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**Attention: Adv Mohamed Shafie Ameerma**

Acting Chairperson and Commissioner South African Human Rights Commission  
Private Bag X 2700  
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Dear Sir

## **SUBMISSION BY FREEDOM OF FREEDOM INSTITUTE: NATIONAL HEARING ON RACISM AND SOCIAL MEDIA IN SOUTH AFRICA**

### **1. Introduction**

- 1.1 The Freedom of Expression Institute (FXI) is a not for profit organisation which was established in 1994 to promote and advance freedom of expression and related rights. The FXI objectives are to fight for and defend freedom of expression, to oppose censorship, to fight for the right of equal access to information and knowledge, and to promote access to media and a free press.
- 1.2 The FXI welcomes this opportunity availed by the South African Human Rights Commission to make a written submission on the National Hearing on Racism and Social Media in South Africa.
- 1.3 The FXI supports any initiative to combat racism and racial discrimination in order to promote substantive equality. The FXI however, cautions against any restrictions on the right to freedom of expression that expand beyond the limitations set out in the Constitution.

### **2. Rationale**

- 2.1 Section 7 of the South African Constitution (Bill of Rights) enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality and freedom. Establishing and maintaining an appropriate balance between these rights are essential in sustaining democracy.

- 2.2 Section 16 (1) is a positive right which provides everyone with the right to freedom of expression, which includes a) freedom of the press and other media; b) freedom to receive or impart information or ideas; c) freedom of artistic creativity; and d) academic freedom and freedom of scientific research. Section 16(2) serves as an internal limitation and provides for forms of expression, which are explicitly not protected by the Constitution.
- 2.3 However, the limitation of freedom of expression under the guise of protecting the rights to dignity and equality of vulnerable and marginalized groups, has often been used to illegitimately limit forms of protected speech. There is need to guard against the perception of free speech as something that is opposite to the prevention of intolerance or social cohesion. On the contrary, free expression, dignity and equality are complementary and self-reinforcing instruments for social cohesion and sustained democracy.
- 2.4 In a democratic society there is need to accept that forms of expression may be deemed shocking, disturbing or even offensive. The FXI is of the view that discussion and public exposure reinforce pluralism and allows even the most vulnerable, marginalized and excluded to be heard. Freedom of expression amplifies all voices and allows for debate and engagement that fosters understanding of opposing views. It is therefore important to oppose any measures aimed at preventing opinions and ideas from being expressed and disseminated.<sup>1</sup>
- 2.5 Free expression and free media are important instruments in facilitating the dissemination and discussion of all kinds of beliefs, thoughts and creeds. Therefore, the justification for the FXI's submissions is that free expression is a necessary condition for social cohesion. Free expression ensures the protection of marginalized and excluded voices in society and promotes mutual respect for minority views.
- 2.6 Freedom of Expression according to the Constitution is stipulated as follows:
16. (1) Everyone has the right to freedom of expression, which includes—
- (a) freedom of the press and other media;
  - (b) freedom to receive or impart information or ideas;
  - (c) freedom of artistic creativity; and
  - (d) academic freedom and freedom of scientific research.

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<sup>1</sup> Matthew Kruger, Regulating Race-Related Expression: Outlining a conceptual framework, The Helen Suzman Foundation, <http://hsf.org.za/resource-centre/hsf-briefs/regulating-race-related-expression>

- 2.7 The FXI is of the view that the current limitations of freedom of expression set out in section 16 (2) are justified and any limitation that expands on the section 16 (2) infringe on the freedom of expression):

The right in subsection (1) does not extend to—

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

### 3. Response to South African Human Rights Commission (SAHRC) questions:

#### How does racism and racial discrimination manifest in the contemporary South African landscape?

- 3.1 In preparation for the submission, the FXI Law Clinic reviewed requests received for advice/legal assistance over a period of four years. The review was in respect of requests that related to racism both on traditional platforms as well as new media i.e. social media. The FXI Law Clinic's responses to the various requests have varied from offering considered legal commentary on a "racist statement" and whether or not it qualifies as hate speech in terms of the Constitution, to offering basic legal advice on one's legal standing and largely advising on recourse options for those who have felt aggrieved. In most cases, the FXI has referred members of the public to the offices of the SAHRC. In an effort to provide context, we have identified the occurrences into three categories, together with a brief commentary on each category:

1. Work place incidences;
2. Incidences that occurred over social media;
3. Other (Speeches made in Public, Artworks, etc.).

