existing laws on sexual offences, domestic violence, harassment, and unfair discrimination should be strengthened, and research should be conducted to identify the appropriate initiatives to prevent and attend to disability hate crime by and with persons with disabilities. Creating a substantive hate crime based on disability has symbolic value, but should only be considered if the existing challenges to full and meaningful participation by persons with disabilities in investigative and court proceedings are addressed through appropriate procedural accommodations.

Introduction

Hate crimes against persons with disabilities are victimisations aimed at someone specifically because of their disability.² Such victimisation take various forms, including physical attacks that target disability aids; cruelty, humiliation, and degrading treatment related to the victim's

disability, and theft by people close to the victim (such as care givers or family members).³ These crimes also include 'bullying, cyber-bullying, physical violence, sexual harassment and assault, domestic violence, financial exploitation and institutional abuse',⁴ as well as the use of derogatory language (like calling someone crazy,

mental, lunatic, insane, psycho, retarded, dumb, and stupid).⁵ Mocking can degenerate into physical assault.⁶

Since 1994, South Africa has focussed mainly on addressing hate crimes based on race.⁷ The Department of Justice and Constitutional Development has considered introducing a hate crime offence into South African law, producing two versions of the so-called 'Hate Crimes Bill' (in 2016 and 2018),⁸ the last of which lapsed in May 2019.⁹ The law reform process is likely to address hate crime by introducing a hate element that aggravates, at sentencing, the base offence (such as rape, theft or assault). The 2018 Bill explains this hate element or 'bias motive' as 'the prejudged negative attitude towards an individual or group that is based on a real or perceived characteristic, which can lead to the victim or victims being attacked based on that attitude'.¹⁰

Because the law reform process was not undertaken by the South African Law Reform Commission (SALRC), it has not elicited the kind of broad-based consultation from stakeholders and the public that is usually the norm. Crucial input from affected parties, such as persons with disabilities, has not been sought. The process appears therefore to be political knee-jerk reaction, rather than a comprehensive process to reform the law that considers existing legislative provisions and the challenges facing the criminal justice system.

In this article, I set out several issues that law reform efforts should address when considering whether to introduce disability hate crime as a self-standing substantive crime or as a penalty enhancement. I also discuss factors that influence accessible reporting by persons with disabilities as victims and witnesses.

Crime against persons with disabilities

Persons with disabilities face criminal and violent behaviour perpetrated by people who have

internalised stigma (ignorance, prejudice and discrimination) and who dehumanise persons with disabilities.¹¹ In some communities, persons with disabilities are deprived of their civil, political and socio-economic rights at the hands of private individuals, the state and the law. These unlawful deprivations of rights involve disability hate crimes that violate mental and physical integrity, life, dignity, and freedom from violence, abuse and exploitation.¹² Perceptions of disability can 'translate into pity, overprotection and the exclusion of disabled people from opportunities'.¹³ These attitudes individualise the 'problem' by pathologising the person's disability, rather than viewing it as a social determinant that can be exacerbated by social and environmental barriers, processes and prejudices.¹⁴ Some communities link disability with ancestral beliefs, or witchcraft, with potentially dire consequences, for example, for persons with albinism.¹⁵

Hate crime intensifies already high levels of stigma and entrenches exclusions from full and equal participation in society for people with disabilities. At the heart of disability hate crime is the socialisation and internalisation of ableism,¹⁶ which is 'the belief that it is better or superior not to have a disability than to have one and that it is better to do things in the way that nondisabled people do'.¹⁷ The effect of ableism is:

a pervasive system of discrimination and exclusion that oppresses people who have mental, emotional and physical disabilities ... Deeply rooted beliefs about health, productivity, beauty, and the value of human life, perpetuated by the public and private media, combine to create an environment that is often hostile to [them]...¹⁸

Ableism is a form of oppression that takes place between individuals, in institutions (education, health and employment settings

for example) and social systems.¹⁹ The introduction of disability hate crimes in the law is one way of addressing, at a symbolic level, ableism that manifests in crime and violence. Although hate crimes cannot categorically address racism, sexism or homophobia, they are an important way to signal society's abhorrence of such offences.

Statistics on crimes committed against persons with disabilities have not been collected or published and there is a dearth of disaggregated data on disability (and types of disability) in criminal offences.²⁰ The media mainly reports on contemporary hate crimes based on race, religion (Islamophobia), ethnicity or social origin (xenophobia), and sexual orientation (homophobia)²¹ rather than disability. Among these, race hate crimes receive most attention, focusing on the implications for 'social and legal treatment of victims, the sentencing of perpetrators, and the availability of resources for research, intervention and advocacy'.²²

However, evidence suggests that persons with disabilities in South Africa experience higher levels of crime and violence, such as rape, theft, assault, murder, and fraud. At a structural level, macro-level violence occurs through laws that allow sterilisation without consent,²³ abuse of mental health users²⁴ and deadly neglect. The latter was illustrated by the Life Esidimeni case, in which 1 700 patients with psycho-social and/or severe and profound intellectual disabilities were transferred from the Life Esidimeni private hospital to non-governmental organisations (NGOs) for reasons of cost, resulting in the death of approximately 144 people from malnutrition, dehydration, lack of basic hygiene and lack of adequate basic or highly specialised medical care. The case, which was described by Justice Moseneke as 'murderous' and 'tortuous' illustrates how persons with disabilities residing in institutions are particularly vulnerable to violence.²⁵

Social perceptions of women with intellectual disabilities may increase their risk of violence (including psychological violence, financial abuse, neglect, and deprivation).²⁶ This stems from the combined cultural devaluation of women and persons with disabilities, overprotection, social isolation and the denial of sexuality in women with disabilities. People with disabilities are also perceived as lacking credibility and exhibiting sexual deviance, and are frequently not provided sexuality education. Perpetrators perceive that there is a lower risk of discovery.²⁷ These myths, perceptions and stigma increase the likelihood that a victim with a disability is targeted for violence, and make it less likely that she will be able to identify, react to and report it.²⁸

Police attitudes towards disability and victims' perceptions regarding the effectiveness of the criminal justice system exacerbate under-reporting.²⁹ The criminal justice system is largely inaccessible for persons with disabilities: from reporting at police stations, to investigation and evidence gathering by police, prosecution by the National Prosecuting Authority, testifying in court as a complainant or witness, and the resolution of criminal cases.³⁰ Although most victims of gender-based violence face barriers, persons with disabilities are disproportionately affected because of the stigma they face, communication and understanding difficulties and the fact that their legal capacity and credibility is questioned.³¹ People with disabilities are less able to self-advocate (or have lower access to advocacy partners who can do so on their behalf), or to follow up with justice personnel on the progress of cases or to agitate for speedy resolution. Access to traditional dispute resolution structures and courts is similarly limited by perceived and actual barriers, stereotypes, attitudes and physical accessibility challenges.³²

South Africa's international and regional law obligations require that the state make

accommodations for disabled persons to enable them to participate equally with those without disabilities, including accommodations in process, in the investigative and preliminary stages.³³ The UN Committee on the Rights of Persons with Disabilities has recommended that South Africa establish legal safeguards to ensure that persons with disabilities are accommodated in all legal proceedings, provide information and communication in accessible formats such as Easy Read, and introduce a systematic training programme on the rights of all persons with disabilities.³⁴

Legislative choices

Countries seeking to enact hate crime laws choose one of two mechanisms. First, states may create a substantive new offence, such as the United Kingdom's (UK) racially and religiously aggravated offences.³⁵ Second, states may increase the penalty for a base offence when that offence is committed with a bias motive – prejudice towards a person because of a particular status, or perceived status, such as race or disability. In common law countries, motive is considered in respect of aggravation at the sentencing stage. Most countries opt for this method.³⁶ For example, the United Kingdom's penalty enhancement hate crime law establishes a duty on the courts to increase sentencing for offences that involve hostility based on a disability (or perceived disability) of the victim, or where a crime is wholly or partly motivated by hostility toward persons who have a disability or a particular disability (and other protected characteristics).³⁷ A second aspect – demonstration of hostility – restricts the scope of the offence. Mere evidence of the crime being committed against a person with a disability would not be sufficient to satisfy the 'demonstration of hostility' test, but rather the perpetrator should have indicated (through words or conduct) his or her hostility toward the victim based on the victim's

disability (or perceived disability) at the time of, immediately before or after the offence.