FXI Law Clinic Analysis (2012 – 2016)		
Workplace	Social Media	Other
20 %	10 %	70 %

(Source: FXI Law Clinic analysis based on 10 reports of racism and racial discrimination)

#### Reported incidents of racism and racial discrimination in the workplace

- 3.2 In the past four years, 20 percent of the reported matters to the FXI were related to alleged racial discrimination and racism that had occurred in the workplace. The occurrences took place

in various parts of the country namely; Newcastle, Kruger National Park, Durban, and Johannesburg. Notably in all alleged incidences, it was often times the employer who would be accused of using foul and offensive language towards their employees. This assessment may be linked to the power dynamics of an employment relationship. Of concern, is that in most cases the employee would let the matter continue before taking steps to report such incidences.

- 3.3 In the majority of the occurrences that have been reported to the FXI, it would be colleagues of the alleged victim that would lay the complaint. Most of the alleged victims have been mostly of African or Indian, and their employers have been mostly white males, which might mirror South Africa's socio-economic landscape.

#### Reported incidents of racism and racial discrimination on social media

- 3.4 The rise of social media as a communication platform has resulted in the perception that racist stereotypes and prejudices are on the increase. Forms of expression, which would have typically involved one or two people, can now be shared instantly and reach thousands of people online. Social media has the potential to contribute to instances where racism and racial discrimination becomes viral, often resulting in outrage online and in the news cycle<sup>2</sup>. The incidents brought to the FXI Law Clinic have been in response to racism or racial discrimination in the public domain where members of the public have requested advice on how to take action when they are of the view that their dignity has been impaired by a third-party posting online. In this FXI would provide an opinion on the Constitutional definition of hate speech, or make a referral to the SAHRC.

#### Other reported incidents of racism and racial discrimination

- 3.5 The majority of the reported matters to the FXI, resulted from occurrences that took place in public ie during public speeches, artworks, published articles etc. The FXI also considered decided Equality Court cases that dealt with racism and racial discrimination. In total the FXI looked at 13 judgements<sup>3</sup> that were handed down from the year 2005- 2016. As stated above we have categorized the cases in respect of where the incidences occurred. The three categories are

1. Incidents that occurred around the workplace;
2. Incidents that occurred through social media;

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<sup>2</sup> <https://qz.com/897548/africas-startups-will-build-a-stronger-ecosystem-with-local-funding/>

<sup>3</sup> Refer to Annexure A

3. Other - refers to incidences that occurred private spaces (at home/apartments) and public spaces (rallies, beauty pageants, malls etc.).

FXI Analysis on Equality Court Cases		
Workplace	Social Media	Other
		Public
		Private
		71%
		29%
33%	9 %	58%

(Source: FXI Analysis on Equality Court Cases 2005-2016)

- 3.6 A significant number of incidences have occurred in the workplace, where racial slurs have been used by employers towards their employees. There have not been any significant indicators as to why racism in the workplace has been prevalent. However, as stated above the FXI is of the view that the power dynamics between an employer/employee play a factor in the manifestation of racial discrimination in the workplace. In most of the judgements we looked at that involved racism or racial discrimination in the workplace, the employer has almost always been the alleged perpetrator in the incident. The use of social media also contributed to forms of expression that have reached beyond the original intended audience.

A large number of decided cases dealt with incidences of disputes or disagreements within private or public spaces.

- 3.7 From the analysis undertaken by the FXI, there is no evidence that social media leads to an increase of racism and/or racial discrimination. Instances of racism and or/racial discrimination seem more prevalent in the workplace or other social spaces.