A specific penalty enhancement already exists in South Africa through mandatory minimum sentencing provisions for sexual offences perpetrated against victims with disabilities.³⁸ The Criminal Law Amendment Act 105 of 1997 specifies that rape and compelled rape, if perpetrated against a victim with a physical or mental disability, will attract the prescribed life sentence.³⁹ Although protective rather than targeted at hate crimes, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (SORMA) creates specific offences against persons with 'mental disability' to 'address the particular vulnerability' of these persons. SORMA requires a sentence of 10 to 20 years for a person convicted of sexual exploitation of, or using a person with a mental disability for pornographic purposes.⁴⁰ Sexual grooming and exposure of pornography to persons with mental disability are also recognised, although these do not attract penalty enhancements.⁴¹

SORMA defines a person with a mental disability as 'including any disorder or disability of the mind, to the extent that he or she, at the time of the alleged commission of the offence in question, was:

- (a) unable to appreciate the nature and reasonably foreseeable consequences of a sexual act;
- (b) able to appreciate the nature and reasonably foreseeable consequences of such an act, but unable to act in accordance with that appreciation;
- (c) unable to resist the commission of any such act; or
- (d) unable to communicate his or her unwillingness to participate in any such act.⁴²

This definition covers intellectual and psychosocial disability and may include neurological disability (such as cerebral palsy and epilepsy) as well as the broader category of cognitive disability (Alzheimer's disease).⁴³ The physical disability status is qualified with the clause 'due to his or her physical disability, is rendered particularly vulnerable'.⁴⁴

During hearings on the then-Sexual Offences Bill, the South African Human Rights Commission (SAHRC) noted that persons with mental disabilities may be isolated, ostracised and 'made fun of' in their communities, making them vulnerable to sex offenders who befriend them and then take advantage of them.⁴⁵ The SAHRC also raised concerns about caregivers who may play a role in sexual grooming. Proposed provisions addressing exploitation and abuse of trust were omitted in the final version of the grooming offence in SORMA, which has been described as a 'missed opportunity'.⁴⁶

South Africa already recognises that persons who are 'mentally disabled' are at heightened risk of, and are less likely to report, sexual offences by setting out provisions to address their lack of ability to consent to sexual act and that require mandatory reporting of 'knowledge, reasonable belief or suspicion' of a sexual act perpetrated against such a person.⁴⁷ Unfortunately, however, such measures can inadvertently feed the stigma relating to the ability and capacity of persons with disabilities to exercise their right to sexuality.⁴⁸

The South African Hate Crimes Bills

Disability hate crimes have not received as much attention in South African legal literature as those based on lesbian or gender-nonconforming status (curative/corrective rape),⁴⁹ ethnicity (xenophobia)⁵⁰ and race.⁵¹ In 2013, Parliament's Research Unit issued a short discussion paper on the topic of

corrective rape and law reform for hate crimes, expressing a preference for the penalty enhancement option.⁵²

This discussion paper called for the Department of Justice and Constitutional Development to 'consult with vulnerable groups on the scope of such a Bill, or the scope of crimes that should be considered for penalty enhancements'. However, to date, consultation with persons with disabilities has not occurred. In 2011, the Minister of Justice established a National Task Team on Gender and Sexual Orientation-based Violence Perpetrated on LGBTI Persons to develop a national intervention strategy for these affected groups, including hate crimes legislation and a policy framework.⁵³ Persons with disabilities were not included in the terms of reference of this task team and the strategy that was developed did not focus on persons with disabilities, bar mention of an intersectional approach that includes disability.⁵⁴

The Hate Crimes Bills have not made a definitive choice between the two legislative approaches available to the state. The first Bill was criticised for not clarifying whether the preferred approach was a substantive offence or penalty enhancement.⁵⁵ The second Bill appears to allow a court to declare *any* offence as aggravated in law based on a protected characteristic such as disability, and not only at the sentencing stage. This hybrid approach means the hate crime aspect is 'layered on' existing base crimes.⁵⁶ The Bill stipulates that:

'A hate crime is an offence recognised under any law, the commission of which by a person is motivated by that person's prejudice or intolerance towards the victim of the crime in question because of one or more of the following characteristics or perceived characteristics of the victim or his or her family member or the victim's association

with, or support for, a group of persons who share the said characteristics...'⁵⁷

The Bill lists 17 characteristics that may give rise to a hate crime including albinism, disability and HIV status.⁵⁸ The bias element, present in the 2016 Bill, has been removed from the motivation of the offence of hate crime.

Defining disability itself is problematic due to the fact that persons with disabilities are not homogenous and neither are those individuals within a specific 'type' of disability. Accordingly the definition of the UN Convention on the Rights of Persons with Disabilities (CRPD) is open ended.⁵⁹ The position in other jurisdictions of a 'clear and uncomplicated definition'⁶⁰ of a disability hate crime may be ideal, but such definition should define the hate crime element and not the disability status to promote inclusion of disabilities broadly speaking.

Guidance from the development of a list of illustrative examples of conduct that may constitute hate crimes perpetrated against persons with disabilities may be sought (whether in the hate crimes legislation itself, or national instructions to police). Such a list or definitions may help not only the police in identifying demonstrations or motivations related to a victim's disability, but will also assist in the education and awareness required on the part of the public and persons with disabilities to ensure the reporting of these offences. Such a list should be contextualised for the South African situation and its drafting will require consultation with persons with disabilities. The Promotion of Equality and Prevention of Unfair Discrimination Act 3 of 2000 (PEPUDA) has an illustrative list of unfair practices in certain sectors that may constitute unfair discrimination.⁶¹ Such a list has value for 'unimaginative' attorneys acting for clients in similar situations to those listed.⁶² Similarly, an illustrative list could assist the police to identify hate crime incidents for investigative

purposes as a primary aim; and as a secondary purpose enable monitoring, including collection of statistics.

The Bill's penalty clause provides that a person convicted of a hate crime is liable, on conviction, to the following penalties deemed appropriate on sentencing:

'Imprisonment, periodical imprisonment, declaration as an habitual criminal, committal to any institution established by law, a fine, correctional supervision or imprisonment from which a person may be placed under correction supervision, as contemplated in section 276 of the Criminal Procedure Act; or (b) postponement or suspension of the sentence or a caution or reprimand, as contemplated in section 297 of the Criminal Procedure Act.'⁶³

Where the minimum sentencing under the Criminal Law Amendment Act is not applicable, in instances where the victim suffered '(i) damage to, the loss of, or the destruction of, property or the loss of money; (ii) physical, or other injury; or (iii) loss of income or support,' the conviction of a 'hate crime' is to be regarded as an aggravating circumstance on sentencing.⁶⁴

The retention of imprisonment as penalty is problematic because it excludes other sanctions, like those provided for in PEPUDA, including civil remedies. Restorative justice principles may be worth exploring as a means to restore fractured relationships and start to address societal prejudices against persons with disabilities.