### **Why has existing legislation such as PEPUDA not had the desired impact of effectively combating racism and racial discrimination?**

- 3.8 The promulgation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) aims to give effect to section 9 of the Constitution, namely to prevent and prohibit unfair discrimination and harassment: to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith.
- 3.9 Although the FXI argues that the definition of hate speech contained in PEPUDA is far broader than the Constitutional limitation on freedom of expression, there is no evidence to support the

view that PEPUDA has not effectively addressed issues of racism and racial discrimination. The challenge may lie in the implementation and the use of PEPUDA i.e. lack of awareness of PEPUDA and Equality Courts, hesitance and lack of understanding towards court processes.<sup>4</sup>

- 3.10 The FXI is of the view that from a substantive point of view, PEPUDA is sufficient to combat racism and racial discrimination as the legislation provides for implementation mechanisms and also sets out the deterrents of not complying with the law. This includes a range of remedies to adequately address the nature and seriousness of the facts. PEPUDA also advocates for a duty to promote equality in South Africa and provides an alternative to the normal judicial route of justice with the establishment of Equality Courts. The remedies in section 21 are geared toward a restorative approach as opposed to a punitive means, towards the promotion of tolerance and social cohesion. Equality Court cases are adjudicated on a case by case basis, addressing the facts and the perceived harm of an applicant.

The FXI accepts that there may be factors that could contribute to the improved effectiveness of PEPUDA - these are access to Equality Courts and the deterrent element.

#### Access to Equality Courts

- 3.11 Equality Courts were created in 2003 to hear cases relating to harassment, hate speech and unfair discrimination. The FXI welcomes the Equality Court model because it is supposed to provide easier access to justice and a quicker remedy is different to the judicial system. For instance, the Act requires matters to be heard expeditiously and in an informal manner which facilitates and promotes participation by the parties. This means that ordinary South Africans can access the Equality courts without legal assistance. Given their informal nature, Equality Courts are meant to be inexpensive as well. These specialized courts are placed in Magistrate's courts to make access to them easier.
- 3.12 However, in as much as the design of the Equality Court were meant for more people to have access to justice and the court system, there isn't generally an awareness of the existence of Equality Courts in South Africa. The courts are currently being underutilized due to lack of awareness of the existence of Equality Courts. There have been reports that in some parts of the country that Equality Courts have not been utilized and some of the courts have been shut down due to the lack of use.<sup>5</sup> It therefore becomes difficult to assess the effectiveness of

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<sup>4</sup> <http://ewn.co.za/2015/06/25/SAs-Equality-Courts-deemed-inefficient>

<sup>5</sup> Ibid.

PEPUDA if the existing mechanisms put in place by PEPUDA, such the establishment of Equality Courts are not being utilized effectively.

#### Deterrent element

- 3.13 Section 21 of the Act provides that court a wide discretion of what remedies to impose on the discriminating party. The remedies that could be imposed range from offering an unconditional apology, to damages awarded to the complainant. The Act gave the Courts sufficient powers to create a deterrent through cases for future “would be” discriminating parties. The Act also provides for the matter to be referred to the National Directorate of Public Prosecutions (NDPP) for possible institution of criminal proceedings in terms of common law or any existing legislature.

For any legislation including PEPUDA to effectively reach the desired outcome, the implementation of the Act should be as efficient as the substantive matter/s contained in the Act.

#### Challenges with the definition of hate speech contained in PEPUDA

- 3.14 The FXI maintains that the definition of hate speech in section 10(1) of PEPUDA is overly broad and introduces speculative elements to the interpretation of hate speech in South African law. The FXI has noted concerns with the definition in South African law and submitted to the Parliamentary High Level Panel on the Assessment of key Legislation (Committee on Social Cohesion) that s10(1) of PEPUDA<sup>6</sup> –
- i. It expands the nature of prohibited action from one that “*constitutes incitement*” to one that “*could reasonably be construed to demonstrate a clear intention*”.
  - ii. It expands the consequence that the prohibited action from “*incitement to cause harm*” to an intention to “*be hurtful*”, “*be harmful or to incite harm*”, or to “*promote or propagate hatred*”.
- 3.15 Section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) together with its proviso in section 12 reads as follows;
- (10) (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
- a) be hurtful;
  - b) be harmful or to incite harm;

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<sup>6</sup> FXI submission to the High Level Panel on the Assessment of key Legislation (Committee on Social Cohesion)

c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.