Considerations for law reform on disability hate crime

Crimes against persons with disabilities are pernicious, but are often invisible. This stems from two factors. First, people think that the crime results from the 'vulnerability' of persons

with disabilities rather than motivation of 'hatred' toward a person with such characteristics.⁶⁵ This stems from widely held beliefs that disability resides in an individual rather than the societal response to difference. Second, law enforcement fails to identify that disability may be an element in the offence due to the invisibility of some disabilities and because of prejudice or ignorance of the potential for disability to be a motivating factor in these cases.⁶⁶ Under-reporting is therefore a symptom of the failure by society and the law to recognise disability hate crime.⁶⁷

Naidoo argues that like hate crimes based on race, 'disability ... [is a] personal, unalterable [characteristic] of the victim. The specific targeting of these characteristics in a criminal act would undoubtedly have a profound psychological and emotional effect on the victim, particularly in a community where ... disability prejudice [is] endemic'.⁶⁸ The retributive function of hate crimes recognises that these crimes cause greater harm than other crimes where membership of a protected group is not the motivation (in whole or in part),⁶⁹ and that they harm not only the individual with the disability, but also their community and society at large.⁷⁰

Substantive hate crimes require a higher burden of evidence as the motivation aspect (hostility) has to be proved. A disadvantage to this approach is that indictments for the base offence may not be successful without the motivation aspect. Prosecutors may therefore avoid using the hate crime law or permit guilty pleas in respect of the base offence to secure a conviction. Appropriate training on indicators of motive could address these challenges.⁷¹ One option would be to use a discriminatory selection version of a substantive offence, which does not require proof of hostility, but rather selection on the basis of prejudices or stereotypes about the vulnerabilities of the

victim. This option has easier application in practice.⁷² Penalty enhancements, although easier to implement may lose the 'expressive' value of hate crimes, particularly where the reason for the sentencing uplift is not recorded.

An appropriate penalty for hate crime should express society's condemnation of the crime and address the harm caused to the community. There is limited evidence of the efficacy of minimum sentencing (or penalty enhancements) on crime and rehabilitation. Restorative justice processes have the potential to undo the harm suffered after reporting,⁷³ challenge the prejudice and bigotry that underlie hate crimes and forge relationships of respect and understanding.⁷⁴ Restorative justice practices are used in child justice⁷⁵ and in traditional courts in South Africa.⁷⁶ Restorative justice is used in mediations, which are used by the Equality courts⁷⁷ and the SAHRC in cases of human rights violations.⁷⁸ We should therefore, consider the potential that alternative methods such as restorative justice hold, particularly for less serious hate crimes.

Training and accountability measures

Article 13 of the CRPD requires the adequate training of police, prosecutors and judges. The state must train justice personnel on a number of listed areas, including the rights of persons with disabilities, their diversity and individuality that requires individual measures to ensure their effective access to justice on an equal basis with others, their individual autonomy and legal capacity, and the 'centrality of effective and meaningful communications to successful inclusion'.⁷⁹ Currently, South Africa provides very little training of this kind, and the CRPD has recommended adequate training of justice personnel to ensure the right of access to justice is realised.⁸⁰ Poor understanding of different types of disabilities, the inability to identify 'invisible' disabilities such as intellectual, psychosocial and neurological disabilities,

and the failure to identify or investigate a perpetrator's motivation for committing an offence, (and consequentially collect insufficient evidence in that regard)⁸¹ can scupper the prosecution of hate crimes based on disability.

Court rules also provide very little procedural accommodation for persons with disabilities. The directives issued to prosecutors on SORMA lack also detail on such accommodations, despite recognising that mentally disabled persons (and children, the elderly and, shockingly, someone who 'has AIDS') are vulnerable and that proceedings involving such persons should be 'expedited' and the cases 'receive priority'.⁸² The glaring gaps in these directives remain a major barrier to the equal participation, dignity and access to justice for persons with disabilities.

Court preparation officers at Sexual Offences Courts have received only limited basic training in how to communicate with and prepare a child witness.⁸³ Heath et al reported that despite an estimated 10–15% of cases involving children and adults with disabilities (often mental and intellectual disabilities), 'most of the court actors had not received specific training on consulting with or preparing persons with intellectual disabilities. Senior stakeholders confirmed that many of these cases are not making it to trial and corroborates the statements of some prosecutors that these types of cases get screened carefully and withdrawn early.'⁸⁴ Sexual offences cases are withdrawn, fail to go to trial or result in acquittals where there is no DNA evidence. Witnesses wait a long time for mental age assessments and deaf witnesses do not receive sign language interpretation due to cost. Many court personnel believe that persons with 'mental' disability provide 'weak' testimonies, making cases 'unwinnable'.⁸⁵

Justice personnel are not equipped to obtain evidence from persons with disabilities, particularly where communication is

problematic, for example where persons cannot 'fully [understand] what is being said to them, [express] themselves through speech, [concentrate] for long periods of time and [remember] information they have been given'.⁸⁶ Holness and Rule argue that '[t]he ability to effectively communicate with the court... is a key requirement for the competence of witnesses.'⁸⁷ Although research shows that intermediaries are sometimes used in court for people with communication difficulties (dependent on the person's disability), there have been no studies on the accommodations that are offered in police stations when receiving a complaint from a person who struggles to communicate. Barriers in communication negatively affect not only the witness's experience, but also 'the fairness of the outcome and other people's perceptions of the fairness of the system'.⁸⁸

Msipa argues that in criminal proceedings 'the question should not be whether a person is competent to testify; rather it should be what types of accommodations are required to enable the person to give effective testimony'.⁸⁹ Measures used in other jurisdictions may offer potential in South Africa, such as developing appropriate questioning techniques for adults who experience communication difficulties, and training personnel to use them.⁹⁰ Introducing dedicated intermediaries or third party support persons (or both) provide other possibilities.⁹¹ Dedicated training of police and prosecutors may challenge assumptions of persons with disabilities as 'pitiable' and inculcate a recognition of them as 'potential and actual victims of crime'. This also emphasises that 'accommodating and including persons with disabilities is, in fact, a matter of entitlement, not charity'.⁹²

Conclusion

The systemic challenges of gender inequality, racism and xenophobia in post-apartheid South

Africa have meant that combatting ableism has been deprioritised compared to victimisation on the basis of race, sex, sexual orientation, religion and ethnicity. Existing laws such as SORMA, PEPUDA, Protection from Harassment Act 17 of 2011 and the minimum sentencing provisions are not adequately implemented and resourced. Legal and policy frameworks do not adequately provide the procedural accommodations needed by victims with disabilities to participate in the legal process.

South Africa's law reform efforts have favoured mechanisms that introduce disability (and other statuses) as motivating factors in hate crime (substantively) and as an aggravation of sentence. This hybrid model provides an opportunity to bring awareness of the equal recognition before the law of persons with disabilities and to begin dismantling disablist discourse and address criminal conduct. However, we first need to strengthen existing legal provisions as a first course of action. The introduction of a new substantive offence of hate crime may bring symbolic value, higher levels of visibility, dedicated resources and victim support initiatives, but it will be unlikely to succeed if existing accessibility and other challenges for persons with a disability are not addressed.

We need evidence-based research and advocacy, including by and with persons with disabilities, to determine the viability of either (or none) of the options for a hate crime law. Given the evidence of the ill-conceived minimum sentencing provisions currently in our law, we should proceed cautiously should the penalty enhancement option prevail.⁹³

We must prioritise dedicated training of police, prosecutors and the judiciary (including magistrates) on disability, how disability can motivate bias crime, and why it is wrongful. If these stakeholders are not committed to the goal of addressing disability hate crime,

measures put in place to do so may not be effective.

Should new legislation to address hate crime be considered, parliament should consult widely with persons with disabilities to ensure that the law addresses their experiences of victimisation and dismantles the barriers to reporting that they face. Carefully considered measures must be put in place to address the barriers to accessing justice for persons with disabilities otherwise the under-reporting of disability hate crime will continue.

Lastly, extra-legal initiatives to dismantle ableism, address disability prejudice, undo systemic violations and to build social cohesion are needed too. Perhaps these initiatives should be the starting point.



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Notes

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