(12) No person may-

- a) disseminate or broadcast any information;
- b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

3.16 There is vagueness in what constitute an intention to be harmful as given currently in s10(1) of PEPUDA. This renders s10(1) of PEPUDA impractical to enforce strictly and hence is inadequate to achieve the intended purpose of limiting hate speech without prejudicing protected forms of speech under section 16(1) of the Constitution.

3.17 FXI submits that the definition of hate speech should be amended, in line with s16 (2) of the Constitution in order to provide greater clarity to the courts and members of the public on types of prohibited speech.

**What challenges and opportunities are presented by both the NAP and the Prevention and Combating of Hate Crimes and Hate Speech Bill, toward the advancement of substantive equality?**

National Action Plan to Combat Racism, Racial Discrimination, Xenophobia And Related Intolerance (NAP)

3.18 The main challenge for legislation and policies that aim towards the advancement of substantive equality is that the definition of hate speech and limitations on freedom of expression in the *National Action Plan To Combat Racism, Racial Discrimination, Xenophobia And Related Intolerance (NAP)*, the *Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000)* and the *Prevention and Combating of Hate Crime and Hate Speech Bill 2016*, are not in line with section 16 of the Constitution.

3.19 It bears repeating that Section 16(2) of the Constitution of South Africa states that the right to freedom of expression does not extend to -

- a) propaganda for war;
- b) incitement of imminent violence;
- c) or *advocacy of hatred* that is based on *race, ethnicity, gender or religion*, and that *constitutes incitement to cause harm*.

3.20 The definition of hate speech given in the NAP is as follows –

The phenomenon of *incitement to discrimination, hostility, or violence*, or what may broadly be referred to as “hate speech.” Any person who by any means of expression publicly and *intentionally advocates hatred* of any other person or group of persons based on –

- a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth; or
- b) any other characteristic where discrimination based on that characteristic causes or perpetuates systemic disadvantage or undermines human dignity, in a way *that incites others to harm such person or group*, is guilty of the offence of hate speech, whether or not such person or group is harmed.

3.21 The FXI acknowledges the attempts made in the draft NAP to narrow the definition of hate speech given in the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).

Although the NAP definition is significantly improved from the PEPUDA definition, it is still broad and inconsistent with s16(2) of the Constitution in that it introduces additional ambiguous terms that –

expands the form of hate speech from “incitement of imminent violence”, as in Section 16(2)(a) of the Constitution, to include “*incitement to discrimination and hostility*”,

3.22 FXI submits that the definition of hate speech given in the NAP be amended, in line with the s16(2) of the Constitution. The FXI further submits that all definitions of hate speech in South African legislation be aligned to such interpretation of hate speech in order to advance the principle of substantive equality.

### Prevention and Combating of Hate Crimes and Hate Speech Bill

3.23 The FXI notes the opportunities that will derive itself from the Bill itself, relates specifically to hate crimes in that the bill aims to:

- Provide for the prevention of hate crimes
- Provide appropriate sentences for people who commit hate crimes will give effect to the country's obligations in terms of the Constitution and International human rights instrument.

3.24 However, in seeking to achieve the above mentioned opportunities, FXI is of the view that there should not be external limitation to freedom of expression, which are extended beyond the existing limitations, which are provided for by the Constitution. The current challenges with the bill are outlined below.

3.25 The proposed Hate Speech bill makes provision for the offence of hate speech in terms of the following sections:

4 (1) (a) Any person who intentionally, by means of any communication whatsoever, communicates to one or more persons in a manner that –

- (i) advocates hatred towards any other person or group of persons; or
- (ii) is threatening, abusive or insulting towards any other person or group of persons, and which demonstrates a clear intention, having regard to all the circumstances, to –

(aa) incite others to harm any person or group of persons, whether or not such person or group of persons is harmed; or

(bb) stir up violence against, or bring into contempt or ridicule, any person or group of persons, based on race, gender, sex, which includes intersex, ethnic or social origin, colour, sexual orientation, religion, belief, culture, language, birth, disability, HIV status, nationality, gender identity, albinism or occupation or trade, is guilty of the offence of hate speech.

(b) Any person who intentionally distributes or makes available an electronic communication which constitutes hate speech as contemplated in paragraph (a), through an electronic communications system which is –

- (i) accessible by any member of the public; or
- (ii) accessible by or directed at a specific person who can be considered to be a victim of hate speech, is guilty of an offence.

(c) Any person who intentionally, in any manner whatsoever, displays any material or makes available any material which is capable of being communicated and which constitutes hate speech as contemplated in paragraph (a), which is accessible by or directed at a specific person who can be considered to be a victim of hate speech, is guilty of an offence.

(2) (a) Any person who attempts to commit, or performs, any act aimed at participating in the commission of an offence referred to in subsection (1) is guilty of an offence and is liable, on conviction, to a sentence as contemplated in section 6(3).

(b) Any person who –

(i) incites, instigates, commands, directs, aids, promotes, advises, recruits, encourages or procures any other person to commit; or

(ii) conspires with any other person to commit, an offence referred to in subsection (1) is guilty of an offence and is liable, on conviction, to a sentence as contemplated in section 6(3).

(3) Any prosecution in terms of this section must be authorised by the Director of Public Prosecutions having jurisdiction or a person delegated thereto by him or her.

3.26 The broadening of the definitions of hate speech, impacts negatively on the freedom of expression, as expressed in the Constitution, as it was envisaged that freedom of expression will create a society, where expression is tolerated and will promote diversity of and interaction among South Africans. Criminalising speech will create a society will create a self-censored, where people are afraid to express themselves as the parameters are too broad and subjective.

#### **4. Conclusion**

4.1 The FXI supports any initiatives that would curb racial discrimination and inequality in society. However, FXI is of the view that in enabling such legislation should not come at the cost of unreasonably limiting the freedom of expression. The Freedom of Expression Institute is in support of any legislation that seeks to promote dignity, equality, respect for human rights, provided that it does not limit the right to freedom of expression beyond the limitations set in section 16 (2) of the Constitution.

4.2 The Freedom of Expression Institute welcomes the opportunity to make a presentation to the South African Human Rights Commission on National Hearing on Racism and Social Media in South Africa.

Yours Faithfully



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## **Annexure A: Hate Speech Cases (1997 – 2016)**

### **1997**

1. Mangope v Asmal and Another 1997 (4) SA 277 (T) at 286J – 287A

### **2005**

2. Cacadu v Van Zyl (1/2005) [2005] ZAEQC 3 (21 October 2005)  
IN THE EQUALITY COURT FOR THE DISTRICT OF VICTORIA WEST  
HELD AT VICTORIA WEST

### **2006**

3. Magubane v Smith (01/2006) [2006] ZAEQC 5 (3 March 2006)  
IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN  
HELD AT DURBAN

### **2007**

4. Strydom v Chiloane [2007] ZAGPHC 234; 2008 (2) SA 247 (T)
5. Smith v Mgoqi and Another (60/2007) [2007] ZAEQC 2 (23 November 2007)  
IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN HELD AT DURBAN
6. Donaldo v Haripersa (29/05) [2007] ZAEQC 3 (5 January 2007)  
IN THE EQUALITY COURT FOR THE DISTRICT OF DURBAN  
HELD AT DURBAN

### **2009**

7. J R Hesselman v K E Belepa, an unreported case, Eastern Cape High Court, Grahamstown local division under case number 231/2009
8. Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park 2009 (4) SA 510 (EC) the North Gauteng High Court sitting as an Equality Court

### **2011**

9. Herselman v Geleba (ECG) (unreported case no 231/2009, 1-9-2011) (Dawood J)
10. In Afri-Forum v Malema 2011 6 SA 240 (EqC)

### **2012**

11. Thomson and Others v 94.7 Highveld Stereo 27/2012 (BCTSA)

### **2014**

12. Nomasomi Gloria Kente v Andre van Deventer (EqC) (unreported case no EC 9/13, 24-10-2014, Cape Town Magistrates Court) (Magistrate Koeries)

**2016**

13. ANC v Sparrow (01/16) [2016] ZAEQC 1/ZAKZDHC 29 (10 June 2016)
14. Thembani v Swanepoel (217044) [2016] ZAECMHC 37 (12 September 2016)  
IN THE HIGH COURT OF SOUTH AFRICA (EASTERN CAPE LOCAL DIVISION:  
MTHATHA)